International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

Reproductive Autonomy of Women in India: A Socio-Legal Analysis

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ABSTRACT

Indian reality pertaining to pregnancy and reproductive justice is different as the traditional values, myths and patriarchal role assumed by the society paves way for undermining the decision-making capacity of the women within a family setup. They are considered subordinate to their male counterparts and are having less power in relationships due to many factors like economic, political, and socio-cultural status and at times, not in a position to protect themselves from gender-based violence. They are considered incapable to decide on their own even in a matter pertaining to their own reproductive choices. The concept of autonomy in healthcare in general has a full-fledged acceptance by the judiciary as it affects the bodily integrity of a person. Likewise, the same idea must be reiterated in the pregnancy decision making, as women are the sole person who undergoes the physical and mental transformation during the process. Women should therefore, have the right to choose when and under what circumstances they should bear a child. So, the interest of the woman is a determinant and she should be mentally prepared to conceive, continue the same and give birth to a child. There are various social and ethical factors that pose a hindrance to pregnancy decision making of women in India. Family and social pressure forms the key factor that knocks upon the decision-making capacity of women.

Keywords: reproductive rights, reproductive autonomy, abortion, adoption laws, pregnancy, surrogacy, fundamental right, body.

INTRODUCTION

This paper contains a legal analysis of the reproductive autonomy of women in India and the extent to which the Indian laws protect this autonomy of women. Indian courts have always given progressive judgements and a widened scope of reproductive rights, which include not only the right to bear children but also to carry a pregnancy to its full term and raise children under the ambit of the woman's fundamental right to life and privacy. As these reproductive rights have been provided under the right to privacy, the state's intervention in these rights must remain minimal and only to the extent of preventing exploitation of women. However, the current legislative framework falls short on the spirit of these high reaching judgements. The Medical Termination of Pregnancy Act, although providing married and unmarried women alike the right to bodily autonomy, finds obstacles in its implementation in rural areas. The surrogacy laws, in the bid to protect women from exploitation, take away the choice of women to make decisions regarding their own body and monetize them. Reproductive autonomy extends to adoption and awareness and accessibility to safe sex practices. Adoption laws in India follow a pattern of exclusion and propagate a heteronormative family structure that ends up feeding into the patriarchy and subjugation of

women in society. Child marriage is a reality in India and female sexuality is systematically suppressed. Young girls who are married off are forced to bear children which is detrimental to their mental and physical health. Adolescent girls are assumed to not be inherently sexual creatures and have no knowledge about safe sex practices resulting in unwanted pregnancies and preventable sexually transmitted diseases. The right to abortion has been granted to women, however its accessibility remains uncertain in rural areas. To ensure reproductive autonomy for women, the laws need proper implementation and execution. Reproductive rights like the right to abortion, right to privacy, right to life, etc are granted to women in India. However, the nation is still plagued by unwanted pregnancies, lack of awareness about safe sex practices, child marriages, restrictions on surrogacy, etc. This paper aims to analyze whether the current legal framework regarding the reproductive rights of women in India is adequate to protect their bodily autonomy.

ANALYSIS AND DISCUSSION: THE EFFECTIVENESS OF CURRENT REPRODUCTIVE LAWS IN PROTECTING THE BODILY AUTONOMY OF WOMEN IN INDIA

Indian courts are known to give progressive judgements regarding socio-political issues like reproductive rights. In a 2016 Bombay High Court judgement regarding abortion, "the right to control her body, fertility and motherhood choices" were vested in the woman alone, ensuring her bodily autonomy (Ghosh & Khaitan, 2017). The Puttaswamy judgement (*K.S. Puttaswamy and Anr. v. Union of India*, 2017) put the rights of women to make reproductive choices under the ambit of the right to personal liberty under Article 21. But to analyze efficiency of the pre-existing laws, the need is to firstly define what we mean by reproductive rights.

