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A Comprehensive Evaluation of the Reproductive Rights of Women in India and Its Impact on Women's Health

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ABSTRACT

The right to women's health encompasses several rights, including the sexual and reproductive rights of women, the right to life, the right to freedom from torture, the right to privacy and education, as well as the right against discrimination. Thus issues relating to this right are a matter of international as well as national concern wherein the nations have a duty to protect and promote this right. However, instances of frequent violations of the reproductive rights of women can be seen despite their constitutional as well as human rights obligations to the nations for their protection and upliftment. The article focuses on the reasons for the violation of the reproductive rights of women in India and its consequences on the reproductive health of women. A discussion is made about the various international instruments like CEDAW 1979, ICCPR 1966, and ICESCR 1966, to mention a few among others that depict the right to health of women as a human right and also include their right to make reproductive choices as well as the constitutional aspects of the right to health focusing on the reproductive right and health of women. An analysis of some of the judicial decisions in India on the right to make reproductive choices, like the Puttaswamy judgment, Suchita Srivastava v. Chandigarh Administration and other related cases, is also made. Some of the laws existing in India that allow women to exercise their reproductive rights and to undergo abortion, like the Pre-Conception and Pre-Natal Diagnostic Techniques Act 1994 and the Medical Termination of Pregnancy Act 1971, are briefly discussed. Finally, a conclusive analysis is provided to understand whether in India the healthcare system has provided adequate facilities to protect the reproductive health of women and what loopholes, if any, exist in the system, concluding with suggestions that could help improve the situation.

Keywords: *sexual rights, human rights, international instruments, judgments, reproductive health.*

I. INTRODUCTION

When we talk about 'reproductive rights', the first thing that usually comes to our mind is the

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right to reproduce. However, the term ‘reproductive rights’ encompasses within itself the right to decide whether a person wants to reproduce or not, as well as the right to reproductive health. It also includes within its ambit a variety of things like the right to family planning, the right to use contraceptives, the right to terminate one’s pregnancy, the right to have information about the various schemes related to reproductive health, and the right to equality and non-discrimination. With regard to women, it has time and again been emphasised by the Indian Judiciary that women’s reproductive rights are necessary for their survival and therefore, these rights have been protected under the fundamental right to life under Article 21 of the Indian Constitution. The Constitution of India has recognised the right to equality of all persons as a fundamental right, and it would not be wrong to state that protecting and safeguarding the reproductive rights of women is giving them a sense of equality with respect to their decision about their pregnancy and other related rights.

II. THE CONSTITUTION OF INDIA AND REPRODUCTIVE RIGHTS OF WOMEN

Reproductive rights have not been expressly recognised as a fundamental right in the Constitution of India. However, these rights emerge from several rights envisaged and protected by our Constitution, like the right to equality and non-discrimination under Article 14 and Article 15, Right to life under Article 21, which includes other rights as well including the right to health, dignity, freedom from torture, ill-treatment and privacy.

The Directive Principles of State Policy enshrined in Part IV of the Constitution also contains provisions related to health and impose an obligation on the state to apply these provisions while framing their policies. Article 39(e) provides that the State shall direct its policy towards securing to ensure that the health and strength of workers, men and women, are not abused. Article 42 ensures that there shall be provisions for maternity relief. Similarly, Article 47 directs the State to raise the level of nutrition and standard of living and to improve public health. The Directive Principles of State Policy, through these articles, impose obligations on the State to uphold the reproductive rights of women in enacting the laws and framing the guidelines.

III. THE HUMAN RIGHTS PERSPECTIVE RELATED TO THE REPRODUCTIVE RIGHTS OF WOMEN

The right to women’s sexual and reproductive health encompasses several human rights like the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education and freedom from discrimination. As mentioned by the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against

Women, women's right to health includes their sexual and reproductive health². It is an obligation on the part of the states to protect and respect the women's sexual and reproductive health. The Special Rapporteur on the Right to Health maintains that women are entitled to reproductive health care services and facilities that are available in sufficient quantity, accessible physically as well as financially and without discrimination³. India has ratified several international human rights conventions which protect the reproductive health and rights of women. The International Covenant on Civil and Political Rights 1966, The International Covenant on Economic, Social and Cultural Rights 1966 and the Convention on the Elimination of All Forms of Discrimination Against Women 1978 specifically protect and uphold women's reproductive rights.

