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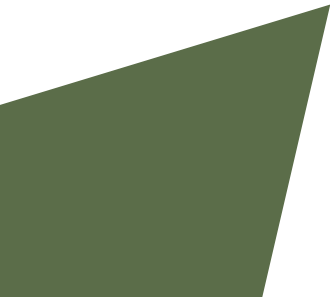
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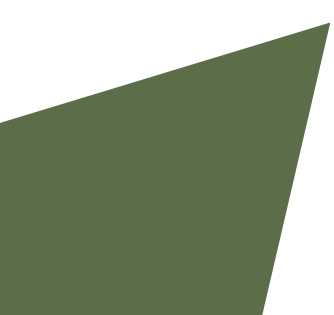
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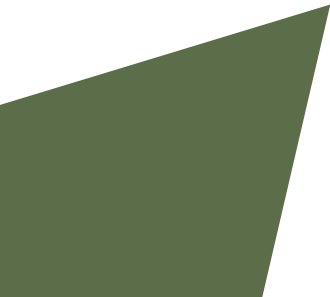
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Reproductive Choice of a woman: Fundamental Right Guaranteed
under Article 21 of the Constitution of India

Samarth Agarwal

The most precious, sacrosanct, inalienable and fundamental of all the fundamental rights of citizen is the Right to life and personal liberty under Article 21ⁱ of the Constitution of India.ⁱⁱ

In a recent judgement pronounced by the Rajasthan High Court on May 1, 2020 the reproductive choice of a woman being a fundamental right guaranteed under Article 21 of the Indian Constitution and the rights of a child rape survivor to make a reproductive choice outweighing the right of the unborn child to be born.

FACTS OF THE CASE

The case involved a 17-year-old minor rape victim who had approached a POCSO judge seeking abortion. However, the lower court declared her application as non-maintainable arguing that the length of gestation had gone beyond the threshold of 20 weeks as prescribed by Sec 2ⁱⁱⁱ of the Medical Termination of Pregnancy Act, 1971. A writ petition was filed by the petitioner before the Rajasthan High Court. However, it was turned down holding that the foetus in womb had a right to life as guaranteed under Article 21 and echoed that the 20 weeks period prescribed by the MTP act had expired. Court also held that it cannot be unmindful of the voice of the 'yet to be born' – a fully alive prospective child in the womb. The order pronounced by the court was challenged by the State government arguing that the disputed judgement infringes upon the fundamental right of rape victims from seeking termination of a forced pregnancy.

JUDGEMENT PRONOUNCED IN THE CASE

The 2-judge bench, referring to *Suchita Srivastava v. Chandigarh Administration*^{iv}, held that it is a woman's right to make reproductive choices and the same was covered under Article 21 of the Indian Constitution. The apex court also noted that a child conceived out of rape would cause grave injury to the mental health of a pregnant women as per Explanation 1 to Section 3^v of the MTP Act.

The court also held that if the request for termination of pregnancy is declined, there would be a direct infringement of the fundamental right of the woman to avoid the after effects of the pregnancy. The court while clasping upon the risks caused to the well-being of a mother by teenage pregnancies referred to *V Krishnan v G. Ranjan*^{vi}, observed that medical experts had established the complications that might arise out of teenage pregnancies. While dealing with the 20 weeks

period recognized under the MTP Act, the court held that the choice of enabling a child rape victim to exercise her right of making reproductive choices easily prevails over rights of the child in the womb to be born even where the pregnancy is at an advanced stage. The court further opined that had the issue been the rights of the unborn child, the same analogy would equally apply to a foetus with known abnormalities because such abnormalities would by themselves not give anyone the right to extinguish the life of a foetus.

ANALYSIS

This judgement ingeminates that only the concerned individual is directly impacted from the reproductive choice he/she makes. Like other aspects of family life, this sphere also has a very limited impact on the society and thus, the author feels that it is an individual who should be having the liberty to take a decision on such matters. The very comportment of the right to reproductive choice connotes it being a facet of the right to privacy. Tracing back the history, one can easily come to a conclusion that the framers of the Indian Constitution were skeptical wrt the liberties and freedom that an individual can enjoy and hence were predetermined to circumscribe the protection guaranteed by the provision to only certain kinds of liberties related to the life and of an individual. As a matter of fact, one can observe that the Indian Constitution doesn't explicitly concede the broader concept of right to life and thus, right to procreative choices^{vii}.