In Suchita Srivastava v. Chandigarh Administration (2009), the appellant, an orphaned, mentally retarded, rape victim, won the right to continue with her pregnancy. Reproductive rights were held to include "a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children and that these rights form part of a woman's right to privacy, dignity and bodily integrity." Such a broad definition would also come to include health and nutrition of both the mother and the child, public healthcare services, access to a gynecologist, maternity, and paternity leaves, etc. According to the United Nation as freedom of couple's reproductive rights also includes their right to make these decisions without facing any discrimination, coercion or violence (Programme of Action of the International Conference on Population and Development,1995).

From this we can infer that reproductive rights are not merely related to reproductive health services, but also include the availability and accessibility of sex education, information about family planning and contraceptives, safe abortions, etc. Women, both married or unmarried, should have the choice to conceive, free from familial pressure. Sterilizations should be affordable and accessible to persons choosing to avail them. Only with full knowledge and information can the people make an informed decision to exercise their reproductive rights. Reproductive rights must also take into consideration the right to adopt, use surrogacy as a means of reproduction and the right to not reproduce. The essence of reproductive rights lies in the right to choose.

Looking at the Puttaswamy judgment (*K.S. Puttaswamy and Anr. v. Union of India*, 2017) in detail, it plays a deciding role in cases related to abortions. Decisions about one's reproductive choices are intimate and require confidentiality. The Puttaswamy judgement, a landmark judgement that brought the right to privacy under the purview of the right to life under Article 21, encapsulates bodily integrity, autonomy, and dignity. It recognized that the right to make reproductive choices was a part of a woman's right to

privacy. Thus, her decision to undergo an abortion is a part of right to privacy, as her intimate decisions should be free from unnecessary state regulation. However, no right is absolute. In case the state wants to restrict a right, it needs to satisfy a few constitutional tests to put a limit on the exercise of those rights. This test includes proving that the limits put by the state are proportional and necessary and that procedural safeguards are present against it. The Puttaswamy judgement empowers women to take decisions regarding their own body and protects their fundamental rights.

Laws like Medical Termination of Pregnancy Act (MTP), Surrogacy Regulation Act, Prohibition of Child Marriages stem from the rights guaranteed under Article 21. They aim to protect the dignity and integrity of women. The age of consent in India for engaging in sexual relationships is 18 years. However, child marriage is a social reality. These child brides, not old enough to understand the complexities of domestic life and the responsibilities that come with it, are forced into marital life. They are forced to have sexual relations without reaching the age of maturity. They are exploited and denied control over their own bodies. The maternal morbidity rate is higher for girls of a young age as their bodies are not physically mature enough to carry a child. The IPC does not recognize forced sexual intercourse with one's wife, if she is above the age 15 years, as rape (IPC, 1860). This exception endangers minor girls, between the ages of 15-18 years, who according to the POCSO Act are unable to give consent, as they can be raped and the perpetrator would not be punished for the sole reason of being in a marital relationship with the victim. This fallacy was corrected in Independent Thought v. Union of India, where it was decided that the IPC exception to rape should be read so as the exception only applies if the wife is above the age of 18, and not 15. The Prohibition of Child Marriage (Amendment) Bill, 2021 is another step in the positive direction as it proposes to make the age of marriage 21 years for both men and women, where it was earlier 18 years for women and 21 years for men. Increasing the age of marriage for women would allow them to get access to higher education, which in turn allows them to make more informed decisions about their own body.

