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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

BALANCING RIGHTS: NAVIGATING PARENTHOOD AND ABORTION IN INDIA'S LEGAL LANDSCAPE

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ABSTRACT

This research paper talks about the fundamental right to abortion and right to parenthood which are often away from one another. The right to parenthood encompasses many aspects such as right to raise a child, to adopt or to surrogacy, and to reproductive health care. The right to abortion, on the other hand, allows individuals to exercise autonomy and bodily decisions, including the ability to terminate an unwanted pregnancy.

Parenthood is the right of both men and women and to not enjoy this right is decision which should be granted to both the parents. This paper recognizes the right to abortion that it is crucial for women's autonomy and their right to make choices about their own bodies, necessarily in unwanted and risky cases. The paper deals with the women's rights and its recognition under the Indian Constitution and the MTPA.

The paper also suggests to strike a balance between both the rights by the recognition of father's right to be a parent and to have a say in the decision of termination of pregnancy. The debate between these two rights is often fuelled by different beliefs regarding the role to regulate reproduction right and state duties. Proponents of the right to parenthood argue that it is a basic human right to have children and that society should assist those who wish to become parents. Ultimately, both the right to parenthood and the right to abortion are crucial in upholding human dignity and ensuring the full realization of human rights.

Keyword: Fundamental rights, Fathers right, Mothers right, pregnancy termination.

1. WOMENS RIGHT TO ABORTION

Currently, no countries constitution explicitly states that the abortion as a legal and human right. In spite of this, a growing number of cases from the Supreme Courts or the High Courts of several nations acknowledges abortion as a basic, inherent right. The right to an abortion is increasingly being interpreted by the courts as an extension of constitutional protections for liberty, equality, and dignity, or more lately for the preservation of one's health. Reproductive rights are today seen in connection to the state's responsibility to ensure that women and girls have the freedom to choose their reproductive options while also defining the parameters of those options. On the one hand, the state is required to respect the privacy of individuals about their reproductive choices.

The women have a constitutional “right to life and personal liberty” under “Article 21” of the Indian Constitution under which right to privacy and a right to reproductive health are inherited rights.

Right to life and personal liberty

“Article 21 of the Constitution” mentions about that “no person should be deprived of right to life and personal liberty”. Among several rights available to women, the right to abortion is seen to be one aspect of the right to life. The right to privacy, is a part of the right to personal liberty has recognised abortion. The definition of "life" in Art. 21 encompasses more than only breathing and doesn't only imply living like an animal or having a difficult life. It covers a wider variety of rights, including the right to a dignified existence, means of livelihood, health, clean air, and many more.¹

The Supreme Court in *Sunil Batra v. Delhi Administration*² stated that Article 21 of the Constitution includes the right to lead a healthy life and enjoy all of the human body’s capabilities. This includes the right to protect a person's traditions, culture, heritage and legacy and all other aspects of things that gives meaning to a person's life. Along with the right to health, it also encompasses the right to live and sleep in peace. Moreover, in *Maneka Gandhi v. UOI*³ the SC enlarged that right to live with dignity is also inherent under right to life.

¹(Kharak Singh v. State of Uttar Pradesh AIR 1963 SC 1295)

²(Sunil Batra v. Delhi Administration AIR 1978 SC 1675)

³ (Maneka Gandhi v. UOI 1978 AIR 597; 1978 SCR)

Every citizen of India has a duty to oppose behaviour that is disrespectful to women's dignity. Additionally, the court in *Sarmishtha Chakraborty v. UOI*⁴ stated that a “woman’s right to reproductive choice is a fundamental aspect of her liberty as envisaged u/A 21 of the Constitution. Woman has a sacred right to maintain her bodily integrity.” Furthermore, the basic notions of “*bodily integrity, personal autonomy, and sovereignty over the body must also be respected*”.