It is the Courts that have interpreted 'right to life and personal liberty' in a broad manner by expanding the panorama of the term "Personal Liberty" and giving it the widest possible meaning in the case of *Maneka Gandhi v. Union of India*. The Supreme Court and High Courts of India have made several far-reaching strides, thus carving out right to privacy and its smaller component i.e. reproductive right and recognizing the denial of reproductive rights as violations of women's and girls' fundamental and human rights.^{viii} This can be backed by the instance where the right to privacy and reproductive rights were included by the apex court in the case of *Suchita Srivastava*.

It is also important to note that the Act dealing with matters related to termination of certain pregnancies i.e. the Medical Termination of Pregnancy Act 1971, does not leave the women with the decision to abort and rests this decision with the registered medical practitioners. The act takes away the women's discretion to make their reproductive choices and the statute is a clear infringement to their right to life guaranteed under Article 21 of the Indian Constitution. The author feels that flaws in the Act only solidifies the significance and evolving role played by the

judiciary to address the legal and practical barriers which operate to deny women and girls their reproductive rights.

The fact that the women and girls continue to experience major barriers to enjoy their reproductive rights including denials of women's and girls' say in decision-making cannot be denied, however, Indian Courts have time and again tried their best to recognize the reproductive rights of women as a fundamental right ensured by the Constitution of India. The environment created by the courts have created a mandate for the government to shift away from population control approaches, confront discriminatory stereotypes that limit women's authority, and instead centre women's rights to dignity, autonomy, and bodily integrity in reproductive health related laws and policies.^{ix}

CONCLUSION

The need of the hour is for the Judiciary to strengthen the laws and the legal machinery dealing with reproductive choices and ensuring "Right to Life" under Article 21 of the Indian Constitution. It needs to revisit the MTP Act ensure strong call for action to continue to defend and uphold the reproductive rights of the women. The Act should observe the consent of not only the medical practitioner but also the woman who is going to give the birth. The fact that the unborn child has certain rights cannot be denied however, the fact that a poor woman who has been raped in a young age has to bear the outcome and live with the consequences of the wrongs and the sinister acts of the wrongdoer also cannot be avoided. Thus, the need of the hour is to understand that behind saving an unborn life, it is an already existing life being killed metaphorically. A balance needs to be struck between the rights of the reproductive choice of the woman and the rights of the unborn child. Even though the Explanation 1 of the Act recognises that a pregnancy arising out of rape can constitute a grave injury to the mental health of the pregnant woman, however the discretionary powers has been granted to the practitioners. The author feels that the medical practitioner and the woman should have equal say in this matter as it strikes a balance between ensuring good health of the pregnant woman and the grants the woman the fundamental right to choose.

The judiciary has time and again tried to give progressive interpretations to Acts and Statutes so that they can fit in the present society and doesn't seem incongruous. The judgement by Rajasthan

HC is another such instance where the court has reiterated the principles of granting widest possible ambit to right to life under Article 21 of the Indian Constitution.

REFERENCES

ⁱ Article 21, Constitution of India, 1950.

ⁱⁱ M.C. Mehta *v.* Union of India, AIR 1986 SC 1086.

ⁱⁱⁱ Section 2, Medical Termination of Pregnancy Act, 1971

^{iv} AIR 2009 9 SCC 1.

^v Section 3, Medical Termination of Pregnancy Act, 1971.

^{vi} H.C.M.P. No. 264 of 1993.

^{vii} Simi Rose George, Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S, 18 SBR 69, 69-92 (2006).

^{viii} Reproductive Rights in Indian Courts, CENTER FOR REPRODUCTIVE RIGHTS (June 4, 2017, 11:43 am), <https://reproductiverights.org/document/reproductive-rights-in-indian-courts>.

^{ix} *Supra* note 9.