

WHO DECIDES? THE STATUS OF REPRODUCTIVE RIGHTS IN INDIA: AN ANALYSIS

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“It is impossible to think about the welfare of the world unless the condition of women is improved. It is impossible for a bird to fly on only one wing.”

Swami Vivekananda

ABSTRACT

The journey of a women's position in Indian society has been truly remarkable. Women excelled in every sphere of life and their contribution to professional as well as to social life has been truly dynamic. It would not be wrong to state that the Indian women has emerged as a “Super Woman”. However, her recognition as an equal partner in sexual and reproductive rights still is negligible. In India, the scope of reproductive rights has been extremely limited to the area of child marriage, female foeticide and sex selection, etc, although the area has a much wider scope. As per the report of World bank and UNICEF. India has the highest number of maternal deaths every year, and unsafe abortions are the major reason for maternal deaths. This paper will give an overview of the reproductive marginalization in India and for this purpose it will adhere to doctrinal approach and analyse legislative and judicial contribution. The paper will also look into the policy framework and will conclude by giving the suggestions.

KEYWORDS: Women, Reproductive Rights, Equality and Reproductive Marginalization

1. INTRODUCTION

India got Independence 76 years ago and it's an appropriate time to analyse the position of women in India. The journey of women's position in Indian society has been truly remarkable. Women excelled every spare of life. Their contribution to professional as well as to social life has been dynamic. It will not be wrong to state that she has emerged as a Super woman.

However, her recognition as an equal partner in sexual and reproductive rights still is negligible. In India, the scope of reproductive rights has been extremely limited to the area of child marriage, female foeticide and sex selection etc, although the area has much wider scope. As per the report of World bank and UNICEF India, India has the highest number of maternal deaths every year and also unsafe abortions are the major reason for maternal deaths.¹

The choice which has a an impeccable impact on women's life is the choice to choose whether to become a mother or not to become a mother.² This choice is emotionally gripping and socially pivotal. It effects the body and the mind of a women to a greater extent. The choices about being mother are bound up with and gender identity, choices about motherhood and childbearing are

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¹ Jaya Kothari & Maya Unnithan, *A Half- Written Promise*, (Sep.23, 2021, 11.21 PM) <http://www.thehindu.com/opinion/op-ed/a-half-written-promise/article62109912.ece>.

² DIANA MEYERS, *THE RUSH TO MOTHERHOOD: PRONATALIST DISCOURSE AND WOMEN'S AUTONOMY* 735 (University of Chicago Press, Chicago, 2001).

emotionally gripping and socially pivotal. Motherhood impacts one's attitude towards life and as a result self-esteem may suffer or may be enhanced.³ The reproductive autonomy is instrumental for the overall well being of a woman.⁴ Men make very significant biological contribution to the reproductive process, as well as their contribution is pivotal in emotional, legal, and social responsibilities. It nevertheless is the process of reproduction, occurs through a woman's body.⁵ As Meyers comments, "securing reproductive autonomy not only entails demanding the right to choose not to procreate, but the right to respect for decisions to procreate, a factor which underpinned feminist opposition to coercive methods of fertility control such as forced sterilization and the withholding of welfare supplements for new babies."⁶ Undoubtedly, motherhood reflects the extent to which reproductive control and 'bodily integrity' are highly implicated in the "formation of women's identity".⁷ Meyers has pointed in her article that "The value of reproductive autonomy is to be found in its instrumentality for fostering one's human needs and interests given their centrality to our well-being and sense of self and women's interests and aspiration are gradually being translated into nationally and internationally recognized rights."⁸ One of these rights is the rights to decide whether to reproduce or not to reproduce.⁹ In **Morgentaler v. The Queen**¹⁰ it was held that right to reproduce has become "an integral part of a woman's struggle to assert her dignity and worth as a human being."¹¹ Although women were historically valued and given respect in the society only because of their childbearing capacity, women are now totally different, they are coming to value themselves as individuals and they wish to become the decision makers as far as reproduction is concerned.¹² Conservative are not accustomed to value and recognizing women, as decision makers in their own lives as well as in the lives of their children, families, or communities.¹³ Kate Millet, goes on to say that "the great mass of women throughout history have been confined to the

³ *Ibid.*

⁴ NICOLETTE PRIAULX, RETHINKING PROGENITIVE CONFLICT: WHY REPRODUCTIVE AUTONOMY MATTERS 16 (2) Med.

