



REPRODUCTIVE RIGHTS OF WOMEN: A CONSTITUTIONAL AND GLOBAL PERSPECTIVE

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ABSTRACT

Relinquishment of women's reproductive health, perpetuated by law, is part of a larger, systematic discrimination against women. Laws impede women's access to reproductive health services. Laws protecting women's reproductive health are rarely or inefficiently implemented. The WHO and the United Nations Population Fund (UNFPA) has always emphasized on the need for the reproductive rights of women. In every country, there is a need to control reproduction and provide basic rights to women. The socio-economic status of women should be maintained, providing them with the right to freedom from discrimination. The primary focus should be on providing equal reproductive rights to women as well as proper health care but as a matter of fact, they are not getting those rights and they are constantly being deprived of them. The men, who often consider women as an object of satisfying their physical needs, don't understand the pain that a woman has to suffer while giving birth to a child. There are instances when a woman doesn't want to conceive a child but they are forced to give birth to them because it's a fact that in a country like India, aborting a child is considered as no less than a taboo. For these reasons, there is an urgent need to have a proper reproductive justice system where the abortion should be based on the consent of women, taking proper

precaution and the providing proper medical facility. This article provides an overview of the constitutional and global perspective of the reproductive rights of women. The authors have discussed the issue of reproductive rights prevailing in India with that of the United States of America and with some other countries as well. It is the responsibility of the government to take a proper step to protect and empower the women's reproductive rights.

INTRODUCTION

The duty of the civil liberties is to establish laws for a good community and maintain a balance between an individual and a government. The people interest should be taken into consideration but due to the conflicting interest with the government, the interests of the people are ignored. As the civil liberties have not left a good impact on the people, there has been an emergence of Liberalism and Utilitarianism. These two schools of thoughts have emerged because of the failure of civil liberties. According to liberalism philosophy, an individual autonomy should not be restricted or limited by the State except they have the power to limit the liberty as prescribed by law. The utilitarianism follows the principle that "the greatest good of the greatest number" should be taken into consideration by the State. The utilitarianism works for the interests of the community at large. Although the liberalism works for an individual autonomy, they have given the power to the State to make laws based on certain terms and conditions. Whereas, the utilitarianism wants the State to function for the greater number of people, providing greatest good. The disputation between these two theories has formed the



topic of debate surrounding the reproductive rights of women.

World Health Organization (WHO) has rightly stated that:

‘Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information to do so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.’¹

It is the basic rights that are vested with an individual and a couple to decide whether they want to reproduce children or not. They can freely decide the number of children they want and are free from any discrimination, coercion and violence, as expressed in the human rights documents. They should also be aware of the rights of reproduction which is based on the highest attainable manageable sex. The couples can do family planning in order to stop pregnancy, use contraceptives (a device or drugs which controls pregnancy which includes methods like: condoms, the diaphragm, implants, intrauterine devices, sterilization and morning-after pills), learn about the sex education in public schools

and to gain awareness about the outcome of reproduction.

NEED FOR REPRODUCTIVE RIGHTS OF WOMEN

The WHO and the United Nations Population Fund (UNFPA) has always emphasized on the need for the reproductive rights of women. In every country, there is a need to control reproduction and provide basic rights to women. The socio-economic status of women should be maintained, providing them with the right to freedom from discrimination. Development Alternatives with Women for a New Era (DAWN) has explained the need for the reproductive rights of women which includes right to have a safe abortion and right to control the reproductive functions. It also states that the health of women should be taken into consideration while she is pregnant. It is the women who the real sufferer and goes through so much pain. There is also need to protect and preserve the rights of women because there are women who are staying in the village and does not know the outcome their reproduction. The women who all are residing in the village only know that childbearing is for the society but at the same point in time, the personal health is at risk. There is also a need to control the population of a particular country by creating awareness about the need for the reproductive rights of women.