Right to Privacy & Reproductive Autonomy

The right to personal liberty includes the freedom from restrictions put on one's movements as well as the freedom from invasions into one's privacy. Although the privacy as a right is not explicitly stated as a basic right in our Constitution, it is a necessary component of human liberty.⁵

In the case of *Justice K. Puttaswamy*⁶ the SC unanimously affirmed that privacy is a constitutionally protected right and is envisaged u/A 21 of the Constitution. The right was found to have "at its base the preservation of personal intimacies," which included, but was not limited to, "procreation" and the "right to be left alone." This decision's relevance and applicability to reproductive rights is evident. The exercise of a person's reproductive rights, including the right to abortion, may now be considered to be firmly based in the right to privacy, which is, in turn, rooted in the principles of liberty, autonomy, and dignity, as the Supreme Court concluded in Puttaswamy.

The right to abortion is a subset of the right to privacy, which is claimed to be a continuation of the right to life under Art. 21. It can also be considered to include a woman's entire control over her organs. Reproductive rights are the basic liberties guaranteed to all couples and people, including the right to make informed decisions about how many, how often, and when to have the children and the right to the best possible sexual and reproductive health. It also involves the free from pressure, aggression, and racism while making reproductive decisions.⁷

Furthermore *Suchita Srivastava v. Chandigarh Administration*⁸ case has also acknowledged that the

⁴ (Sarmishtha Chakraborty v. UOI WP (Civil) No. 431 of 2017)

⁵ (Kharak Singh v. State of Uttar Pradesh AIR 1963 SC 1295)

⁶ (K.S. Puttaswamy v. Union of India (2017) 10 SCC 1)

⁷ (Cairo, 1994)

⁸ (Suchita Srivastava v. Chandigarh Adm., (2009) 9SCC 1)

right to reproductive autonomy, which includes the ability to make "*reproductive decisions as well as to reproduce as well as refrain from reproducing and procreating*," is part of Article 21.

In the case of *Mamta Verma v. Union of India*⁹ and *Meera Santosh Pal v. UOI*¹⁰, the court said explicitly that the freedom to make reproductive decisions is a part of women's human liberty. It is viable to exercise reproductive choice to procreate while also abstaining from procreation.

When a woman's body experiences pregnancy, it has a significant influence on her health, mental stability, and quality of life. As a result, woman must be the only one who can decide how to handle her pregnancy. Only women should have the authority to control their own bodies, including decisions on reproduction and parenthood. Let's not overlook a basic right of women: the freedom to control their own bodies, including whether or not to become and carry a child to term.

Right to Health

"Article 21 of the Constitution" encompasses multiple rights and "right to health" is one such right recognised by the court. The potential to reproduce and the freedom to make responsible decisions are both part of the right to reproductive health. Additionally, it entails having access to a range of reproductive health resources that enable people to make informed, autonomous, and ethical reproductive decisions.¹¹

Additionally, Article 21 affirms a woman's right to health and guarantees constitutional protection for the choice she takes (to terminate or not to terminate) that is least destructive to her physical and emotional well-being. When the physical, mental, and financial costs of continuing a pregnancy outweigh the consequences of doing so, the State cannot compel the woman to do so against her will as it would be detrimental to women's mental wellbeing.

⁹ (*Mamta Verma v. Union of India* (2018) 14 SCC 289)

¹⁰ (*Meera Santosh Pal v. Union of India* (2018) 14 SCC 133)

¹¹ (*Devika Biswas v. Union of India* (2016) 10 SCC 726)

2. MEDICAL TERMINATION OF PREGNANCY ACT, 1971

Legal Position of abortion in India-

Under the Indian Penal Code (IPC), abortion was permitted in India up until 1971. However, there are no specific restrictions on abortion in the IPC wherein miscarriage is covered from “sections 312 to 316 of the IPC”. According to the MTP Act, there are a few circumstances in which a woman may choose to end her pregnancy. Its objective was to provide some exemptions from the “Indian Penal Code, 1872 (IPC)” provision that makes "causing a miscarriage" a crime. The severe requirements of the law were found to be endangering the health and lives of many women seeking abortions.