The International Covenant on Economic, Social and Cultural Rights 1966 in Article 2 Para 2 guarantees that the rights mentioned in the Covenant will be exercised by all irrespective of any discrimination of any kind. Article 3 of the Covenant ensures the equal rights of men and women to enjoy all economic, social and cultural rights of the Covenant. The Covenant in Article 12 recognises the right of every person to the highest attainable standard of mental and physical health.

The International Covenant on Civil and Political Rights 1966 in Article 2 Para 1 ensures to all individuals the right to enjoy all the rights set forth in the Covenant without distinction of any kind. The Covenant also protects the privacy of every individual in Article 17.

The Convention on Elimination of All Forms of Discrimination Against Women 1979 or CEDAW as we popularly know it in its preamble, mentions as one of its objects to ensure the equal rights of men and women and also acknowledges the fact that women are still subject to discrimination and this discrimination violates the principles of equality of rights and respect for human dignity. In Article 10 of CEDAW 1978 it is stated about women's right to education which includes access to specific educational information to help to ensure the health and well being of families including information and advice on family planning. Article 16 of CEDAW 1978 gives women equal rights with men in deciding freely and responsibly on the number and spacing of children and to have access to education, information and means to enable them to exercise these rights. Article 12 Para 1 of CEDAW obliges States to take appropriate measures to eliminate discrimination against women in the field of health care in order to give men and

²*Sexual and Reproductive Health and Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (May 20, 2022, 10:20 AM), <https://www.ohrchr.org/en/node/3447/sexual-and-reproductive-health-and-rights>.

³ *ibid*

women equality in terms of access to health care services and those related to family planning. In Para 2 of Article 12 the States have to ensure that women get appropriate services with regard to their pregnancy, confinement and post natal period granting them free services as well as adequate nutrition during pregnancy and lactation. Article 14(b) specifically talks about women in rural areas to have access to adequate health care services including information, counselling and services related to family planning. In Article 11(1)(f), CEDAW 1978 talks about women's right to protection of health and safety in working conditions including safeguarding of the reproductive function.

The CEDAW Committee's General Recommendation 24 recommends that states prioritise the prevention of unwanted pregnancy through family planning and sex education⁴.

The CESCR General Comment 14 has explained that the provision of maternal health services is comparable to a core obligation which cannot be derogated from under any circumstances and the States have the immediate obligation to take deliberate, concrete and targeted steps towards fulfilling the right to health in the context of pregnancy and child birth.⁵

The CESCR General Comment 22 recommends States to repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information.⁶

The Convention on the Rights of Persons with Disability also mentions in Article 3, 5, 7, 10, 12, 17, 22, 23 (1)(b), 25 about individual autonomy including the freedom to make one's own choices and guaranteeing rights to life, privacy, personal integrity, non discrimination, legal capacity on an equal basis with others and support in exercising this capacity outlining the state's duties to combat prejudices and harmful practices relating to persons with disability including those based on sex and age and safeguarding the rights to sexual and reproductive health founded on the basis of free and informed consent, like the right to decide on the number and spacing of children, to access age appropriate reproductive and family planning information and necessary means to exercise these rights.

IV. VIOLATION OF REPRODUCTIVE RIGHTS OF WOMEN

Indian Society from ancient times and even today is a patriarchal society. Women are often looked upon as the weaker sex both mentally and physically leading to their exploitation in various ways and in various areas. This has led to the frequent infringement of their rights

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

particularly those pertaining to their sexual and reproductive health. Due to societal beliefs and customs that are prevalent in India, girls face the problems of child marriage or getting married at a very young age when their bodies are not physically ready to bear children often leading to miscarriages, repeated pregnancies in the hope of procuring a male child to continue the family lineage as well as frequent abortions without their consent or choice. Women from the lower rungs of the society do not get proper pre natal and post natal care as well as are deprived in getting adequate health care facilities. All these instances are not only a violation of women's reproductive rights but also greatly impact women's mental and physical health.