¹ World Health Organization (January 25, 2019, 2: 45 PM) <http://who.int/reproductivehealth/en/>

² Anne Souwman, Choice for Youth and Sexuality, Sexual and Reproductive Health and Rights (SRHR) (January 25, 2019, 2: 55 PM) <https://choiceforyouth.org/srhr/sexual-and-reproductive-health-and-rights/>

³ Development Alternatives with Women for a New Era (DAWN) (January 25, 2019, 2: 59 PM) <http://www.dawnnet.org/feminist-resources/about/main>



The primary focus should be on providing equal reproductive rights to women as well as proper healthcare but as a matter of fact, they are not getting those rights and they are constantly being deprived of them. The men, who often consider women as an object of satisfying their physical needs, don't understand the pain that a woman has to suffer while giving birth to a child. There are instances when a woman doesn't want to conceive a child but they are forced to give birth to them because it's a fact that in a country like India, aborting a child is considered as no less than a taboo. For these reasons, there is an urgent need to have a proper reproductive justice system where the abortion should be based on the consent of women, taking proper precaution and the providing proper medical facility.

MEN REPRODUCTIVE RIGHTS

As we are living in male dominating society, the reproductive rights of men are still a question to be answered. The reproductive justice system has legalized the reproductive rights of women in the matter pertaining to abortion, adoption and procreation. There is an organization, Center for Men (NCM) that fights for the rights of men when it comes to an issue related to false paternity, adoption, abortion choices and rights over frozen embryos. In *Roe v Wade for Men*⁴, the court rejected the plea of a biological father who claimed that he is under no obligation to financially support an unwanted baby under the Equal Protection Clause. The court was not able to take a proper stand on the rights of the men. It was held that the constitutional law will be applied in the case

of reproductive rights of men and women as they are treated equally in the society.

U.S.A. PERSPECTIVE ON REPRODUCTIVE RIGHTS OF WOMEN

The right to reproduce is something that has not been implicitly defined by U.S.A. Constitution but its Supreme Court has held that the personal right of women pertaining to procreation, contraception, family relationship and childbearing are part of fundamental rights. The 14th Amendment of U.S.A. constitution talks about the right to privacy of women which should not be infringed by any person when it is a case of reproduction. Let us take the case of abortion during the American Civil War. During the war, there was anti-abortion campaign taking place. All the Christian people were in favor to make a law, permitting the abortion with the consent of the pregnant woman. The State was against the policy and passed a law banning abortion. It suggested that the State was influenced by the strong religious groups which lead to the intervention of abortion. They never cared for the health of women, instead of that created a threat to the life of women and children.⁵ It was a feminist movement which legalized the abortion in the U.S.A. In the U.S.A. abortion is viewed as the woman's right to personal liberty. In the year 1973, the reproductive rights of women got judicial recognition by the Supreme Court, where they refuted the anti-abortion laws on the ground that it violates women right to reproduce of their own choice and abortion was finally included as

⁴ 410 U.S. 113 (1972)

⁵ Krishna Gupta, Women Law and Public Opinion, 74 (2001)



a part of right to personal liberty. Now U.S.A. Constitution has permitted abortion with the consent of women, at all stages prior to quickening. Earlier involuntary sterilization is something that was done in U.S.A. without the consent of the women and with the belief that the community interest was involved. The Supreme Court⁶ held that it violates the personal autonomy of an individual and hence made sterilization legalize with the consent of women. The reproductive rights of women have only been a matter of debate in the country like U.S.A. but with the strong constitutional jurisprudence, the reproductive rights of women have been given legal recognition. The State and Court have played a major role in legalizing the reproductive rights of women.

INDIAN PERSPECTIVE ON REPRODUCTIVE RIGHTS OF WOMEN

India is a part signatory body i.e. International Conference on Population and Development, 1994 which works for ethical and professional standards of personal reproductive autonomy of women.⁷ The National Population Policy, 2000 has given the right to women in the matter pertaining to contraception.⁸ Although the women reproductive rights are taken due care by the international organization whether it has been legalized in India or not. The society in

India is conservative when it comes to matter pertaining to abortion, contraception, family relationship and childbearing. It is the social pressure from the society which hampers the women reproductive behavior and health.⁹ It is the NGOs in India who needs to fight for the reproductive rights and choice of women. Due to the family pressure, 33% of women want the birth of son instead of a daughter. Every 85% of husband and men wants at least one son in the family so that their family succession continues.¹⁰ It is also a fact that though the reproductive rights are vested with couples it is the family who takes the final call. There is need to implement the reproductive rights of women with due care and diligence.