According to the IPC, any action taken with the intent to end the pregnancy or cause the child's death after delivery is illegal, and both the woman intending to terminate the pregnancy and the doctor who performed it may face charges. Abortions were therefore seen to be appropriate under some circumstances. The MTP Act sought to restrict abortion to situations where the mother's mental or physical health was in danger or when there was a high risk that the unborn child would have severe physical or mental deformities. It was against the law for a woman to end a pregnancy, but if one of these conditions held true, she could.

It was against the law for a woman to end a pregnancy, but if one of these conditions held true, she could. Additionally, the attempt to legalise abortions took place at the same time as a push to reduce the population of the nation by using coercive measures and mass sterilising campaigns, usually with eugenic objectives, on individuals from disadvantaged backgrounds. “The Committee by the Ministry of Health in 1964 examined the question of legalising abortion recommended that it be permitted on the basis of eugenics. It is clear that passing the MTP Act had nothing related to a woman's right to choose how to have children when seen in the context of the greater fight to slow population growth.” In *Suchita Srivastava*¹² ruling, the SC had come to the conclusion that a pregnant woman’s capacity to make reproductive decisions falls under the purview of human liberty protected by Article 21 and that such choices can be utilised to both reproduce and refrain from reproduction. Contrary to this precedence, the MTP Act permits abortions only in extremely specific circumstances. Since 2017, women seeking to terminate pregnancies that have gone above the MTP Act's 20-week restriction

¹² (Suchita Srivastava v. Chandigarh Administration (2009) 9SCC 1)

have filed many applications before the SC and several HCs.

The Supreme Court of India permitted the termination of a pregnancy that was 22 weeks old. Seven-member Medical Board has stated that permitting a pregnancy to continue might endanger the woman's physical and mental health. According to the Supreme Court, a woman's freedom to choose her reproductive options falls under the definition of "personal liberty" u/A 21, and she is therefore free to end a pregnancy under the provisions of her right to bodily integrity.¹³

In *Savita Sachin Patil v. Union of India*,¹⁴ however, the Court declined to allow a 27-week pregnancy to be aborted. The Medical Board decided that while the woman was not in danger, the foetus had major physical defects. Following that, the Court declined to grant termination by relying on the Medical Board Report.

On therapeutic, eugenic, humanitarian, and social grounds, the new Medical Termination of Pregnancy (Amendment) Act 2021 offers universal access to complete treatment by extending access to safe and legal abortion services. The new law, which went into force on March 25, 2021, will assist to attain Sustainable Development Goals by lowering avoidable maternal death. The amendments take into consideration medical technological advancements, streamline provider criteria, raise the top trimester limit under specific conditions, eliminate the gestation restriction for cases that might place a strain on the health system. The goal is to give women who need safe and high-quality abortion care access to it by not harming their dignity, autonomy, secrecy, or justice.

Amendments brought are-

1. Increasing from 20 to 24 weeks the maximum gestation period for specific groups of women, including those who have experienced rape, incest, and other forms of vulnerability (women with varied abilities, minors, among others).
2. A single provider's opinion is needed to end a pregnancy up to 20 weeks.
3. Two medical opinions are necessary for a pregnancy termination between 20 and 24 weeks.
4. The gestation restriction shall not be enforced in situations where a Medical Board has

¹³(Mrs. X v. Union of India 2016 14 SCC 382)

¹⁴ (Savita Sachin Patil v. Union of India W.P.(C) 121 of 2017, S.C.C., 28 Feb. 2017)

identified serious foetal abnormalities.

5. Clause of nondisclosure - Only someone who has been given authorization by the court may get the identify and other personal details of a woman who has terminated the pregnancy.
6. Due to the contraception provision's inability to grant access to safe abortions based on a woman's decision, regardless of her marital status, MTP services were made available to unmarried women.

Termination of pregnancy up to 20 weeks requires:

- “The opinion of one Registered Medical Practitioner (RMP).
- The views of two RMPs on ending a pregnancy between 20 - 24 weeks gestation.
- A state-level medical board's opinion is necessary when pregnancy is terminated after 24 weeks owing to serious foetal abnormalities.”