⁵ *Ibid.*

⁶ Jaya Kothari, *supra* note 1.

⁷ Inmaculada de Melo-Martin, *Ethics and Uncertainty: In Vitro fertilization and risks to women's health* 9 RISK 208 (1998).

⁸ *Ibid.*

⁹ Jaya Kothari, *supra* note 1.

¹⁰ I.S.C.R 30, 172 (can. 1988. As Madam Justice Wilson of the Supreme Court of Canada explained: Women's needs and aspiration are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issues in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

¹¹ Rebecca J. Cook, *Human Rights and Reproductive self Determination* 44 AM. U.L. REV. 976 (1994-1995).

¹² *Ibid.*

¹³ *Ibid.*

cultural level of animal of life in providing the male with sexual outlet and exercising the animal functions of reproduction and care of the young”. However, things have changed considerably and in present scenario the women are considered to be far more responsible decision makers in the lives. Recently, There is a valid acknowledgement of the legitimacy of women’s rights to reproductive and related choice and this transition is indeed the recognition and respect that women are receiving. Nevertheless, the domains of women’s rights and reproductive freedom are fertile spaces for double bind¹⁴ analysis, particularly as applied to race, religion and bioethics.¹⁵ In these spheres, reconciling reproductive autonomy and career aspirations with social expectation is oft-times challenging; the demands from each sphere are unique and sometimes perceived as irreconcilable.¹⁶

The term “Reproductive Health” was officially first time defined by the United Nations/ World Health Organization in 1994 at the international conference on population development held at Cairo, Egypt. The definition of health given by WHO is a state of complete physical, mental and social wellbeing and it’s not restricted to the absence of disease or infirmity and “Reproductive Health “means reproductive processes, function at all stages of life .

The aim of this paper is to discuss the reproductive rights in the detail and to bring out the major issues related to them in India. The paper will broadly be divided in four parts the first part will be defining the Reproductive Rights. The second part will be talking about the Legal framework related to them. The third part will discuss the role of judiciary in shaping the reproductive rights and finally the paper would provide the summery of the problems related to the implementation of these rights and it will come up with some suggestions for the better implementation of these Rights.

1.1 Objectives of Study:

The paper resolves around the reproductive marginalization in India. International laws and declarations recognize certain rights that all human beings are entitled to. One of these rights, which the Constitution of India has recognized, is that of sexual and reproductive health. The women's rights have been recognized to reproductive and sexual health as a key to women's overall health. Rights to reproductive and sexual health include the right to life, liberty

¹⁴ According to American Heritage Dictionary, double bind means a situation in which a person must choose between equally unsatisfactory alternatives; a punishing and inescapable dilemma.

¹⁵ Michele Goodwin, *Assisted Reproductive technology and double Bind: Illusory Choices of Motherhood*, Gender RACE& JUST.3 (2205-2006).

¹⁶ *Ibid.*

and the security of the person; the right to health care and information; and the right to non-discrimination in the allocation of resources to health services and in their availability and accessibility. The present paper attempts to examine the various aspects of women's reproductive rights in the Indian perspective on the basis of both legislative as well as judicial response and it aims to bring out the gap between both.

1.2 Research Questions?

- Whether the participation of women as equal partners in a matrimonial bond to make reproductive choices has been recognised in Indian society?
- Whether the legislation in India and Judicial response on reproductive rights has been favourable?

1.3 HYPOTHESIS

- Women have attained the equality in reproductive rights in India.

2. RESEARCH METHODOLOGY

- The methodology of the study in this paper is 'doctrinal method'.

3. What are Reproductive Rights?

Reproductive rights are legal and basic rights. They have been defined by World Health organization as the "Basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health." They also include the right to safe abortion, right to Birth control and the right to good quality reproductive healthcare¹⁷. Some of these Rights has already been recognized in binding International and National legal frameworks but majority of them are still in the form of conferences, declarations etc which are non-binding in the nature personal autonomy also includes reproductive decisions and it has been well recognized by 1994 UNPIN¹⁸. The rights have been widened up to include the access not only to safe abortion but also to have accesses to contraception and also to have a say in the decisions concerning reproductions UNPIN also recognizes the right to speak against coercion and violence while exercising the

¹⁷ Lieber, Katherine B (1992), *Selling the Womb : Can the Feminist Critique of Surrogacy be Answered?*, 68.1 INDIANA LAW JOURNAL 3.

