



## UNBORN CHILD AND REPRODUCTIVE AUTONOMY OF THE FEMALES

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### ABSTRACT

*The recent judgement of the Supreme Court in **X v. Principal chief secretary health and family welfare department, Govt of NCT Delhi** upheld the reproductive autonomy of the females and now unmarried females too have right to terminate the pregnancy. Earlier in accordance with the Section 3 of the MTP Act only married females and rape victims had the right to terminate the pregnancy that too in some exceptional circumstances. Conferment of this right on unmarried females set fire to the question that will it not automatically result into violation of the rights of the unborn child? And in case of conflict whose rights will prevail over whom? Answering these questions is imperative.*

**Key words:** - Unborn, Rights, Reproductive autonomy.

### INTRODUCTION

When it comes about unborn child there has been always a conflict between pro-life and pro-choice. Pro-life is a term most commonly used to support the foetal rights. The term describes the political and ethical view, which mentions that the foetus and embryo are human beings, and therefore have a right to live. Contrary to this, Pro-choice describes the political and ethical view that a woman should have complete control over her fertility and pregnancy. Proponents of this view hold that the expectant mother should have the right to abort/ terminate her pregnancy even after viability of the foetus, as a matter of 'self determination rights'. The pro-life group believes that human life has to be valued from fertilization, conception or implantation until the natural death. Any action which destroys an embryo or foetus is morally wrong. The believers in pro choice group accept that having a child is a personal choice affecting a woman's body, personal health and future. More broadly, pro-choice group has its justification in term of "individual liberty," "reproductive



freedom” and reproductive rights.<sup>1</sup> Unborn person on the caprice of its mother undoubtedly have rights, similarly the expectant mother also has some rights. These rights are always not in conformity with the unborn child, they may at some times contradict with the rights of unborn child. These conflicting interests or rights pose most strenuous question that whose rights will prevail over whom.

## **REPRODUCTIVE AUTONOMY AND CONTENTIONS**

Term reproductive autonomy means the power to decide when to have children, their number etc. It is the power to have reproductive choices and control over own body. The right derives its force from Article 21 of the constitution, which provides that no one should be deprived of right to life and personal liberty except in accordance with the procedure established by law. This right to personal liberty includes the right to decide number and spacing between the children, methods of birth control, right to terminate the pregnancy etc. Thus latter half of the Article 21 of the constitution upholds reproductive autonomy of the females but does that not mean we are violating right to life of the unborn enshrined under former half of the same Article?

Further Article 14 of the constitution talks about equality before law. It provides that the State shall not deny any person equality before law or the equal protection of the laws within the territory of India. But it was alleged that Section 3 of the MTP Act is against the spirit of Article 14 as it discriminates between married and unmarried females. If that is true does not that mean same article provides protection to unborn child also. Mainly from these two articles the right to reproductive autonomy derives strength. But same two articles also protect right and interest of the unborn child, which leads to a chaotic situation where in absence of clear provision it is a herculean task to decide whose rights will prevail over whom?

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<sup>1</sup> Prof Ashwani Kr Bansal and Sunanada Bharti, “Health interest of foetus and expectant mother” 158 *JCPS* 42(2008).



## JUDICIARY ON REPRODUCTIVE AUTONOMY OF THE FEMALES

Word reproductive autonomy means the right of a female over her own body to make autonomous decision about reproductive functions. These are the procreative choices a female can exercise over her body. Undoubtedly a female have full control over her body and can exercise this right freely. Here question is will such exercise of right to reproductive autonomy will or will not affect the right to life to unborn child? The answer to the question would obviously depend on the answer to the two questions, namely (1) whether or not an unborn child is a person within the meaning of life/liberty clauses in Article 21 and (2) whether or not it has life. There should be no doubt that a foetus or child in the mother's womb is not a natural person. But there should be equally no doubt that it is a 'juristic' person or 'judicial' person.<sup>2</sup> In *Jabbar V. State*<sup>3</sup> The Allahabad High Court held that, an unborn child, in the advanced stage of its mother's pregnancy, has a being or life of its own, and that it has a body. Even if the child is unborn and within the womb of the mother, it is capable of being spoken as 'person' if its body is developed sufficiently to make it possible to call it a child.