In India, the family plays a very major role when it comes to childbearing but at the same time, the consent of women should be given equal importance. Every citizen in India, have the right to privacy which falls under the ambit of the right to life under Article 21 of the Constitution of India. It gives the women the right to have her choice and make a call in the matter of having a child.

Further, the policy and service implementation fails when it comes to the rural areas as the women are not provided with contraceptive because there is lack of

⁶ *Buck v Bell*, 274 U.S. 200

⁷ United Nations International Conference on Population and Development (ICPD), 5-13 September 1994, Cairo, Egypt (January 26, 2019, 1: 45 PM) <http://enb.iisd.org/cairo.html>

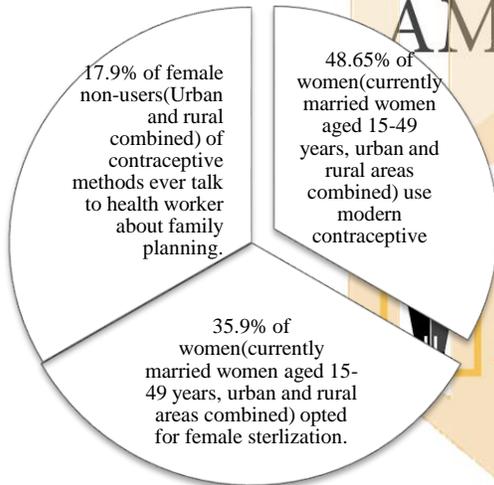
⁸ Ministry of Health and Family Welfare, National Commission on Population, government of India: National Population Policy, 2000 (January 26, 2019, 1: 55 PM) <https://mohfw.nic.in/natpp.pdf>

⁹ International center for research on women (ICRW), Reproductive Rights and choice: The role of abortion in India Information Bulletin, pg 1-4, November 2001 (January 26, 2019, 2: 05 PM) <http://cogprints.org/7794/1/2011-1-9.pdf>

¹⁰ Pande R. Astone NM, Explaining son's preference in rural India: The role of women's social and economic position (2001) (January 26, 2019, 2: 13 PM) <http://cogprints.org/7794/1/2011-1-9.pdf>



primary health centers.¹¹ In the rural areas, women can go for tubectomy or fertilization depending on the availability of health center. As the specialized medical officer prefer to do the treatment in urban areas. The woman is not left with any choice but to go urban place with such condition. The women are not given right to choice which violates Article 21 of Constitution. Even if the policy provides women to choose an option of their choice, the service provider (medical officer) does not practice such principle. There was a recent National Family Health Survey (NFHS 4)¹² throws some light on the reproductive rights of women.



In the year 1972, the Parliament of India passed the law on Medical Termination of Pregnancy Act, 1971 (hereinafter referred as

‘MTP Act’) which made abortion legal in India. However, the benefits of this act are far away from what is expected from it. Most of the people are unaware of this right. Further aborting a child is considered a taboo in Indian Society. Moreover, the act attracts a lot of criticism, as it gives more right to married women in cases of abortion when compared to single women. The issue has been discussed in detail in the further topics.

ABORTION

According to Section 312 of Indian Penal Code, 1860 (hereinafter referred as ‘IPC’) causing miscarriage is a criminal offence. The abortion can only be done only when the life of women is at risk. If the abortion is done voluntarily and if there is no risk to the life women, then the person will be punished for three years imprisonment or fine or both. A woman also falls within the meaning of this section. Notwithstanding anything in this Section, the Parliament passed the MTP Act, which allows the abortion to take place if the pregnancy will cause grave injury to the mental or physical health of the women. With respect to gender relation, India is one of the most conservative countries in the world. It is considered no less than a taboo for an Indian woman to have a pre-marital sexual relationship or to conceive a child, this is mainly because of the so-called strict social, cultural and religious background or to put it in a better way, the patriarchal thinking we all Indians have. The MTP Act, 1971, is one of the finest examples where the legislators have shown their patriarchal thinking while enacting a law.