¹⁸ United nations international conference on population and development, 1994.

life related to bearing of children.¹⁹ Similar rights have been recognized UNFPA , OHCHR and DIHR 2014 over the years the rights related to make the reproductive choices have been recognized in various judicial decisions yet the reality of woman and girls on the ground is contrary to whatever is being propounded.²⁰

3.1 REPRODUCTIVE AUTONOMY/EQUALITY

Human Rights are a universal concept. Reproductive autonomy includes a right of a woman to bodily integrity and her right to the highest attainable physical and mental health which includes her sexual and reproductive health too. Every woman should have the complete autonomy to decide about her own body.

The World needs to be reminded of women's human rights, which include the right to: "equality, dignity, autonomy, information, bodily integrity, respect for private life, the highest attainable standard of health, including sexual and reproductive health, and freedom from torture and cruel, inhuman and degrading treatment". The right of every a woman or girl to make autonomous decisions about her life as well as about her own body and reproductive functions is at the core of her basic rights to "**equality, privacy, and bodily integrity**".

Equality in reproductive health as suggested by WHO includes access, without discrimination, to affordable, quality contraception. The decision as to decide whether to continue a pregnancy or terminate as it may shape a woman's entire future personal life as well as family life. The decision has a crucial impact on women's enjoyment of other human rights. The decision is therefore fundamentally and primarily the woman's decision.

The chart sums up the Reproductive Rights:

¹⁹ Bindu Shajan Perappadan, *A Setback for Surrogacy in India?* HINDU, November 29, 2015 at 5.

²⁰ Sarangi, Anjora, "*Commercial Surrogacy in India*" Engendering's (Dec.12, 2015) (Nov. 24, 2023, 7:50 PM) <http://blogs.lse.ac.uk/gender/2016/12/21-commercial-surrogacy-in-india/>.



3.2 LEGISLATIVE RESCUE

There are various enactments which are recognizing the reproductive rights as legal rights.

1. Indian Constitution vis- Reproductive Rights

Reproductive rights are the most important component of human rights. They are surrounded by civil, social, political and economic rights. This includes right to health, right to privacy, right to life, right to equality, right against torture and so on. Reproductive rights of a woman are comprehensive rights hampering them would result in violation of gender justice. The most important article of Indian Constitution which deals with reproductive rights indirectly is Article 21 and “It states that no person shall be deprived of his personal life and liberty except the procedure established by law”. Every individual is given choices and These choices can also be related to the exercise of reproductive rights. Article 13 prohibits the State from making any such law which is contravention with a fundamental right. Article 14 of the Indian Constitutions grants us right to equality before law and equal protection of law. So, the woman cannot be denied the right to make choices about reproductive rights. Then comes Article 15 which protects discrimination on the ground of race, cast, religion, sex, place of birth or any of them. So, it impliedly prohibits the gender biasness.

Even though these rights do not expressly provide for reproductive rights but time and again Supreme Court has given various decisions regarding the scope of these articles. Hence, every woman has the freedom to make their own choices and is also free to enjoy their reproductive rights.

2. Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act :

This act is an enactment of 1994 and it is amended in 2003. It works as an important tool for addressing sex selective abortions. The objective of this act is to prohibit the use of sex selection techniques before as well as after conception in other words the main object of this enactment is to prevent the misuse of prenatal diagnostic technique for sex related abortions. The act lists various offences related to the abuse of prenatal diagnostic techniques. The sex selection on any human being, conducted PNDT test for any purpose other than the once mentioned in this enactment are offences. Distribution, sale, renting of any ultrasound machine or any similar equipment capable of detecting sex of the foetus are offences under the act.