It is easier to argue in favour of personhood of foetus, where the rights of unborn as against the third party are involved, a grave ethical question may arise where the needs of the foetus and pregnant woman diverge. However abortion continues to be completely illegal or severely restricted by law in almost every country. Whether and to what extent abortions should be permitted, encouraged restricted or severally repressed is a social issue that has divided theologians, philosophers, legislators and general public.<sup>4</sup>

The American Supreme Court for the first time in *Roe v Wade*<sup>5</sup> recognised women's right to terminate her pregnancy. The Court found this right to be rooted in the Constitutional right to privacy. In brief the Court held that a women's right to terminate her pregnancy is such that the State may not prohibit abortion until the foetus reaches the

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<sup>2</sup> Justice Pollock Basu, *Law Relating to Protection of Human Rights* 132 (Modern law Publication, 1<sup>st</sup> edn., 2002).

<sup>3</sup> LNIND1965All 197

<sup>4</sup> *Supra* note 2 at 127.

<sup>5</sup> 410 U.S. 113 (1973).



viability. However on 24 June 2022 in **Dobbs v Jackson Women's Health Organization** Supreme Court of US overruled the historic judgement in *roe v. wade*. Where in contrary to **Roe v. wade** it was held that right to abortion is not a constitutional right.

In India abortion is permissible only in exceptional circumstances provided under Section 3 of the Medical termination of Pregnancy Act, to preserve the life of the pregnant women when the continuation of such pregnancy poses danger to her life. It is allowed through the medical removal of the child from the mother's womb<sup>6</sup>.

If the expectant mother, after voluntarily exercising her right to retain the foetus, is unwilling to continue with her pregnancy, not because her own life is threatened, but because medical examinations conducted at an advance stage of pregnancy show that the child, if born, would be severally handicapped. It would be tyrannical, if the unwilling mother were forced to bring a deformed or seriously ill/ handicapped child into this world and its caretaking were thrust on her. It may hit her fundamental right to privacy and would come in conflict with her other fundamental rights.<sup>7</sup> However in *X vs Principal secretary health and family welfare department* and another while allowing termination of pregnancy to the 22 weeks pregnant unmarried female Court observed that denying an unmarried woman the right to a safe abortion violates her personal autonomy and freedom.

Women have an absolute freedom and discretion under law whether to conceive or not. But when once exercised this option to conceive, termination of the foetus is an offence under the Indian Penal Code, Section 312. The Medical Termination of the pregnancy Act, 1971 exactly at this stage interferes and allows a woman to go voluntarily for abortion. When the woman is major her decision is final under M.T.P. Act but the problem arises when she is minor. Under the MTP Act, a minor girl cannot approach a doctor for abortion on her own. The consent of the parent or guardian is required.<sup>8</sup>

Similarly, Section 3 of the Medical Termination of the Pregnancy Act permits abortion in exceptional circumstances only when in the opinion of a doctor continuation of

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<sup>6</sup> *Supra* note 2 at 129.

<sup>7</sup> *Supra* note 1 at 164.

<sup>8</sup> *Supra* note 2 at 125.



such pregnancy causes any physical or mental injury to the women. Thus the right to abortion is only a conditional right. There can be no abortion beyond 24 weeks of pregnancy. State never sanctions a blank licence to any women or other person to kill the child in mother's womb. On the other hand it imposed many restrictions on termination of pregnancy and thus protected the rights of unborn child to be born alive<sup>9</sup>

In **Nidhi Singh v. State Of Chattisgarh**<sup>10</sup> the Court allowed termination of the pregnancy which was the result of forcible sexual intercourse on the prosecutrix as the pregnancy caused her anguish.

While allowing for termination various considerations need to be taken into the account. Like age of the prosecutrix, her willingness to terminate the pregnancy, her social status, financial conditions physical and mental conditions etc **Krishnan v. G Rajan**<sup>11</sup> Petitioner's father requested to terminate the pregnancy of the minor girl as it was alleged that it was the result of the rape on the minor, while the girl was not willing to terminate her unborn baby. Court while hearing in camera considered the fact that life of child in embryo cannot be taken away for the reason supplied by the petitioner. Every religious system in the world upheld the sanctity of the life of an unborn. The Court further considering the fact that unborn child being physically dependent on its mother prior to its birth need not lead to the assumption that it has no relevant separate existence and upheld the validity of minor girls consent in the matter of retaining the pregnancy. Court further taking into consideration the benefit of the expecting minor and unborn issued directions for her care during her pregnancy and post-delivery period. The Court ordered that she must be examined and advised by a senior medical officer in relation to medicine and diet during pregnancy. Further she must be paid a sum of rs. 250/- per month by the respondent no.1. In **Chanderkant Jayantilal Suthar v. State of Guajrat**,<sup>12</sup> a 14 years of rape victim was directed to undergo a medical examination by a team of the gynaecologists to ascertain that whether she is fit to abort her foetus or not. As the panel unanimously decided that

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<sup>9</sup> *Id.* at 129.