3: FATHERS RIGHT TO PARENTHOOD

Parenthood is one experience which is depicted as a central aspect of human life plans in majority societies. People desire children for various reasons, including giving and receiving love, strengthening the bond between couples, adding meaning to life, finding enjoyment and pleasure in parenting, continuing family legacies, conforming to social norms, and ensuring future material benefits such as assistance in old age or governmental support.

While some motivations for parenthood are more common or socially valued than others, there is a consensus that individuals should have the freedom to make choices to have children. This right to establish a family is so crucial that it is recognized as a fundamental human right, as articulated in Article 16 of the “United Nations Universal Declaration of Human Rights” and Article 12 of the “Human Rights Act”. But Fathers in India are deprived of this Human Right by “Medical Termination of Pregnancy Act”.

MTP Act is violative of father’s right to retain the unborn child, as even if the father wants to retain and become a parent the decision of abortion is entirely left in the hands of the women as the Rights of the father is not considered in the MTP Act. The provisions of MTP Act, specifically Section 3(4) that talks about the requisite condition that

“no pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained

the age of eighteen years, is a [mentally ill person], shall be terminated except with the consent in writing of her guardian and another condition that no pregnancy shall be terminated except with the consent of the pregnant woman”.

It is to be noted that nowhere in this section the rights of father are considered and the act is silent about the rights of the father in retaining or terminating the pregnancy.

Courts in several cases in India have recognised how MTP Act is ignorant about the fathers right to parenthood and the consent of father for the abortion is nowhere necessary. In the case of “**Anil Kumar Malhotra v. Ajay Pisricha**” where the court stated that “there is no need of consent for the father of the child or husband of the mother for the abortion of the child, as there is no provision mentioned under the MTP Act, 1971 regarding the consent of the father for the abortion”.¹⁵

Furthermore, in **Paton v. Trustees of BPAS and Anr.** wherein the Division bench held that there is no right given to the father of the unborn to stop his spouse or a practitioner to perform legal abortion and further denied the injunction.¹⁶

As neither the judiciary nor the legislation recognizes the rights of father of an unborn child to prevent abortion, even if the father wants to retain the child the decision of abortion is entirely left in the hands of the women, even the father do not have to be notified prior to an abortion.

Further, a father should have a right to opt out of parenthood if he does not desire to be a father like a mother there should be a mechanism where fathers right to abortion as well as his to retain the unborn child should be recognised. Rights granted under Article 21 of the Constitution which included woman's right to an abortion, equality, and parental obligations there is a wide inconsistency with the right of father as it refuses to support their forthcoming progeny, the inconsistency among the three principles is to resolved to safeguard the rights of the father.

In **K.S. Puttaswamy** judgment the bench held that “right to privacy includes the right to complete autonomy over one’s body. This includes reproductive autonomy, and by that extension, the right to

¹⁵ (Anil Kumar Malhotra vs. Ajay Pisricha Civil Appeal No.4704/2013)

¹⁶ (Paton v. Trustees of BPAS and Anr. (1978 2 All.ER.987))

parenthood. Marriage is also no longer a pre-requisite to the right to parenthood. In recognition of this same dimension, single parents are now afforded the right to adopt in India". Right to parenthood or paternity recognized under Art. 21 is an inclusive right as it includes motherhood as the right available to women and fatherhood as the right available to father.¹⁷

The right to parenthood is protected by several international conventions such as the "ICCPR" and "UDHR". The rights related to reproduction that are recognized in international law can be divided into four main health-related categories: *the right to establish a family, the right to choose the number and timing of children, access to family planning information and services, and the right to benefit from advances in science*. International human rights documents offer a range of rights that suggest the existence of a right to procreation and reproductive health, and all these rights are entitled for both the parents.

The courts in matrimonial cases have recognized that going for abortion w/o the valid consent of the husband causes mental cruelty towards the petitioners in the case of "**Satya v. Siri Ram**", the wife without informing the husband terminated her pregnancy twice going against the wishes of her husband, court held that the act of wife amounted to mental cruelty¹⁸.