3. The Medical Termination of Pregnancy Act 1971

The medical termination of pregnancy act 1971 makes reason for the termination of pregnancy only up to twenty weeks, if any unwanted pregnancy has progress beyond the periods of twenty weeks woman have to approach a medical board and a court to seek termination of the pregnancy. The process for termination unwanted pregnancy beyond twenty weeks is a difficult and cumbersome process it is further to be noticed that this act does not accommodate non-medical concerns. For example, economic cost of raising a child or any discretion related to a relationship between career choices and having a child is of no importance. The major drawback of the enactment is non reorganisation of one's right over one's body if the women is pregnant under twelve weeks and she wants to abort the child the permission of one medical practitioner is required but if the pregnancy is beyond twelve weeks and below twenty weeks the authorization of two practitioners is made mandatory beyond the period of twenty weeks Section 5 of the act applies which makes it mandatory for the medical practitioners to believe that abortion is must in order to save the life of a woman. This act claims that these restrictions are there to balance the rights of a women to privacy against the legitimate interest of the State to protect the potential human life and the other justification of MTP act is that it prevents of sex selective abortions but it is to be noticed this enactment has been under the criticism over the years for its very restrictive scope and its failure to keep up with the technological advancement. The privacy concept has been given very less importance under the section 3 and 5 of the MTP act.²¹It is very evident that section 3 and 5 of MTP act are violative of women's right to make reproductive choices, which is a part of right to privacy and right to life and also to have a safe pregnancy. She is not given a right to exercise her right to physical integrity and making a choice relating to her body MTP act makes the

²¹ Suchita Srivastava v Chandigarh Administrations 2009 (India).

abortion completely doctor centric and doctors are having ultimate discretion over the body of a woman. It is further to be noted that the procedure to terminate pregnancy beyond twenty weeks is even more rigid and this approach has led to unsafe abortions by mid- wives and quacks. In addition, the Act does not address the plight of a woman who is forced to carry a pregnancy.

The state can put limitations on fundamental rights but these limitations are required to pass the test of constitutional jurisprudence. The MTP act has been voiced against for years and hence an amendment Bill was introduced in 2014. The medical termination of pregnancy (Amendment) Bill seeks to give new dimensions to the reproductive rights under the Bill. It is very crucial for privacy concern. It allows abortion up to twelve weeks completely on the basis of woman's discretion but these amendments may not be satisfactory to address all the privacy related concerns because even this bill insists on establishing that either the mother or foetus should be at risk. The amendment bill has not yet been passed so the legislature has the opportunity to make the change in order to address the privacy concern.

3.3 JUDICIAL APPROACH ON THE REPRODUCTIVE RIGHTS

The judiciary has been very progressive on the reproductive rights of a woman the apex and the several State High Courts have taken many decisions wherein they have recognized the denial of reproductive rights as the grave violation of the human rights of the woman. There are numerous cases where the decisions have been given considering the reproductive rights of a woman. These decisions recognized a right to safe abortion as an important aspect of their right to life, equality, body integrity. Some of the cases are mentioned below:-

- **Justice KS Puttaswamy v/s Union of India**²² supreme court specifically recognized the constitutional rights of every woman to make reproductive choices and it also held that reproductive choices are part of personal liberty under Article 21 of the Indian Constitution. It was a *Suo motu* PIL concerning the absolute deplorable condition of a female prison inmate. It was held that "Women should have the right to control her body, fertility and motherhood choices". The court also touched upon the point that a State has a legitimate interest in protecting the life of an expected child but it stated that the pregnancy takes place within the body of a woman and she is physically and emotionally invested in pregnancy. It has profound bearing on her mental and physical health so considering all these aspects, an unborn foetus cannot be given importance over a living woman.

²² Decided on 26th September, 2018 (India).

