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Reproductive Rights of Women in a Patriarchal Society - An Overview

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ABSTRACT

This paper is an in-depth analysis of women's reproductive rights under the wide topic human rights of women. The authors has made an effort to bring out the reproductive rights of women in India and the obstacles they face to cherish those rights in a patriarchal society. Reproductive rights were established as a subset of human rights. The Indian courts has been extremely progressive on women reproductive rights by issuing several notable decisions recognizing women's reproductive rights as part of the "inalienable survival rights" which is impliedly protected under the fundamental right to life and these judgments have an important bearing on the sexual and reproductive rights of women.

A Patriarchal Society, family, or system is one in which the men have all or most of the power and importance. For the apparent reasons women becomes the victim in such society. Her rights, choices from education to reproduction become dormant, suppressed and dependant.

At the outset, this paper highlights the human rights which comprise the legal framework of women's reproductive rights in a patriarchal society, it deals with reproductive rights of mentally challenged women and abortion resulting from rape in brief, and also discusses the judicial aspects of abortion rights and reproductive health of women in India

KEYWORDS : Reproductive, Patriarchal, fundamental, surrogacy, abortion..

I. INTRODUCTION

In the era of urbanization and globalization, societies need solution grounded in a vision of gender equality and justice and also consistent with culture to provide better life for both men and women. As a result, series of treaties and international conference agreements were influenced by global movement of women's rights which provided legal foundation for limiting the gender discrimination and gender based violation. These agreements confer various rights which ultimately began to address the reproductive rights of women. Thus the reproductive rights were established as a subset of the human rights at the United Nations 1968 international

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conference on human rights. The promotion of reproductive rights should be fundamental basis for government and community sponsored policies and programmers. Issues related to reproductive rights are the most dynamically contested rights' issues worldwide, in spite of the population's religion and culture including abortion. Human rights bodies have emphasized that access to abortion is a matter of human rights and also have provided guidance on when there is a need to decriminalize abortion. State obligation is to ensure access to these services in accordance with standards of human rights in order to eliminate discrimination against women and ensure women's right to health as well as other fundamental human rights. While outcomes in individual cases have varied, the various legal barriers results in grave physical and mental health harms and violations of rights including the right to reproductive autonomy caused by the denial of termination of pregnancy after 20 weeks. However, India has yet to reform its laws to address this issue. Instead, women are required to approach a court to have their individual situation reviewed by a government established medical board. This has resulted in legal third-party authorization requirement that disempowers women leads to unnecessary delays, denials, and inconsistencies in the application of the law, as well as a chilling effect on access to MTPs even at earlier stages of pregnancy.

This paper deals with the human rights which pay a key role in women's reproductive rights, and deals women's rights in respect abortion and law that governs abortion in India. Further, the measures that ought to be taken for ensuring an acceptable standard of reproductive health in women are explained.

II. HUMAN RIGHTS AS A KEY TO REPRODUCTIVE RIGHTS:

Women's rights have been primarily emphasized by the United Nations Population Fund and World Health Organization. The program of action of International Conference on Population and Development and the Fourth World Conference on Women articulated the sexual and reproductive rights of women. The United Nations organization's International Covenant on Social, Economical and Cultural rights, the UN convention on Complete Elimination of All Forms of Discrimination against Women (CEDAW), the Universal Declaration of Human Rights 1948, and several fundamental rights enshrined in Indian constitution from Art 14-32 & directive principles describe the human rights of Women. India after joining the UNO gave much importance to human rights by incorporating these into the constitution. The National Human Rights Commission was established for protection of human rights whereas National Commission for Women, a statutory body was set up under the National Commission for Women Act, 1990 to take effective measures to safeguard the women and recommend

legislative measures in order to improve the status of women.

III. RIGHT TO EQUALITY IN REPRODUCTIVE DECISION:

Everyone has the right to decide freely without any coercion the number and spacing of their children. Article 16(1) of CEDAW state that parties shall ensure, on a basis of equality of men and women, the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights .² Women have the right to choose whom and when to marry and start a family. However in reality, girls marry below the age of 18years in India .This practice forces them into a role which they are biologically and mentally unprepared. In 1995, the Fourth World Conference on Women declared that “the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health.”³ Women’s ability to control own body was therefore acknowledged as the first steps to secure empowerment in any other form.