DIFFERENT APPROACHES FOR SINGLE AND MARRIED WOMEN

¹¹ Koeing M, Editor, Improving quality of care in India’s Family Welfare Programme, Population council: New Delhi. India (1999) (January 26, 2019, 2: 34 PM) <http://www.popcouncil.org/>
¹² National Family Health Survey (NFHS-4), (2015-16) Mumbai, India. International Institute for population Science (IIPS) and ORC Macro 2000 (January 26, 2019, 2: 39 PM) <http://rchiips.org/nfhs/nfhs4.shtm>



Under Section 3(2) of the MTP Act, 1971, it is clear that if the doctor is of the opinion ‘that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped, only in such cases the pregnancy can be terminated.’ One of the most important concerns in the MTP Act is that not even for once the term “single women” or “unmarried women” has been used in the act. This leaves us for us to interpret that what will happen if a single woman gets pregnant and she wants to terminate her pregnancy. From what we can interpret is that if the girl is single then in such case, she doesn’t get an abortion unless the doctor determines that a pregnancy puts her in grave physical or mental danger. If the girl is single, then she has no right to make choices about her own physical and emotional well-being. On the other hand, if the girl covers herself up with the cloak of marriage, then she doesn’t need a doctor to determine that whether she needs an abortion or not. As a virtuous bride lady, the Act has itself provided them with two loopholes i.e. “unplanned pregnancy” and “failure of contraception” in the Explanation 2 to Section 3 of MTP act, 1971. This is the level of discrimination which an unmarried woman has to suffer in cases of abortion, all applauses to our lawmakers.

Coming on to the constitutional perspective, the above-said anomaly violates the right to equality which is guaranteed under Article 14 of Constitution. Article 14 clearly states that the State shall not deny any person equality before the law and should provide

equal protection of the law. The MTP Act, 1971 clearly violates Article 14 as unmarried women are not getting an equal right like a married woman in cases of termination of pregnancy. Although Article 14 states that the State can treat a different person differently by applying different laws but when it comes to termination of pregnancy, the biggest question which arises is that why marriage has to be the sole basis for giving different rights to different women. Isn’t every woman has the same human right to terminate her pregnancy irrespective of the fact whether she is married or not. The State has miserably failed to understand this fact and has enacted a law which is of such a discriminatory nature till the extent that it even violates Article 14 of the Indian Constitution.

In *High Court On Its Own Motion v The State of Maharashtra*¹³, the court interpreted the MTP Act, 1971, which is considered as one of the most important judgments in the recent era in relation to giving equal rights to unmarried women in cases of abortion.

Facts

The brief facts of the case were that upon a direction from the High Court, a Judge of the City Civil and Sessions Court made a visit to a district women’s prison in Mumbai. During the visit, it was noticed that one of the female inmates had made an application seeking authorization to terminate her four-month-old pregnancy, on conditions of ill-health. The matter was taken up as a *suomotu* PIL by the High Court. The particular inmate’s case which prompted the PIL was finally able to medically terminate her pregnancy. The

¹³ 2016 (4) RCR (Criminal) 417



Court considered same conditions in which several other female prison inmates were unable to obtain the requisite permission to medically terminate their pregnancies, despite being in dire conditions.

