REPRODUCTIVE RIGHTS OF LESBIANS IN INDIA

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***Abstract*—The Indian judiciary in its locus classicus judgment of Justice K.S. Puttaswamy (Retd.) v. Union of India identifies the 'right to reproductive choice' as an inherent right under Article 21 of the Constitution. Additionally, even the Committee on Economic, Social, and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) recognize sexual and reproductive rights to be inclusive under women's right to health. This paper is aimed to lay focus on the recurring issues related to the highly talked about reproductive choices of women.**

With the passing of the Apex court's landmark abortion ruling in the case of Suchithra Srivatsava v. Chandigarh Administration, the uproar for the freedom of reproductive choices has been at an all-time high leading to several diversely opinionated debates. Amidst these, the LGBTQ's ability to make decisions regarding their reproductive health is still a mooting problem. The concept of reproductive choice acknowledges that women should have the freedom to make decisions about their reproductive lives without interference, coercion, or discrimination. It recognizes that women have the right to access accurate information and a range of reproductive healthcare services, including contraception, prenatal care, safe abortion, and other reproductive health services. It is pertinent to note that reproductive choice extends beyond the decision to have children.

Lesbians, like all individuals, have the right to access comprehensive reproductive healthcare, including contraceptive options, sexually transmitted infection (STI) testing, and general reproductive health services. The paper intends to accentuate the prominence of how salient it is for lesbians to be aware of their rights, seek support from LGBTQ+ organizations, and advocate for equitable access to reproductive healthcare and choices.

***Index Terms*—Reproduction, freedom, abortion, Lesbians, LGBTQ**

I. Introduction

Reproductive rights encompass a fundamental aspect of human autonomy and dignity, granting individuals the freedom to make informed decisions regarding their reproductive health and the ability to control their own bodies. The WHO defines reproductive rights as the recognition of the fundamental rights of all couples and individuals to choose the number, spacing, and timing of their children freely and responsibly and to have access to information, as well as the right to the best possible sexual and reproductive health. These rights also include the freedom of all individuals to make decisions about reproduction without fear of prejudice, violence, or coercion.[1].

[1] Dr. Carmel Shalev, expert member, CEDAW, paper presented on Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women at the International Conference on Reproductive Health, Mumbai (India), 15-19 March 1998.

Women's right to reproductive health[2] has been recognized by the Hon'ble Apex Court of India in a plethora of cases. It has pronounced that it is an inherent aspect u/a 21 of the Constitution[3].

At their core, reproductive rights acknowledge that individuals have diverse circumstances, values, and needs when it comes to their reproductive lives. They recognize that people should have the freedom to make decisions about their own bodies without coercion, discrimination, or stigma. By empowering individuals with the right to make choices about their reproductive health, reproductive rights play a vital role in fostering personal autonomy, bodily integrity, and overall well-being.

LGBTQ reproductive rights refer to the rights of lesbian, gay, bisexual, transgender, and queer individuals to access reproductive healthcare and make decisions about their reproductive lives without discrimination or barriers. These rights include the ability to pursue parenthood, access to assisted reproductive technologies, adoption, and reproductive health services. Historically, the LGBTQ community has faced significant challenges and discrimination when it comes to reproductive rights. Same-sex couples have encountered barriers in accessing fertility treatments, adoption agencies, and legal recognition of their parental rights. Transgender individuals have faced obstacles in accessing gender-affirming healthcare and preserving their fertility options before undergoing medical transition.

Reproductive rights awareness helps foster knowledge, understanding, and action to promote and protect the rights of individuals to make informed decisions about their reproductive health, free from discrimination, coercion, or violence. It contributes to creating a more just and equitable society where everyone can exercise their reproductive rights and lead healthy, fulfilling lives.

In recent years, there have been positive developments in recognizing and protecting the reproductive rights of LGBTQ individuals. Many countries have taken steps to legalize same-sex marriage and provide legal recognition to same-sex couples as parents. Additionally, there is a growing recognition of the importance of inclusive healthcare policies that address the unique reproductive needs of LGBTQ individuals. In the celebrated judgment of *Navtej Singh Johar v Union of India*[4], the Hon'ble Supreme Court while decriminalizing homosexuality, also held that women save an honor to sexual autonomy, which is a critical element of their qualification to individual opportunity. Here, lesbians also come under the purview of women and are entitled to sexual autonomy.

II. METHODOLOGY

This paper is studied and researched in an analytical way. Even though some existing literature overviewed the changes and challenges with various focuses provided a perspective overview of the reproductive rights of lesbians in India. The paper seeks to understand and advocate for the fundamental

[2] *Sandesh Bansal* v. *Union of India*, WP No. 9061 of 2008.
[3] Supra note 1.
[4] AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016.

rights and freedoms related to reproductive health, autonomy, and decision-making. Furthermore, this work aims to assess reproductive rights encompassing a range of issues, including access to contraception, safe and legal abortion, comprehensive sexual education, and healthcare services related to reproductive health.