<sup>10</sup> WPC No 1988 /2019

<sup>11</sup> 1994 (1) LW (Cri) 16 Mad DB

<sup>12</sup> AIR 2015 SC668



aborting the foetus is necessary to preserve the physical and mental health of the girl. Again in **Janak Ramsang Kanzariya v state of Gujarat**<sup>13</sup> Gujarat High Court allowed termination of pregnancy of a twelve year old rape victim taking into consideration various factors like her age, her poor economic status, her physical and psychological health and the social, mental and physical problems such child would face. In **Marimuthu vs The Inspector of Police**<sup>14</sup> The question before Madras High Court was that the father of a minor pregnant have the right to abort the unborn child which is the result of rape committed on such minor or not, when the minor herself is willing to carry the child. It was contended that the continuance of the pregnancy would cause a risk of the injury to the health of the minor as the pregnancy is the result of the rape. The Court observed that the girl seems to be mature enough to understand the implications of the pregnancy and decision taken by her to retain the pregnancy is after she has been informed the implications of the pregnancy. Court while deciding the case took into notice the **Denforth's** case where it was held that a mature minor has a right to make her own choice about abortion without parental involvement. The Court further observed that the right to autonomy to the woman and to decide what to do with her body including whether to get pregnant or not and if pregnant whether to retain the pregnancy and motherhood. Hence the Court while dismissing the petition held that pregnancy cannot be terminated against the wishes of the minor girl.

However in **Surjibhai Badaji Kalasva V. State of Gujrat**<sup>15</sup> Gujarat High Court denied to grant the permission to terminate the pregnancy of a 13 year old rape victim who was 7 and half month pregnant. The Court while declining the permission took into consideration the report of the medical board according to which termination at later stage was highly risky for the minor as well as to the unborn child. The Court issued guidelines for the medical assistance to the victim and ensured arrangements for the adoption of the child in case if after delivery victim and her family shows their unwillingness to raise the baby.

But in this case no doubt that she is having reproductive autonomy and cannot be forced to carry the pregnancy especially when it is the result of sexual assault. Prima facie

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<sup>13</sup> SCraA No.707/2010

<sup>14</sup> WP (MD) No. 12212/2016

<sup>15</sup> LNIND 2018 GUJ 169



the decision in **Surjibhai Badaji Kalasva** case comes face to face in conflict with the right of woman over her body and reproductive choices. The study reveals that there is no unanimous view point on the termination of pregnancy in case of minor rape victim.

In **Suchita Shrivastva v. Chandigarh Admn**<sup>16</sup> Chandigarh Administration (respondent in the present case) on behalf of victim, a mentally retarded orphan approached the Court for the permission for termination of her pregnancy on the ground that she was mentally retarded and being orphan she do not have any parent or guardian to take care of her pre-natal and post-natal. The victim was willing to carry the pregnancy as well as to bear the child. The Apex Court concluded that State must respect the personal autonomy and reproductive choices of a mentally retarded woman. In this case the Court laid down the theory of the 'best interest'. The Court opined that the Court is to ascertain the course of action which would serve the best interest of the person in question. The Court while deciding must take into consideration the medical opinion on the feasibility of the pregnancy, social circumstances, the physical and mental health and the reproductive choices of the victim. The Court further observed that the directions given by Punjab and Haryana High Court for the termination of the pregnancy of the victim are not in the best interest of the victim. Court further opined that terminating pregnancy at such a late stage could have endangered victim's physical health and the same could have also caused mental anguish to the victim since she had not consented to the abortion. In **Naynaben Kantilal Shah v. Secretary**<sup>17</sup> A deaf and dumb tribal rape victim through the president of Paldi Vikas Grih filed for the termination of her pregnancy. However at the time of informed consent she retracted and showed her willingness to carry the child. The Court opined that there is no need to terminate the pregnancy merely because she has less understanding of the things around her in comparison to others. Hence the Court while dismissing the present petition directed to pay her compensation and ordered to provide her time to time medical assistance. The Court on recommendation of the medical board took notice of the fact that apart from being differently abled person for her incapacities to hear and speak, she is also having low IQ and unable to handle the child after the delivery, and hence permitted the

