



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Reproductive Rights of women in India: A Critical Analysis under the umbrella of Article 21

Mihika Suryavanshi^a

^aREVA University, Bangalore, India

Received 01 January 2023; *Accepted* 14 January 2023; *Published* 21 January 2023

Social change and advocacy have inevitably and unquestionably changed the modern theories of cultural norms, law, and public policy. One of the paramount bifurcations of contemporary activism is that of the interdependence and inter-relationship between the fields of human rights and human health. How reproduction is managed and controlled is inseparable from how women are managed and controlled. India, though regarded as a developing country with archaic laws, has always been liberal regarding reproductive rights. From the Medical Termination of Pregnancy Act to abortion as a fundamental right of women, the organs of the government have always been protective and beneficiary towards women's reproductive rights. In this article, I seek to discuss the essential legislations that play a key role in comprehending and interpreting a women's right to abortion under the umbrella of Article 21 of the Indian constitution by analysing various articles, research papers, interviews, policies, and conventions.

Keywords: *human rights, health, abortion, article 21, reproductive rights.*

INTRODUCTION

A violent clash has existed between the legal system and morality ever since civilizations agreed upon a common ground to rule people. While legal positivists like Hart argue that law does not

need to have specific moral standards made through norms, Jurists like Fuller contend that legal procedures have a key component of ethical significance.

Reproductive rights rely upon the recognition of the fundamental rights of individuals and couples to rationally, responsibly, and freely decide the timing, spacing, and number of children along with the adequate information and means to do the same. It also rests on the recognition of making reproductive decisions without any coercion, discrimination, or violence. ¹The right to reproductive anatomy refers to an individual independent decision about the birth of children. Women constitute half of humankind and 40% of the global workforce. As service providers and professionals, they actively contribute to the overall socio-economic development.

The right to abortion has always varied in different legislations across the world due to the perspective of lawmakers seeing it as moral or not. Time and time again, society has regarded arguments regarding anti-or pro-life choices as selfish, individualistic, and leftist in nature. United Nations General assembly adopted CEDAW- the Convention on Elimination of All Forms of Discrimination Against Women in 1979. This international treaty essentially captures the interrelationship between civil political and cultural rights in the current economy by defining discrimination in terms of both the purpose and effect of indirect and direct discrimination.

RELEVANT LEGISLATION AND POLICIES IN INDIA

The Parliament after considering the cultural norms and health of women passed various bills and acts to ensure that women have a right to keep or abort their child while also considering their physical health. India has adopted the following Legislations regarding the Reproductive rights of Women mentioned as following:

¹ World Health Organization

Maternity Benefit Act, 1961: The Act² was enacted to ensure that women are provided with maternity benefits and other benefits before and after childbirth.

Maternity Benefit (Amendment) Act, 2017: The Amendment act³ essentially amended and changed the limit of maternity leave to 26 weeks from 12 weeks as prescribed in the previous legislation.

Medical Termination of Pregnancy Act, 1971: MTP⁴ primarily laid down a sub-structure regarding medical termination of pregnancy from a legal point of view. The primary duty of utmost importance to all the organs of the government is to ensure that all women survive pregnancy and childbirth⁵.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

As previously stated, India has been extremely broadminded and permissive regarding abortions under various circumstances. Ever since 1971, abortions are interpreted by the court of law through the Medical Termination of Pregnancy Act, 1971⁶ along with the Constitution. Initially, the government of India through the Ministry of Health claimed that the primary aim of the statute was for doctors or medical practitioners to perform abortions in case of emergencies or abnormalities. Ultimately, the statute was amended to make abortion an accessible right for all major women without any discrimination in terms of marital status, caste, religion, etc., hence protecting their right to autonomy and privacy under Article 14 of the Indian Constitution.⁷

The legislation was revised in 2003 and 2021 to the circumstances of the developing country to ensure the accessibility to safe and legal abortions. The legislation ensures to keep the identity of the women undergoing abortion is completely confidential. Due to this, the spouse of the

² Maternity Benefit Act 1961

³ Maternity Benefit (Amendment) Act 2017

⁴ Medical Termination of Pregnancy Act 1971

⁵ *Sandesh Bansal v UOI* Writ Petition (Civil) 9061/2008

⁶ Medical Termination of Pregnancy Act 1971

⁷ Constitution of India 1950, art. 14

woman need not be present during the procedure. However, in cases like cruelty or domestic violence, the woman may sue the husband for causing a miscarriage. Medical Termination of Pregnancy (Amendment) Act, 2021 essentially amended and changed the limit of safe abortions to 24 weeks from 20 weeks as prescribed in the previous legislation and also removed the limit in case of foetal abnormalities. Abortions are primarily allowed under three conditions.

- Pregnancy before twenty weeks can be terminated upon the opinion of any one medical practitioner. A twenty-four-week-old pregnancy requires the opinion of two medical practitioners.
- A pregnancy where a woman has the risk of dying due to childbirth.
- Upon doctor's Advice, a Woman may terminate her pregnancy if the child is to be born with significant mental and/or physical disabilities.

Unmarried Women may also seek abortions in India. What makes India's Legislation unique are the conditions under which a woman may extend her pregnancy period from 20 weeks to 24 weeks before an abortion.

- Survivors of Sexual Assault;
- Survivors of Rape;
- Survivors of Incest;
- Girls under the age of eighteen;
- Women with Physical Disabilities;
- Women in humanitarian settings, disasters, or emergencies;
- Divorce or the death of the spouse that results in a change in the marital status;
- Foetal abnormalities.

DRAWBACKS OF THE MEDICAL TERMINATION OF PREGNANCY ACT

The MTP is intrinsically and elementally beneficiary in nature but it does have some minor limitations. Some of them are mentioned as follows:

- Queer groups or Transgenders may struggle to seek abortions.