III. LITERATURE REVIEW

Over the last decade, Indian courts have issued several notable opinions feting women's reproductive rights as part of the "inalienable survival rights" implicitly defended under the abecedarian right to life. In certain ground-breaking judgments, the courts have indeed for the first time honored reproductive rights as essential for women's equivalency and have called for respect for women's rights to autonomy and decision-making concerning gestation. In cases gauging motherly health, contraception, revocation, and child marriage, Indian courts have espoused robust delineations of "reproductive rights" that reflect mortal rights norms.[5] While court opinions aren't invariant, several trailblazing rulings have bravely affirmed women's rights to remedies for violations of reproductive rights including the first case encyclopaedically to fete motherly health as a right — and laid the foundation for Indian courts to continue to play a strong part in precluding and addressing ongoing violations of these rights.

IV. FREEDOM OF REPRODUCTIVE CHOICE: NEED OF THE HOUR

Reproductive choice is important as it upholds individual autonomy, promotes gender equality, contributes to better health outcomes, supports sustainable development, empowers individuals economically, and enhances mental well-being. It is a fundamental right that enables individuals to make decisions that profoundly impact their lives and the overall well-being of society.

Freedom of reproductive choice refers to the right of individuals to make decisions regarding their reproductive health and family planning without interference, coercion[6], or discrimination. It encompasses the ability to choose whether to have children, when to have them, and how many children to have. This freedom includes access to comprehensive reproductive healthcare services, information, and education. The concept of freedom of reproductive choice is rooted in the principles of bodily autonomy, privacy, and human rights. It recognizes that individuals should have the freedom to make decisions about their own bodies and reproductive lives, without being subjected to external pressures or constraints.

The Human rights law has time and then stipulated that women must be free to decide when they want to be pregnant, the number of children they want to have, and how they want to space their pregnancies.[7]

The hotly debated topic of freedom of reproductive choice includes the following key aspects:

[5] Reproductive rights in Indian court.
[6] *Devika Biswas v. Union of India & Others,* W.P. (C) 81/2012.
[7] WHO, Abortion care guideline, March 2022.

a) Access to Information

Individuals have the right to accurate and unbiased information about contraception, family planning methods, sexual health, and reproductive options. Access to information empowers individuals to make informed decisions based on their own values, beliefs, and circumstances.

b) Contraception and Family Planning:

In the case of *Kumari D v State of Karnataka*[8], the Hon'ble Karnataka High Court recognized that reproductive choices can be exercised to procreate as well as to abstain from procreating. The utmost importance is to respect a woman's legal entitlement to privacy, dignity, and bodily integrity. Accordingly, women have a right to refuse a sexual activity or to use contraceptives to avoid pregnancy. Even before this judgment, the Hon'ble Supreme Court, in *Suchitra Srivastava and Another vs. Chandigarh Admiration*[9] upheld that reproductive autonomy is one significant aspect of personal liberty and thus, *women* have a free choice over birth- control methods like undertaking sterilizations.

c) Safe and Legal Abortion:

The celebrated case of *Roe v Wade*[10] before the Hon'ble US Supreme Court recognized women's right to have an abortion. This decision decided the legality of abortion. In India, an exclusive statute titled the Medical Termination of Pregnancy Act, 1971 was passed by the legislature. Vide Art. 3 of the aforesaid act states that pregnancy can be terminated:

(1) As a health measure when there is a danger to the life or risk to the physical or mental health of the women;

(2) On humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc. and

(3) Eugenic grounds - where there is a substantial risk that the child if born, would suffer from deformities and diseases.

d) Comprehensive Reproductive Healthcare:

Reproductive choice includes access to quality healthcare services that address a wide range of reproductive needs, including prenatal care, sexual health screenings, fertility treatments, and support for reproductive health issues. The Delhi High Court in its joint decision in *Laxmi Mandal v. Deen Dayal Harinagar*

[8] W.P. No. 104344/2021.
[9] Supra note 2.
[10] 410 U.S. 113.