Independent Thought v. Union of India (2017) further reiterated the reproductive rights of unmarried girls and women. The earlier MTP Act of 1971 was amended in 2021 to also include unmarried women. Any woman, regardless of her marital status, can get an abortion. Spousal or parental consent is not a prerequisite for the procedure in case of adults while minors do need to have the consent of their guardian to undergo an abortion. This is to make sure that women are given control of their bodies and can choose whether to continue with the pregnancy or not. Carrying an unwanted pregnancy takes a toll on the physical and emotional health of the woman and can have drastic effects. Especially for rape survivors, to carry your rapists' child is equivalent to mental cruelty. The Act makes an exception for rape survivors and they can get an abortion even when the gestation period is up to 24 weeks. The identity of the woman is to be kept confidential, to avoid social stigma, and a breach of the same attracts a fine and/or imprisonment of 1 year. A significant right under the right to privacy under Article 21 is the right to make intimate decisions without unnecessary interference from the state. The Act balances this right while placing reasonable restrictions on it in terms of the gestation period and approval of medical professionals. The right to safe abortions contributes towards Sustainable Development Goals as it promotes sexual and reproductive health while reducing maternal mortality. 50% of maternal deaths caused by sepsis are related to illegal abortions (Prakash et. al., 1991). Back-alley abortions unnecessarily put the lives of the patients at risk as the procedure can be carried out safely by medical practitioners. However, the maternal mortality rate in India has not seen a significant decline in the last 15 years (Prakash et. al., 1991). The Act requires the abortion to be performed by ob./gyn specialists. However, there is a 75% shortage of such specialists

in community health centers in rural areas. Women seeking an abortion come from all socioeconomic groups, from both urban and rural areas and from all age groups. For the marginalized communities to take benefit of the Act, there must be a robust system of public healthcare supporting the same. Information regarding the procedure should be available in the public domain and the abortion itself should be accessible and affordable for the effective implementation of the Act.
The state goes to the extent of recognizing the reproductive rights of prisoners by letting them exercise their conjugal rights. Punjab became the first state in India to allow prisoners to have conjugal visits (Pandey & Chhabra, 2022). Various courts across the country have passed orders letting prisoners, who have displayed good behavior, leave for purposes of "procreation" or to "maintain marital relations." However, conjugal rights are not absolute and a balance is to be struck between the rights of a convict and of the victim to prevent the misuse of this provision.
Surrogacy is another means of reproduction wherein an intending couple contracts a surrogate mother to give birth to their child. Because of low costs and easy access to surrogates, India had become a top destination for surrogacy. This led to the exploitation of women by surrogacy agencies as the surrogate mothers were not paid adequately for their services. With foreigners flocking to the country, attracted by the cheap cost of surrogacy, this exploitation further increased due to lack of laws regulating it. Instances of these foreigners refusing to take the baby or pay the surrogate mother were not uncommon. The Surrogacy (Regulation) Act, 2021 banned commercial surrogacy in India. As per the Act, only a heteronormative married couple consisting of a man of more than 21years of age and a woman of more than 18years of age, where they are both infertile and have no biological or adopted children of their own, are eligible for having a child by surrogacy. Only altruistic surrogacy is allowed in the country, and the surrogate must be a woman of 25-35 years of age, who is a close relative of the intending couple, and is has a child of her own. The Act excludes unmarried men, widowed men, unmarried yet cohabitating heteronormative couples, and the LGBTQ+ community members from having a child through surrogacy. This Act propagates a state sanctioned notion of the ideal family that restricts the reproductive rights of all those who do not fall under the binary of heteronormative relationships. This denies autonomy to the people and is in clear contravention of the fundamental rights to equality, freedom, life, and liberty. In Navtej Singh Johar v. Union of India (2018), the Supreme Court while decriminalizing all consensual sex between adults, reiterated that all individuals are equal before the law and cannot be discriminated against based on their gender identity or sexual orientation. The Surrogacy (Regulation) Act etches in law very strong perceived notions of womanhood and family which ends up being detrimental to the bodily integrity and agency of a woman and denies them monetary compensation for labor that involves their bodies. There is no rational nexus between the Act being passed to prevent the exploitation of surrogates as it proposes a blanket ban on commercial surrogacy instead of forming laws to regulate it. A balance needs to be struck between protecting the child bearer from exploitation and the rights of the surrogate to get the monetary compensation and that of the intending couple to reproduce.
The same pattern of exclusion is followed in the adoption laws of India. Adoptions in India are governed by the Hindu Adoption & Maintenance Act 1956 and the Juvenile Justice (JJ) Act, 2015. Under HAMA, any Hindu male or female, having reached the age of majority, of sound mind, whether married or unmarried, can adopt a child. If the individual is married, the consent of the spouse is required. Under the JJ Act, a physically fit, financially sound, highly motivated, and mentally alert male or female can adopt a child, regardless of marital status. However, a single male cannot adopt a girl child. Married couples willing to adopt must be in a stable relationship for at least 2 years. People of the third gender can legally