- Additionally, without the permission of two Medical Practitioners, a woman may not get an abortion after and between the twentieth and twenty-fourth week.

ABORTION UNDER THE UMBRELLA OF ARTICLE 21

Abortion can directly be related to the fundamental right of life and liberty under article 21 of the Indian Constitution. This article essentially states that no one shall be deprived of his or her right to life or personal liberty followed by the procedure established by law and not due process of law. Although some challenges or pending before the judiciary, the Apex Court has never explicitly related or compared the fundamental right of abortion of pregnant people to be violative of any human right.⁸ The main argument which arises in such circumstances is that of the Human right of the child in question. It must be noted that the child is not fully developed during the timelines wherein abortion is permitted under laws in India. Also, the MTP was passed primarily to ensure the health and safety of the pregnant woman. Before the Puttaswamy case⁹, the jurisprudence in India regarding Article 21 was concerned with the inter-relationship between privacy and was primarily associated with the rights of bodily dignity and integrity.

The *Nand Kishore case*¹⁰ challenged the validity of the MTP Act in 2006. The petitioner contended that Section 3(2) of the MTP Act which sets out restrictions for pregnancy and requires medical practitioners' opinions, violates Article 21. Despite this, the decision provided little reasoning for pregnant woman's right to privacy and autonomy. The High Court further stated that the MTP's primary purpose is to safeguard the life of a pregnant woman and relieve any physical or mental harm caused during the pregnancy. Hence it is absolutely and fully in compliance with part III of the Constitution.

Supreme Court in a case¹¹ gave more comprehensive reasoning as to the interpretation of the MTP act. A petition was filed before a full bench for a woman with a mental disability to terminate her advanced pregnancy. Supreme Court found, in this case, that the rudimentary

⁸ *Swati Agarwal v UOI* WP (C) 825 of 2019; *Nand Kishor Sharma v UOI* AIR (2006) Raj 166

⁹ *KS Puttaswamy J (retired) v UOI* (2018) 5 SCC 1

¹⁰ *Nand Kishor @Nandu v State of Rajasthan* RLW 2006 (4) Raj 2761

¹¹ *Suchitra Shrivastava v Chandigarh Administration* AIR (2010) SC 235

right to make absolutely any reproductive right including choosing or waiving any procreating in the future is an aspect of the Personal Liberty of a woman under Article 21. According to the Supreme Court in *Suchita Srivastava*, medical termination of pregnancy shall take place only under the conditions of the provided statutes. The court's ratio decidendi for the abortion limit of twenty weeks was set out for the safety of women's health.

In 2015 a writ petition was filed for a 27th-week pregnancy abortion by a rape survivor¹². The court explained that, while it acknowledges the suffering that the timeline imposed by the MTP act may inflict on the rape survivor, the requirement of timelines set out in the MTP act must not be ignored. The predominant duty of any legislative body is to keep the spirit of the constitution alive by adhering to its basic structure which includes liberty and equality for all. The court rejected the petition for termination because MTP, being a beneficiary statute, came up with laws to ensure the safety of women. In this instant case, the life of the pregnant woman was not endangered due to this pregnancy.

Additionally, in 2017, Supreme Court relying on the *Suchita Srivastava* case held that in a case¹³ that a woman carrying a foetus with several anomalies in the 24th week of her pregnancy can be allowed to terminate it because "the right of bodily integrity calls for permission to allow her to terminate her pregnancy" In cases¹⁴ Apex Court also allowed a woman carrying a foetus anencephaly to terminate her pregnancy at 24 weeks, stating that the choice to abstain from procreation is within the limits of reproductive autonomy, provided that her life is not in danger.

In *Devika Biswas v Union of India*,¹⁵ the Hon'ble Supreme Court held that the right to choose sterilisation comes within the ambit of reproductive rights under part III of the Indian constitution. A PIL filed before the High Court of Bombay¹⁶ has ruled that a forced abortion

¹² *Ashaben v State of Gujarat* 2015 (4) Crimes 1 (Guj)

¹³ *Mrs X & Ors. V UOI* Writ Petition (Civil) No 81/2017

¹⁴ *Meera Santosh v UOI* Writ Petition (Civil) No 17/2017

¹⁵ *Devika Biswas v Union of India* (2016) 10 SCC 726

¹⁶ Bombay High Court Suo Moto Public Interest Litigation No 1 of 2016

through coercion is violative of her bodily integrity and violates the fundamental right of a woman's Article 21¹⁷ as well the MTP.

In *Puttaswamy's case*, the scope and ambit of fundamental rights were enhanced and the Right to Privacy was recognized as a fundamental right. From this perspective, the transformation of arguments regarding the relationship between the right to privacy and social accountability has increased multi-fold. In this regard, the choice of keeping a child or terminating the pregnancy is a matter of privacy.

CONCLUSION

The Right to Life and Personal Liberty under the Indian constitution contains the Right to Motherhood¹⁸ as well as the Right to abstain from it. This means that reproductive rights are given absolute constitutional protection. The Indian Constitution is a feminist document and has always been liberal while interpreting laws revolving around the rights of women. Through various beneficiary Legislations, Policies and Schemes passed by the Parliament, it is clear that the primary purpose of the laws is to ensure overall social welfare. Through precedents, the Court has rightly interpreted Reproductive Rights as a Fundamental Right under the umbrella of Article 21¹⁹.

¹⁷ Constitution of India 1950, art. 21

¹⁸ *Vijay Menon v State of Maharashtra* (2015) SCC OnLine Bom 6127

¹⁹ Constitution of India 1950, art. 21