Hospital & Ors.[11] and *Jaitun v. Maternity Home, MCD, Jangpura & Ors.*[12] that dealt with the denials faced by two women who were below the poverty line, to access to healthcare relating to reproductive health. The Court held the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and the reproductive rights of the mother. The Court relied upon CEDAW and ICESCR, and stated that "no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background…This is where the inalienable right to health which is so inherent in the right to life gets enforced." Similarly, the Hon'ble Supreme Court in *Paschim Banga Khet samity vs. West Bengal*[13] recognized that the states are duty-bound to give adequate medical facilities to women, failing which will be a violation of Article 21 of the Constitution.

e) Non-Discrimination and Equity:

Freedom of reproductive choice emphasizes the importance of ensuring that all individuals, regardless of their gender, sexual orientation, socioeconomic status, or other characteristics, have equal access to reproductive healthcare and the ability to exercise their reproductive rights without facing discrimination or barriers.

f) Advocacy and Policy Support:

Protecting and promoting freedom of reproductive choice often involves advocating for policies and laws that support reproductive rights and ensuring that healthcare systems are designed to respect and fulfill these rights. It also includes advocating for comprehensive sexuality education and the elimination of gender-based violence and coercion. The Supreme Court while delivering the judgment in the *Devika Biwas* case, correlated the government policies positioning female sterilization as a focal point for violations of equality for women.

V. CONSTITUTION OF INDIA AND REPRODUCTIVE RIGHTS

Reproductive rights are essential to the consummation of all mortal rights. They encompass a diapason of civil, political, profitable, and social rights, from the rights to health and life, to the rights to equivalency and non-discrimination, sequestration, information, and to be free from torture or ill- treatment. States' scores to guarantee these rights bear that women and girls not only have access to comprehensive reproductive health information and services but also that they witness positive reproductive health issues similar as lower rates of unsafe revocation and motherly mortality and the occasion to make completely informed opinions — free from violence, demarcation, and compulsion — about their fornication and

[11] W.P.(C) 8853/2008.
[12] W.P.(C) 10700/2009.
[13] 1996 SCC (4) 37, JT 1996 (6) 43.

reduplication. Violations of reproductive rights disproportionately detriment women due to their capacity to come pregnant and legal protection of these rights as human rights is critical to enable gender justice and the equality of women.

The Constitution of India does not explicitly mention reproductive rights for women. However, several provisions in the Constitution are relevant to the protection of women's reproductive health and rights. These provisions uphold the principles of equality, dignity, and non-discrimination, which have been interpreted by the courts to include reproductive rights.

- The Right to equality, as enshrined in Article 14[14] of the Constitution, prohibits discrimination on various grounds, including gender. This provision has been instrumental in challenging discriminatory laws and practices that affect women's reproductive rights.

- The Right to life and personal liberty, guaranteed by Article 21[15] of the Constitution, has been interpreted broadly to encompass reproductive rights. The Supreme Court of India has held that the right to privacy, which is inherent in Article 21, includes the right to make decisions about one's reproductive choices.

- The Constitution also guarantees the Right to freedom of expression and the right to information, which are crucial for women to access accurate and comprehensive reproductive healthcare information.

- Additionally, the Constitution mandates the State to promote the welfare of its citizens, as stated in the Directive Principles of State Policy (Part IV of the Constitution). These principles include provisions related to maternal and child health, equal pay for equal work, and the improvement of public health.

While the Constitution does not explicitly address reproductive rights, the courts have recognized and protected women's reproductive autonomy through their interpretations of the fundamental rights guaranteed by the Constitution. Over the years, various judicial decisions have upheld a woman's right to make choices regarding her reproductive health, including decisions related to contraception, abortion, and assisted reproduction techniques. It's important to note that the interpretation and application of constitutional provisions can evolve over time through judicial pronouncements and legislative actions. Therefore, the understanding and protection of reproductive rights in India continue to develop in response to societal changes and legal developments.

[14] Constitution of India,1950.
[15] Constitution of India,1950.

VI. LESBIAN WOMEN AND THEIR RIGHTS

The struggles faced by lesbian women are harder because the existing legal framework seems like it is designed only for heterosexual women. This makes it gruelling for lesbian women to avail the reproductive health services. But like all individuals, lesbian women are entitled to the same fundamental human rights as everyone else.

The Universal Declaration of Human Rights, 1948, vide Article 25 has enshrined that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family…." Even the Preamble to the WHO Constitution states that for every human being, one of the fundamental rights is to enjoy "the highest attainable standard of health". The Protocol on Economic, Social and Cultural Rights, in Article 12(1) mentions that the States parties have agreed to "… recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The provision is also supported by Convention on the Rights of the Child, in which Article 24(2)(f) mandates the States parties to "develop preventive health care, guidance for parents and family planning education and services".

The Convention on Elimination of All Forms of Discrimination against Women, 1979, in Articles 11, 12, and 14 have declared in unequivocal terms that States shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning and to eliminate discrimination against women in rural areas in order to ensure to such women the right to have access to adequate health care facilities, including information, counselling and services in family planning. This means that the State's duty is to respect, protect and satisfy the requisites needed for women's rights to health care.