Judgment

The court held that ‘a pregnant woman prisoner should not be treated any differently from any other pregnant woman.’ Though the judges were mainly dealing with medical termination of pregnancy of two under trial prisoners in a Mumbai jail and consequently, laying down guidelines mainly to deal with termination of pregnancy rights for other women prisoners in Mumbai jails, to their due credit, the judges have very skillfully, chosen not to restrict the application of the principles and observations made in the judgment only to cases of ‘under trial/ convicted women prisoners’. It is firmly stated that the judgment was applicable to all ‘pregnant women’ irrespective of whether the woman is a single working woman or a housewife or a prisoner. They all have the equal rights in relation to the termination of pregnancy. The relevant parts of the judgment were:

‘A woman’s decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child... these are decisions taken by responsible women who have few other options. They are women who would ideally have preferred

to prevent an unwanted pregnancy but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman’s bodily integrity and aggravates her mental trauma which would be deleterious to her mental health’.

The most important part of the judgment which gives equal rights to unmarried women in matters related to abortion is:

‘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’.

STERILIZATION

The rule of compulsory sterilizations, enforced during the Emergency in 1975 was no less than dictatorship. A number of State Governments enacted laws making sterilizations as compulsory. Moreover, the forced sterilization surgeries are often unsuccessful which causes infection in the body of women. The government violated the reproductive autonomy of women by not providing the women with basic reproductive rights. The forced sterilization can cause infection in the body of women which is infringing the Right to life covered under Article 21 of the Constitution. They cannot take a life of an individual by implementing such ruthless policy in the country. It is also the duty of the state under Article 42 of the Constitution to protect the health of infant and mother by maternity benefit. Instead of forcing the women for sterilization the State shall improve public health for



pregnant women under Article 47 of the Constitution. The policy of forced sterilization is disregarded by the citizen of India as it is infringing the right to reproductive choice of women.

In *Devika Biswas v Union of India & Others*.¹⁴, a health activist filed a Public Interest Litigation challenging the practice carried out by the Government of Bihar for forced sterilization of women. The women, who wanted to go for sterilization, were not given the proper counseling. The procedure to carry out the sterilization process took place in school rather than a hospital. The condition of the place was unsanitary and the process carried out by the government was unethical manner. The Court held that:

‘The respondents had violated two components of Article 21 of the Constitution (Protection of Life and Personal Liberty): the right to health and reproductive rights. The freedom to exercise reproductive rights includes the right to make a choice regarding sterilization on the basis of informed consent and free from any form of compulsion’.

REPRODUCTIVE RIGHTS OF MENTALLY RETARDED WOMEN

A woman who is disabled is always denied her constitutional rights because nobody is ready to deal with their problem. The state and the society think that she is the weakest person in the society due to the fact that she is mentally retarded. If she gets raped by a man, then she has to escape the pregnancy because nobody is there to take care of her

child. If the retarded woman has a consensual sex with a man, then she can either escape the pregnancy or can give life to the child depending on the consent of men. The reproductive rights of mentally retarded women do not get any recognition in MTP Act. This raises a fundamental issue as there is no law that protects mentally retarded women to take a decision on her life and body. The State also deny its duty because the retarded women do not fall under the ambit of the same group as explained under Article 14 of the Constitution. According to Article 12 of UN Rights of Persons with Disabilities Convention, it is the duty of the state to provide a proper legal framework for mentally retarded women. The Indian legal system needs a great deal of change by following the international legislation. It also put a question on the competence of Indian government as for whether they are competent enough to protect women with disabilities.

GLOBAL PERSPECTIVE ON REPRODUCTIVE RIGHTS OF WOMEN Romania

The Constitution of Romania guarantees the protection of reproductive rights of women. The state has adopted a national strategy on sexual and reproductive health. They organize reproductive education programme where they talk about the teen pregnancy and issues related to it. In Romania, there is a high rate of teenage pregnancy. According to Constitution of Romania, it is the duty of the state to provide a good living standard to women and medical care in relation to public health. The physician is under an obligation to take due care of women during

¹⁴ (2016) 10 SCC 726



the time of pregnancy and abortion. If the physician intentionally kills or injured the women then they will be under Criminal Code for not taking due care of the patient.

The Democratic Republic of Congo

In the Democratic Republic of Congo, the women do not enjoy the same reproductive rights as men. *Prima facie*, according to Article 14 of Constitution of Democratic Republic of Congo it is the duty of the public authority see to the eliminations of all forms discrimination against women and ensures protection and promotions of their rights. But in reality, there is gender-based violence in the country where the external female genitalia is removed providing a very low standard of medical services. If abortion takes place illegally then both the medical practitioner and patient would be given imprisonment up to 5 years which may extend up to 15 years.