adopt a child if they are legally recognized as a couple. However, same sex couples cannot adopt as they are not a couple in the eyes of law. Live-in couples can now adopt children after a circular banning the same was withdrawn by the Central Adoption Resource Authority (CARA) (Chandra, 2018). The state enforced ideal of what a traditional family is needs to change with the changing times. Furthermore, the process of adoption is plagued by a large amount of paperwork and is a long, lengthy process.

When these laws are not implemented in an efficient manner, people lose the safeguards protecting their right to make choices regarding their own body. The most vulnerable being girls and women, who are seen as a reproductive commodity rather than an autonomous being. There is also intersectional marginalization that happens within this group, as girls and women belonging to lower castes or class or living in rural areas, are more susceptible to having their rights infringed. Oppressed and marginalized, they are not given the choice of choosing their spouses and are forced into marriages. Young girls are married off. Married women are forced to conceive a child under pressure from their family, whether they consent to it or not. Societal perception of womanhood and the ideals about how a woman is the epitome of motherhood and nurturing, forces them to adhere to the domestic sphere, restricting their freedom. Female sexuality is seen as a taboo and any conversations around the same are stigmatized. Women who embrace their sexuality are ostracized from society. This makes access to contraception highly difficult for women. Information about female contraceptives like female condoms is not readily available in the public sphere and access to them is highly limited to upper class women.

Adolescents, experiencing new bodily changes, are also a major stakeholder as the state of sex education in India is far from adequate. Adolescent sexuality is stigmatized and looked down upon. Parental consent is required for reproductive health services for minors which restricts their access to them. For a minor to get an abortion, she requires the consent of her parent/s or guardian which might put them in danger of facing violence at home. Honor killings, wherein a person, who has allegedly brought shame to their community, is murdered by their own family members, are not uncommon in India. The social evils of child marriages and female genital mutilation, both an effort to exercise external control over female sexuality, still exist despite laws prohibiting the same.

Unmarried girls face a lot of social barriers while accessing healthcare services like abortions or contraceptives, because they are assumed to be sexually inactive. They face social stigma and the danger of ostracization which prevents them from accessing these services. Women are required to follow pre-set ideals of purity and are held responsible for the respect of the family and any sexual activity is condemned. The law, however, has decriminalized all consensual sexual activity between adults. This includes same-sex sexual acts and even extra-marital sexual activity. Earlier, adultery used to be a punishable offence. Joseph Shine v. Union of India (2019) struck down Section 497 of the IPC and decriminalized adultery. This was a step in the right direction as it serves as a precedent and ensures that sex between consenting adults remains out of unnecessary state regulation.

A closer look at the Joseph Shine v. Union of India shows us how this judgement also empowers women as the earlier provision of the IPC, Section 497, reduced women to only a victim and considered them at par as the property of the men they were married to. The Section penalized adultery only for men who "engaged in sexual intercourse with another man's wife." A married man sleeping with an unmarried girl would not be punishable for the offence of adultery. A woman could not be made liable for adultery. Thus, the essence of the crime of adultery was not being unfaithful to your spouse, but engaging in sexual acts with a married woman, who was considered as her husband's property. The crime committed by a married

man who sleeps with another man's wife, is not against his own spouse, but against the woman's husband. Striking down this provision helped bring women out of the patriarchal control of the society.
Government awareness campaigns about contraceptives or family planning seldom pay attention to the needs of older people or people with disabilities. Their needs are overlooked and ignored as they are not considered sexually active. People with disabilities require disability related support to access reproductive health services, which is lacking. Members of the LGBTQ+ community are also sidelined in these schemes. STD awareness campaigns, contraceptive promotion campaigns, etc. need to be made more inclusive for them to benefit all the stakeholders. All these groups of people have been historically excluded from accessing healthcare and require special government attention to ensure that this historical wrong is corrected. Awareness campaigns on injectable contraceptives and free distributions need to focus more in the rural areas. Development of public healthcare infrastructure needs to happen to ensure institutional deliveries in rural areas.