V. LEGISLATIONS RELATED TO REPRODUCTIVE RIGHTS OF WOMEN

The Medical Termination of Pregnancy Act 1971 and the Pre Conception and Pre Natal Diagnostic Techniques Act 1994 are the legislative enactments in India dealing with the regulation of abortion and to prohibit pre natal diagnostic techniques to determine the sex of the foetus leading to female foeticide respectively. Very recently the Medical Termination of Pregnancy Act 1971 has been amended by way of the Medical Termination of Pregnancy (Amendment) Bill 2021. As a result of this new amendment abortion can now be conducted within 20 weeks on one doctor's advice for certain categories of women including victims of rape which was earlier to be done within 12 weeks of conception on one doctor's advice and two doctors opinion between 12 to 20 weeks. The Amendment seeks to direct States and Union Territories to set up medical boards to determine whether pregnancy can be terminated after 24 weeks if there is foetal abnormality⁷. A positive change has been brought about by the Amendment in Section 3 to include unmarried women and to give them the right to terminate their pregnancy within the time limits as framed by the Act. Section 5A has been added that punishes medical practitioners for their failure to protect the privacy of women who want to terminate their pregnancy. It can be said that no doubt these changes brought about by the Amendment will be helpful for protecting the reproductive rights of women.

The Pre -Conception and Pre -Natal Diagnostic Techniques Act 1994 was enacted in the year 1994 much later than the Medical Termination of Pregnancy Act 1971. In 1975 the technology to ascertain the sex of the foetus had arrived in India in order to determine the genetic abnormalities⁸. However these technologies were misused to determine the sex of the foetus leading to abortions if the foetus was detected to be a female. The Act was passed to regulate

⁷ Devika Nair, Shruti Singhi, Suman Thusoo, *Why Amendments to Medical Termination of Pregnancy Bill Don't Go Far Enough*, THE WIRE(MAY 14, 2022, 9:00 AM), <https://thewire.in/health/medical-termination-of-pregnancy-aamendment-bill-women-abortions>.

⁸ Tapan Ranjan Mohanty, *Law, Liberty and Life: A discursive analysis of PCPNDT Act*, UNILASALLE EDITORA(MAY 2, 2022, 8:30PM), <https://dialnet.unirioja.es>.

the use of prenatal diagnostic techniques in order to detect genetic or metabolic disorder, abnormality in chromosomes, congenital malformations as well as sex linked disorders and to prevent misuse of such technologies for the purpose of sex determination ultimately resulting in female foeticide. The Act also prohibits except when certain specific conditions exist, genetic or individual counselling centres or genetic laboratories or clinics to conduct pre natal diagnostic techniques including ultrasonography for determining the sex of the foetus and also prevents any person conducting the procedure to communicate to the pregnant woman or her relative the sex of the foetus in any manner. The Act imposes an obligation on all ultrasonography units to display a signboard mentioning that the detection of the sex of the foetus is illegal. The Act gives the Central Government the power to take proper action in case there has been violation of any provision of this Act.

Legislations like this are definitely a step forward towards protecting and safeguarding the interests of women. Even though there are loopholes in both the Medical Termination of Pregnancy Act 1971 and the Pre -Conception and Pre -Natal Diagnostic Techniques Act 1994 with regard to their implementation and interpretation, it cannot be denied that both the Acts have been able to safeguard the reproductive rights of women to a certain extent with regard to preventing them from undergoing forced abortions, giving women both married and unmarried the right to decide whether they want to terminate their pregnancy or not as well as upholding the dignity and privacy of women.

VI. JUDICIAL RESPONSE TOWARDS REPRODUCTIVE RIGHTS OF WOMEN

The Indian Judiciary has always emphasized on the importance of protecting the reproductive health and rights of women and its violations have been designated as violations of the basic fundamental rights and human rights. Through its judgments the Supreme Court and the High Courts have not only upheld the various reproductive rights of women but have also clearly specified the role of the Indian Government and State Governments respectively to provide services to protect the reproductive health of women ranging from affordable maternity services, reducing the burden of forced pregnancy, preventing forced abortions as well as preventing child marriage.

One of the most important reproductive right of a woman is her maternal health. It is a duty on the part of the Government to ensure that a mother gets timely and affordable access to health care services during and after child birth. A failure on the part of the Government to provide such basic necessity is a gross violation of a woman's reproductive right.