- **Navtej Singh Johar and others v/s Union of India**²³ the supreme court has decriminalized homo sexuality and they also accorded woman sexual autonomy.
- **Independent thought v/s Union of India**²⁴ the apex court gave very important decision in the context of reproductive rights of woman. The court held that human rights of a girl child are extremely important and it is immaterial whether she is married or unmarried.
- **Paschim Banga Khet Samity verses West Bengal**²⁵ it was held by the court that it is the fundamental duty of a welfare state to provide medical facilities to the woman and it will be in the contravention with article 21 of the constitution if any kind of denial of medical intervention takes place by the Government Hospital.
- **Sucheta Srivastav and another v/s Chandigarh Administration**²⁶. The supreme court observed that reproductive independency is the most important aspect of personal liberty. It was also stated that dignity, bodily integrity and privacy should be respected and recognized. Supreme Court observed that ““There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21.” They also emphasized that women are free to use birth control methods such as undergoing sterilisation procedure etc.
- **Laxmi Mandal v/s Din Dayal Harinagar Hospital and other**²⁷ and in **Jaitun v/s maternity and MCT ,Jangpur** and others. The High court of Delhi gave a joint decision and it was held that woman should not be denied medical treatment just because she is socially / economically backward
- **Sudesh Bansal v/s Union of India**²⁸ It was a stated by the court that overlooking the inability of woman to survive pregnancy violates her right to life under Article 21
- The Supreme Court ruled in the **X v/s The principal secretary health and family Welfare Department Govt of NCT of Delhi**²⁹ its historic decision that if an un-married single mother does not want to continue her pregnancy and its between 20 to 24 weeks she must be allowed to abort and not letting her do so is the violation of Right to equality before law. It also ruled that even if a married woman has un-consensual sex with her husband she holds the right to abort.

²³ Decided on 6th September ,2018 (India).

²⁴ Decided on 11th October,2017 (India).

²⁵ Decided on 6th May,1996 (India).

²⁶ Decided on 28th August, 2009 (Supreme Court) (India).

²⁷ Decided on 4th June,2010 (Delhi, High Court) (India).

²⁸ Decided on 13th November, 2010 (Delhi, High Court) (India).

²⁹ Decided on September 29 2022 (India).

- **Ajay Kumar Pasricha & Others v. Anik Kumar Malhotra**, Punjab and Haryana High Court reiterated women's rights to reproductive autonomy. High court dismissed a suit filed by a husband against a doctor for aborting the foetus against his consent. High Court stated that "it is a personal right of a woman to give birth to a child. No body can interfere in the personal decision of the wife to carry on or abort her pregnancy and unwanted pregnancy would naturally affect the mental health of the pregnant women."³⁰
- **Hallo Bi v. State of Madhya Pradesh and Others**, the High Court of Madhya Pradesh affirmed the stand taken by Punjab and Haryana High court and highlighted the importance of reproductive autonomy. The importance of providing safe abortion opportunities to the victims of sexual assault was highlighted. The court stated that "we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health."³¹
- **Own Motion v. State of Maharashtra**, the Bombay High Court gave a decision, which elaborated the importance for women prisoners to have access to abortion. The decision recognizes the fact that unwanted pregnancies "represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health." The decision boldly recognizes that an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant."³²

Thus, it can be said that Indian Judiciary has played a very positive and vital role in providing justice to woman whose reproductive rights are violated.

4. CONCLUSION AND SUGGESTIONS

The above mentioned cases are illustrative of the fact that the judiciary is playing a significant role in India to address the social, legal and practical

³⁰ Ajay Kumar Pasricha & Others. v. Anil Kumar Malhotra & Others, C.R. 6017/2011, Punjab and Haryana High Court) (India).

³¹ 2013(1) MPHT 451 (India).

³² High Court on its own Motion v. The State of Maharashtra, W.P. (CRL) No. 1/2016 (India).

obstacle, in realization of reproductive rights. NGO's are also playing a vital role in educating the youth about reproductive rights.

It will not be wrong to state that sexual rights as well as reproductive rights are a part of comprehensive health right. To ensure that these rights are propended well within the public health system the government should ensure that literacy related to the realization of these rights should be made accessible. The public health care facilities are made available to the economically backward section of the society. The amendment to MTP Act is also a need of hour. The medical treatment provided to woman of the lower section is not adequate. This results in making uninformed reproductive choices. Sexual literacy is required to be provided to the sex worker as well as to transgenders. Society also has a very important role to play they should respect the privacy of the couples.

Following can be some additional suggestions:

1. Adolescent girls and boys should be educated on family planning and sexual health.
2. Abortion should not be a taboo in the society rather safe abortions should be encouraged in the society.
3. Medical Termination of Pregnancy Act, should be amended in order to encourage termination of unwanted pregnancy at any stage of the pregnancy.
4. Access to contraceptives should be made easy.
5. These are some of the suggestions to make this unstamped road accessible for women.

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