<sup>16</sup> (2009) 9 SCC 1

<sup>17</sup> R/CR.MA/11800/2017



Vikas Grih to approach the Court for giving the child to an orphanage. In **Geeta Devi V. state of HP and others**<sup>18</sup> HP High Court allowed termination of pregnancy to the petitioner a rape victim suffering with mild to moderate mental retardation. On the directions of Hon'ble High Court the board submitted its report according to which the child was suffering with some serious medical abnormality which may result in mental retardation, and the possibility of the survival of the child outside the womb was low. Normal delivery was not possible and caesarean would be complex. Moreover the victim was found suffering with a hole in her heart, which may further led to the complications of surgery. Hence Court allowed termination. Where as in **Ms. Z (S) v. state of Bihar and Others**<sup>19</sup> An appeal was preferred against the order of the Patna High Court seeking various directions including a request not to disclose identity of the petitioner on any record including official website, registry of the Court, official websites, search engines and web portals. Petitioner was a destitute mentally retarded rape victim abandoned by her husband and family and was suffering with HIV. She was taken for termination of pregnancy with her consent by the competent authority of a shelter home however the hospital authorities failed to terminate the pregnancy by the prescribed time. Hence applicant approached the High Court with a prayer to allow her to terminate the pregnancy as she had been sexually assaulted and was HIV+ and there were chances of the transmission of the disease to the child. Ironically the learned Judge failed to understand the gravity of the matter and wasted the time in unnecessary formalities and declined the prayer for termination of the pregnancy. Hence present appeal was preferred before the Honourable Supreme Court of the India. The Medical Board examining the victim submitted that at this stage of gestation the termination of pregnancy was highly risky to the expecting female and the child in the womb. She was advised to continue with HAART therapy and pre-natal care to reduce the risk of the HIV transmission to the unborn. On recommendation of the medical board the Court refused to give the permission for termination of the pregnancy. The Court further directed to make best medical facilities available to the victim so as to ensure proper care and supervision pre-natal as well as post-natal. The Court allowed paying the compensation

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<sup>18</sup> CWP NO. 2250/2017

<sup>19</sup> LIND 2017 SC394





to the victim which shall be kept in the fixed deposit in the name of the victim. The interest can be utilised for the benefit of the Victim as well as unborn. The Court further ordered that the child to be born shall be given proper treatment and nutrition by the State.

The decision in *Suchita Shrivastva* case seems to be in conformity with the law but in the opinion of the researcher it is really incongruous. The researcher found it ironical that the Court while keeping in mind the reproductive autonomy of the victim allowed her to sustain the pregnancy but failed to issue directions for the pre-natal and ante-natal care of the child. Further being aware of the fact that the victim is not mentally stable and orphan Court made no provision for the future welfare of the child and left it on the mercy of a person who herself was at the pity of others. Though the Court evolved the theory of best interest, but seems it failed to implement it in the gist. It would have been much better if besides being creative the Court would have been protective also and would have issued guidelines and directions for the compensation to the victim and care and future of the child. However the Courts in *Naynaben Kantilal Shah* and *Ms. Z (S) v. State of Bihar* seems to be highly creative as in both the cases the respective Courts not only took into consideration the reproductive autonomy of the victim but also took cognizance for the betterment and future of the unborn. The Court not only made provision for medical assistance to the victim before and after delivery but also directed the Vikas Grih to approach the Court for giving the child to an orphanage where as in *Ms. Z (S) v. State of Bihar* the Court made provision for the subsistence of the child out of the interest on the compensation amount paid to the victim. As far as the question related to reproductive choice and best interest is concerned we must understand that though the facts in the *Suchita Shrivastva* and *Ms. Z (S) v. State of Bihar* appears to be identical but they are far more different. In *Suchita Shrivastva* the victim was willing to carry the pregnancy hence the Court while giving respect to her reproductive autonomy allowed to sustain the pregnancy in her best interest as abortion would have affected her physical and mental health but in *Ms. Z (S) v. State of Bihar* no doubt that the victim was not willing to carry the pregnancy but she was already in her second trimester due to the negligence on the part of hospital and erroneous decision of the High Court, termination of the pregnancy was not in her best interest as it would have caused some



serious injuries to her and have retarded her health. Hence keeping in view the best interest of the victim the Court denied the termination of the pregnancy. According to the researcher no doubt that victim is having reproductive autonomy over her body but that right can be curtailed in the best interest of the victim only.

## **CONCLUSION**

Thus it can be inferred that in case of conflict undoubtedly reproductive autonomy of the females will prevail over the rights of the unborn child. In absence of a particular law Courts after having due regard to the reproductive autonomy, physical as well as mental health of the woman permit termination of the pregnancy. Courts are trying to resolve the question taking into consideration the best interest of the expecting female. Further in some of the cases judiciary is really thoughtful while issuing direction for the medical assistance and adoption of the child.