In 2011, the Delhi High Court issued a landmark joint decision in the cases of *Laxmi Mandal*

*v. Deen Dayal Harinagar Hospital and Others*⁹ as well as *Jaitun v. Maternity Home, MCD Jangpura and Others*.¹⁰ Both these cases dealt with the violation of the constitutional and reproductive rights of two women who were below the poverty line and denied access to adequate maternal care both during and after their pregnancy. As a result of this one woman died. The court held that there was systematic failure on the part of the Government to implement efficiently pre natal and post natal services provided under the State sponsored schemes. The right to life and the right to health- the two inalienable survival rights and in particular the reproductive right of a mother were clearly violated in these cases. With regard to public health, no pregnant woman should be denied treatment at any stage irrespective of her social and economic background. This is where the inalienable right to health which is so inherent to the right to life gets enforced. The court highlighted the need to reform the maternal health schemes and also stated that access to health services should be available across the state.

The High Court of Madhya Pradesh in *Sandesh Bansal v. Union of India*¹¹ reiterated the judgment of the Delhi High Court given in *Laxmi Mandal v. Deen Dayal Harinagar Hospital and Others*. A PIL was filed against the Government of Madhya Pradesh over the lack of implementation of maternal health schemes in Madhya Pradesh. The court observed that a woman's inability to survive a pregnancy and childbirth violates the right to life under Article 21 of the Constitution of India. The Court directed the Government to take various measures to improve maternal health care in the State. The Court also issued interim orders as a result of which a blood bank and a water tank was constructed to improve the condition of the primary health care centres.

Another case where the Supreme Court had upheld the right of a woman to make a reproductive choice was *Suchita Srivastava v. Chandigarh Administration*.¹² In this case an orphaned woman suffering from mental retardation had been raped and had conceived. The Punjab and Haryana High Court had ordered the termination of her pregnancy without her consent under Section 3 of the Medical Termination of Pregnancy Act 1971 considering it to be in her best interest but the Supreme Court stayed the order of the High Court holding that the right to make a reproductive choice flows from the right to liberty under Article 21 of the Constitution of India. To take away a woman's right to reproductive choice is to violate her right to privacy. Mental retardation does not take away the right of a woman to decide on her termination of pregnancy. A woman's right to privacy, dignity and bodily integrity should be respected. No

⁹ 2008 W.P.(C). 8853 (India).

¹⁰ 2009 W.P.(C) 10700(India).

¹¹ 2008 W.P.(C) 9061 (India).

¹² (2009) 11 S.C.C. 409 (India).

restriction should be made on the exercise of her reproductive choice such as a woman's right to refuse participation in sexual activity, or on the use of contraceptives.

In *Devika Biswas v. Union of India*¹³ a public interest litigation was filed challenging the state government's practice of subjecting women to sterilisation procedures in unsanitary sterilisation camps where informed consent is not taken from the patients prior to the procedure. The Supreme Court held that such practices violates the two components of Article 21 – fundamental right to health and reproductive rights. Liberty to exercise reproductive rights includes the right to make choices regarding sterilisation on the basis of consent and free from any form of coercion.

In *Hallo Bi Halima v. State of Madhya Pradesh*¹⁴ a woman undertrial prisoner had approached the Madhya Pradesh High Court seeking permission to terminate her pregnancy of 12 weeks which was the result of forced prostitution. She had initially made the request to the jail authorities which was later forwarded to the Chief Judicial Magistrate who rejected it. The High Court allowed her to terminate the pregnancy on the ground that a woman's right to make reproductive choices is a dimension of her personal liberty. It also held that forced prostitution amounts to rape and is covered under the conditions stipulated in Section 3(2) of the Medical Termination of Pregnancy Act 1971 for the termination of pregnancy.

In *Shaikh Ayesha Khatoon v. Union of India*¹⁵ the Bombay High Court allowed termination of a 27 weeks pregnancy due to existing foetal impairments and low chances of independent survival post birth. In order to meet the object of the Medical Termination of Pregnancy Act 1971 and to advance the cause of justice, the conditions for medical termination of pregnancy provided under section 3(2)(b)(i) &(ii) of the Act should be read into Section 5(1) , which considers termination of pregnancy over 20 weeks. In cases of foetal impairment , mental injury caused to the woman would be sufficient to meet the requirement of Section 5 and denial of her choice to terminate the pregnancy would violate her personal liberty under Article 21.

In *R v. State of Haryana*,¹⁶ the Punjab and Haryana High Court applied the best interest test and considered the grave injury caused to the physical and mental health of the minor rape survivor due to the social and emotional effects on the continuation of her pregnancy. Since in this case the medical board constituted gave an opinion against the termination of her pregnancy on the ground that the pregnancy was beyond the 20 week limit in the Medical Termination of

¹³ 2012 W.P.(C) 12 (India).