In the case of **Kumar Verma v. Usha**, the "wife got her very first pregnancy terminated w/o the consent of the husband and for no valid reason; she in fact concealed the fact of termination of her pregnancy from the husband. It was held that she was guilty of cruelty¹⁹. Similarly in **Suman Kapur v. Sudhir Kapur** the court held that an abortion by a woman w/o her husband's consent would amount to mental cruelty and a ground for divorce".²⁰

The rights of father are not recognized the only recourse available to father to prevent abortion under MTP Act is that to go for injunction order before the civil court, it causes grave mental agony to the father when he is not able to retain his child and many times didn't even inform that his child is being terminated, thus, MTP Act violates fathers right to paternity and thus, the Right of Parenthood.

¹⁷ (K.S. Puttaswamy and Anr. v. Union of India (2017) 10 SCC 1)

¹⁸ (Satya v. Siri Ram AIR 1983 P H 252)

¹⁹ (Kumar Verma v. Usha A.I.R. 1987 Del. 86)

²⁰ (Suman Kapur v. Sudhir Kapur court (2009) 1 SCC 422)

4: THE NEED FOR AN AMENDMENTS

The most undiscussed right in the current legal framework with respect to abortion is the fathers right to retain the unborn child, to be a parent and to be consented before the abortion or at least known the child he desired to have is being aborted or if he not desire to have the child, to seek abortion with the consent of the partner and not to be forced in the financial and emotional burden of bearing the child.

Everyone recognises rights of women as mentioned above in this paper which are utmost important by there should be a parity in law and the right of parenthood and abortion should be recognised for both the parents and women though bearing a child should not alone take the decision of abortion and consult husband before doing so.

When paying attention to the issue of abortion, it is crucial to acknowledge that the rights of the father should be respected when making family planning decisions that involve abortion. While the mother's rights often take precedence, it's important to recognize that both parents share equal responsibility for the unborn child. Therefore, there is a pressing need to raise awareness about this less-discussed aspect and urge the Indian judicial system to reconsider old notions, granting fathers an equal voice, if not in all cases, then at least in some.

Several countries, including Indonesia, Malawi, Syria, and Saudi Arabia, have previously required that a woman's husband give permission for an abortion. These countries believe that both parents should have equal rights and responsibilities when it comes to deciding whether to terminate a pregnancy. Even if the pregnancy is deemed abnormal, both parents must be consulted before any action is taken.²¹

In today's society, both parents play an equally vital role in raising children, and this importance should not diminish due to marital conflicts. It is essential to establish a legal framework that grants fathers the same decision-making rights as mothers in matters related to abortion. In many situations, women may choose not to continue a pregnancy for reasons such as maintaining their physical well-

²¹ (Walters)

being or simply because they do not wish to take on the responsibility of raising a child. Unfortunately, the father's perspective is often overlooked violating his right to parenthood. Consequently, there is a need to amend the “Medical Termination of Pregnancy Act” to include provisions that consider the father's consent in the decision-making process regarding abortion, particularly in situations where there is an imbalance in this arena.

5: CONCLUSION

Indian law with respect to abortion is very progressive in nature, with the recognition of women’s right to privacy and bodily autonomy and with the recent amendments the women have an assurance of their rights in abortion. Women’s Right to abortion and right to parenthood have a striking balance as her choice to bear a child or to be a parent of an unborn is recognised and well preserved. However, on the other hand the recognition that the child is not only women’s but the father is too involved in bearing a child is paid less attention to. Fathers right to paternity and parenthood is however goes unrecognised due to the preference given, thus it is long way to strike a balance between both the rights and have an ideal abortion law, where it is inclusive of the consent mechanism needed to preserve right to paternity and parenthood. The Constitution of India recognises and guarantees equality as a basic human and fundamental right thus minor changes in the existing framework can be a step towards providing right to abortion and parenthood to the father as both the parents are equally responsible for the childbirth, to fulfil the child needs. Thus, wants of both parents should be considered for an abortion and to strike a balance.

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