Article 17 of the Beijing Conference of 1995 has also declared that: "The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment". At this conference, the right to health with special reference to women's reproductive health was recognized. At the International Conference on Population and Development, in 1994, the contracting states surrendered to moral and master standards in family organizing organizations, including the honor to individual conceptive independence and total sexual direction equality.

India was a signatory to almost all the aforesaid conventions on women's right to reproductive health.

The Hon'ble Apex Court in the case of *Devika Biswas v. Union of India & Ors*[16], recognized women's autonomy and gender equality as core elements of women's constitutionally-protected reproductive rights. Through this judgment, the Indian legal framework relating to women's reproductive rights travelled way ahead of the reproductive health framework.

Now, the reproductive rights include, but are not limited to:

- Right to non-discrimination[17]: Lesbian women should be protected from discrimination based on their sexual orientation. This means they should have equal opportunities in employment, housing, education, healthcare, and other areas of life.
- Right to privacy[18]: Lesbian women, like all individuals, have the right to privacy regarding their sexual orientation. They should not be subjected to intrusive measures or discrimination based on their sexual orientation.
- Right to freedom of expression[19]: Lesbian women have the right to express their sexual orientation openly and freely, without fear of persecution or discrimination.
- Right to freedom of association: Lesbian women have the right to form and join organizations that support and advocate for their rights, as well as to participate in public and social life without facing discrimination.
- Right to protection from violence and hate crimes: Lesbian women should be protected from violence, including hate crimes, based on their sexual orientation. Law enforcement should effectively investigate and prosecute acts of violence against them.
- Right to marriage and family[20]: Lesbian women should have the same rights as heterosexual individuals to enter into marriage or civil partnerships. They should also have equal rights to adoption, assisted reproduction, and other family-related matters.
- Right to healthcare: Lesbian women have the right to access healthcare services without discrimination or prejudice. This includes reproductive health services, mental health support, and appropriate care for their specific health needs.

It is important to note that the recognition and protection of these rights vary across countries and regions. While progress has been made in many places, lesbian women still face legal and social challenges in some societies. Efforts are ongoing to advocate for equal rights and to combat discrimination and prejudice against lesbian women and the LGBTQ+ community as a whole.

[16] Supra note 8.
[17] Supra note 6.
[18] Supra note 1.
[19] Supra note 6.
[20] *Deepika Singh versus Central Administrative Tribunal & Ors.,* C.A. No 5308/2022.

VII. CONCLUSION

In conclusion, lesbian reproductive choices are a complex and multifaceted topic that intersects with both reproductive rights and LGBTQ+ rights. Lesbian individuals and couples face unique challenges and considerations when it comes to building their families and making decisions about reproduction. While societal and legal barriers have historically posed obstacles, progress is being made to recognize and support the reproductive choices of lesbian individuals. Lesbian couples who wish to have biological children have various options available to them, including assisted reproductive technologies such as donor insemination, in vitro fertilization (IVF), and surrogacy. These methods allow lesbian couples to conceive and carry pregnancies, enabling them to experience the joys and challenges of parenthood.

However, lesbian individuals and couples may also face discrimination, both overt and subtle, when seeking reproductive services or trying to start a family. Some healthcare providers or institutions may hold biases or lack awareness about the specific needs of lesbian patients, potentially resulting in limited access to fertility treatments, adoption services, or legal protections. In this, India as a country has still not wholeheartedly accepted the LGBTQ+ community. Even though there has been greater progress by the means of supportive steps such as decriminalization of Section 377, generation Z spreading awareness on the lives of the LGBTQ+ and how important it is to treat them equally and inclusively, the innermost corners of the country including the older generations have had a hard time accepting the fact that people of similar sex can be attracted to each other and that they can build families of their own.

To address these challenges and promote lesbian reproductive choice, it is essential to advocate for inclusive policies, legislation, and cultural changes. This includes ensuring legal recognition of same-sex relationships and their rights to access reproductive technologies and adoption services. Healthcare providers and institutions must receive education and training to eliminate biases and provide inclusive and respectful care to lesbian patients. Additionally, raising awareness and fostering dialogue about lesbian reproductive choices can help challenge societal stereotypes and promote acceptance and understanding. Sharing personal stories and experiences can contribute to a broader societal understanding of diverse family structures and the importance of supporting all individuals in their reproductive journeys.

Ultimately, supporting lesbian reproductive choices means recognizing and affirming the autonomy and rights of lesbian individuals and couples to make decisions about their bodies, relationships, and families. By embracing inclusivity and equality, society can foster an environment where lesbian individuals have the freedom to pursue their desired reproductive paths and experience the joys of parenthood on their terms.

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