¹⁴ 2013 W.P. 408 (India).

¹⁵ 2017 W.P. 36727 (India).

¹⁶ 2016 W.P. 6733 (India).

Pregnancy ct 1971 the court did not allow the termination.

Another judgment of the Bombay High Court that highlights the problem of pregnant women and her reproductive rights is *Own Motion v. State of Maharashtra*¹⁷. The petitioner wanted to terminate her pregnancy on her 26th week on the ground that further continuation of pregnancy will adversely affect her mental health. The court ruled that women prisoners have a right to abortion and it is a part of their right to live with dignity under Article 21 of the Constitution of India.

In *Meera Santosh Pal v. Union of India*¹⁸, a married woman approached the Apex Court to abort her fetus of 24 weeks as the foetus suffered from anencephaly, disease in which the baby is born with an underdeveloped brain and incomplete skull. A baby born with this defect dies after birth and there is no treatment for this defect. So if the pregnancy is not terminated it would affect the mother's mental and physical health. The medical practitioners examined the petitioner and on the advice of the practitioners the court ruled that if the petitioner goes through the entire term of pregnancy it would adversely affect her mental health putting her life in danger. The court further held that a woman's right to terminate her pregnancy concerning the safety of her life is of great significance.

With regard to privacy, in *Justice K.S. Puttaswamy v. Union of India*¹⁹ a nine judge bench of the Apex Court unanimously affirmed that privacy is a fundamental right under the Constitution of India and recognised the constitutional right of a woman to make reproductive choices as part of their personal liberty under Article 21. Privacy is an inalienable right and comes within its ambit the right to make reproductive choices as well as informational privacy. Based on this judgment we may say that reproductive rights and the right to make decisions regarding reproduction are also a part of the right to privacy.

VII. CONCLUSIVE ANALYSIS

The issue about the reproductive rights of women and its consequences on the health of women has always been discussed and debated. This issue has received a positive response from the judiciary at all times but in reality the situation is not as simple as it seems to be. There are loopholes and gaps in the legislations related to it as well as in the implementation of directions by the governments when ordered by the courts. If we look at the legislations we will notice that the recent amendment to the Medical Termination of Pregnancy Act 1971 has brought about

¹⁷ 2016 W.P. (CRL) 1 (India).

¹⁸ AIR 2017 S.C. 787(India).

¹⁹ 2012 W.P. (C) 494 (India).

changes in the gestational limits, given unmarried women the right to decide on the termination of their pregnancy, yet under this new amendment woman's reproductive choices and rights have received a backseat as on the grounds of an injury to her mental or physical health or due to severe abnormality in the foetus a woman always has to look up to the doctor seeking his permission or consent to undergo the abortion. The question then arises – Do women really have the right to make a reproductive choice? The recent amendment fails to give autonomy to a woman with respect to her body.

As far as the Pre Conception and Pre Natal Diagnostic Techniques Act 1994 is concerned there are lacunae in this Act too which have a negative impact as far as reproductive choices of women are concerned. This Act punishes women for violation of the provisions of this Act but doing such a thing would only mean taking away the right of a woman to make an autonomous decision.

The role played by the Indian Courts cannot be underemphasized to uphold the dignity and reproductive rights of women. Each time the judiciary has included the reproductive rights of women as a part of the fundamental rights casting a duty on the governments to change and upgrade their policies and procedures at all levels to safeguard women's reproductive rights and health.

It is necessary for a country like India where women's matters are always neglected and have occupied a secondary place to develop a proper public health care system that will cater the needs of the woman from every strata of the society. An affordable and accessible health care facilities available at all levels of the society and in different parts of the country is the need of the hour. Through the judgments we have seen that women from the poor section of the society are most neglected when it comes to getting access to pre natal and post natal care and services. This should be looked into by the local governments with utmost sincerity. The governmental schemes related to women should focus on areas which uphold the reproductive choices and health of women so that the basic objective behind all the judgments passed by the courts on women's health and reproductive choices is fulfilled. Further most women from the rural areas and those belonging to the poor section of the society are not aware of their reproductive rights. Campaigns should be organised to educate such women about their rights and the necessary institutions where they can seek help in case of need.