Mexico

In Mexico, if a woman illegally aborts a child then she will be charged under the Criminal law. Although some of the states permit abortion in special circumstances like medical tape. It is the duty of the Ministry of Health to provide medicine and health services to women at the time of pregnancy. Also according to Article 123(19)(k) of Mexico the women are entitled to get one month leave prior childbirth and two months leave after such date. They also get nursing aid and infant care services.

STEPS TO BE TAKEN TO EMPOWER WOMEN'S REPRODUCTIVE RIGHT

There is a need to take care of women during the time of pregnancy and abortion. If the health of a woman is not taken care of,

it would result in unwanted pregnancy and the unsafe abortion which would lead to death and injury of women and children. If there are any harmful traditional practices carried out by society or family or men then it will lead to female genocide. It is the duty of every individual and doctor to provide with a quality of reproductive health services to women in order to safe childbearing and life of women. The steps to be taken are:

- Government should organize gender-sensitive programmes in which the couples should be made aware about decision making in a sexual relationship. They should also make the couples aware that both men and women play an important and equal role in family planning. The outcome of their relationship gives and takes the life of a child. They should also sensitize men by saying that how difficult it is for women to give birth to a child.
- The government should also organize family planning programmes, where the trained service provider should provide sensitive culture conditions. There should be a friendly relation that needs to be carried out between women and family. The counselor should also inform the family about the informed consent in contraceptive choice. At the same time, the women should get privacy, confidentiality, comfortableness and a good environment from the family.
- The government should also organize safe motherhood programme where they should talk about the outcome of infections, hypertension and obstructed labor. They should also be made aware of the nearest medical centers in case of emergency. The community health worker should make the



mother aware about breastfeeding, infant care, hygiene, immunizations and maintaining good health.

- The abortion and post abortion-related public health issue should be taken care by the government. It is the duty of the government to reduce unwanted pregnancy and prevent abortions. It is the duty of the government to provide quality health services to women.
- It is the duty of the government to make laws for unmarried women who want to have an abortion. They should not leave the abortion of unmarried women in the good faith of a doctor. The law should also be made for mentally retarded women with respect to abortion.
- The men and women should be also made aware of the outcome of sexually transmitted diseases (STDs), including Human immunodeficiency virus (HIV) and Acquired Immune Disease Syndrome (AIDS).

CONCLUSION

Women, all over the world, living in any part of the country, regardless of its development or financial status, are vulnerable to the problems of unwanted pregnancy. Legalized abortion is a significant public health matter because of its negative association with the socio-economic and health consequences for both the women and their families. The question of abortion in India brings up a dispute which is multifaceted with legal, medical social and moral arguments. It has constantly been a struggle to understand on whose side the rights are heavier in order to have the balance, the questions of whose life is to be given more importance. Well, that being said, there are numerous possible and

perhaps practical solutions to the abortion debate, which only means that legislators and courts play a very vital role in dealing with them in a very sensitive manner, and any legislation, if it must last, must stem from an inclusive consideration of all the issues involved. The cases which arise relating to this issue have been decided by courts only when the case is of extreme emergency viz. of the likelihood of physical and mental damage to both the mother and the offspring, or to the trauma caused to survivors of rape, otherwise being staved off as a personal debate.

The Medical Termination of Pregnancy (Amendment) Bill, 2014, is a step forward towards living more reproductive rights to women. The bill proposes to extend the limit for termination of pregnancy to twenty-four weeks. It also seeks to amend Section 3 of Act of 1971 which deals with Termination of pregnancy by a registered medical practitioner. The most important part of the bill is that it gives equal rights to unmarried women and their rights are at par with married women but the main problem with this bill is that it is still pending in the Parliament for more than two years. This shows the reluctance of our legislators in dealing with such sensitive issues.