State's effectiveness in protecting the reproductive rights of the people can be judged from the criteria of how well it has come along in eliminating discrimination with respect to access to reproductive health services or contraceptives, accessibility, affordability and availability of these services, decriminalization of consensual sexual activities between adults, spreading awareness, forming progressive laws and policies, maternal mortality rate, and through its budget allocation to the cause.

Among the women studied, only 32% of those living in urban-slum areas had an institutional delivery, compared to 93% of those living in non-slum urban areas and 79% of those living in rural areas, according to a household survey from Chandigarh Union Territory that compared coverage of maternal health care (Gupta et. al., 2008). Caste, class, and rural/urban divide makes access to these services inequitable. Schemes like National Rural Health Mission (NRHM), Janani Shishu Suraksha Karyakram (JSSK), etc. aim to promote maternal healthcare and improve access to the same in rural areas. However, the social stigma surrounding reproductive healthcare is still an obstacle.

Family Welfare Schemes have seen an increase in the budget allocation in 2022-23. These schemes fund the Swastha Nagrik Yojana (SNY), research, social marketing, and free distribution of contraceptives, etc. Budget allocation for these saw an increase of over 58% from that of last year (Ahuja, 2022). Increase in funding for the cause would also lead to development of better healthcare infrastructure. Maternal mortality rate, although on the decline, is yet to see a significant decrease. A significant cause for a high mortality rate in India is also illiteracy. The percentage of women pursuing higher education is low, and even lower in rural areas. Child marriage is also a big reason why girls are not sent to school as it is seen as a far more convenient option to marry them off. Young girls who are married off before reaching the age of maturity face a lot of emotional and sexual trauma. Their bodies are unfit for pregnancy. The maternal mortality rate in young girls is significantly higher.

The state of sex education in schools is inadequate to say the least. In 2007, 6 Indian states banned sex education in schools in a bid to preserve the culture. A country plagued by AIDS, this would only further the crisis. Lack of knowledge and an increased sexual activity, which is the case in adolescents, creates a dangerous combination and increases the risk of spread of sexually transmitted diseases. Misinformation about STDs runs rampant and young adolescents also find it difficult to consult a doctor due to social barriers. An informative curriculum of sex education would ensure adolescents being responsible and would result in the prevention of STDs. It would also result in a reduction in unplanned pregnancies which also take a toll on young girls and affects both their physical and emotional health. Not having sex

education in schools in a bid to preserve culture is inconsiderate of the lives of the young citizens of the country.

CONCLUSION

Laws and policies in India related to reproductive rights aim to protect a woman's autonomy and sovereignty when it comes to decisions related to her body or mental well-being. The woman is in charge and only her decision matters to undergo an abortion. However, contrary to the law, it is a common practice in hospitals to ask for the husband's consent. The gaps between policy and practice need to be addressed. The laws propagate a heteronormative traditional ideal of what a family should be and enforces everyone to conform to that binary. This sidelines LGBTQ+ members and the people who do not fall into the category of a straight, married couple. The law also does not empower adolescents enough to exercise their reproductive rights as they still require parental consent to get reproductive healthcare which causes a hindrance in the access to the same. Laws and policies are meant to serve as a guiding force to the state to ensure that the framework that has been laid down by the Parliament is implemented in letter and spirit. The laws in India paint a better picture compared to other countries like the USA, where Roe v. Wade (1973), a judgement which held unnecessary state regulations on abortions to be unconstitutional and conferred the right to undergo the procedure to the woman until the fetus becomes viable, was overturned recently. Although the laws due to some extent protect the fundamental rights of the woman, the lack of proper maternal care, public health infrastructure, awareness, etc. reduces the extent to which citizens can exercise these very rights. The laws do in good faith aim to protect the rights of the stakeholders involved, but much is yet to be done both in policy formulation and implementation to ensure that these laws are followed in letter and spirit.

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