IV. RIGHT TO SEXUAL AND REPRODUCTIVE SECURITY:

Everyone has the right to life free from gender based violence and protection of mental and physical integrity. Women are subjected to many forms of violence that includes sexual harassment, rape, pre natal sex selection, trafficking, prostitution, female foeticide, incest and dowry related domestic violence which might not brought into light due to social stigma. The remedy can be sought by providing expeditious redressal through legal system. Article 5(a) of CEDAW: Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Article 6 States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women⁴

V. RIGHT TO REPRODUCTIVE AND SEXUAL HEALTH SERVICES:

Women have the right to access to safe and affordable methods of birth control and family planning, safe motherhood, prevention and treatment of sexually transmitted diseases. But, in India, nearly one lakh women die during delivery and the increased number of HIV/AIDS

² UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180.

³ Fourth World Conference on Women, Platform for Action (1995), para. 106(k).

⁴ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180

reflects the unsafe sex. Therefore, it is to provide access to the required services. Information and service should be available at an acceptable level of quality which is consistent with dignity of client. Article 12(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning and to have access to adequate health care facilities, including information, counseling and services in family planning⁵.

VI. RIGHT TO ACCESS TO INFORMATION AND EDUCATION:

Everyone should have access to information regarding reproductive and sexual issues which has to be in clear, sensitive and complete manner. Sex education should be made as part in the ordinary curriculum by education institutes in order to guarantee Women's reproductive and sexual rights. Article 10 States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:(c)The elimination of any stereotype by the revision of textbooks and school programmes and the adaptation of teaching methods;(h)States Parties shall ensure access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning⁶.

VII. ABORTION & REPRODUCTIVE AUTONOMY:

The Autonomy means the ability to make decisions regarding one's self and life based on their values, morals, desires, customs, and beliefs. Autonomy is implied in various fundamental rights such as liberty, dignity, security, privacy and bodily integrity of a person. From these, arises the right of a woman to make decisions regarding fertility and sexuality, free from all coercion. This is known as reproductive autonomy. Reproductive autonomy, i.e. the ability to be self-determining and to act on one's values and desires in making decisions about reproduction, is an important concept in law and policy. Therefore, the developments that have come about in the legal regime related to reproductive autonomy have all risen from the women's demand for contraception and abortion services, which in turn stems from the assertion that women should be given complete autonomy to exercise control over their bodies and reproductive processes.. Abortion means premature termination of pregnancy or the deliberate termination of a human pregnancy, most often performed during the first 28 weeks

⁵ *Id*

⁶ *Supra* 3

of pregnancy or before the pregnancy is carried to term, this became an important issue during this period. It was believed and still is that the right to safe abortions was an important part of a woman's right to self-determination, along with access to contraception. Abortion is generally divided into three categories, namely, spontaneous, therapeutic and criminal⁷. The battle of reproductive autonomy was a battle for women's right to control their reproductive capacities by preventing or terminating unwanted pregnancies as mentioned in *Nanda Kishore Sharma v. Union of India*.⁸

VIII. INSURANCE ACT, 1948 ABORTION AS FUNDAMENTAL RIGHTS:

Right to abortion as an absolute right that "should be available, according to her, to any women without insolent inquisition or ruinous financial burden, for our bodies are our own"⁹

The Puttaswamy judgment specifically recognized the constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution. The bench also restated the position adopted by a three-judge bench in *Suchita Srivastava v Chandigarh Administration*¹⁰, which held that reproductive rights 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 her bodily integrity.

Abortion causes emotional turmoil for many women and their family members, especially when accompanied by coercion by the state. However, it cannot be seen as anything less than that of an unalienable right for women. Women have a right over their bodies and their reproductive autonomy that cannot be transferred to their families or the state. This is more relevant in this country where childbearing is modified by social norms and women's right to decide when and if they want to bear children remains a theoretical rather than a practical right. The existing laws on abortion are inadequate and designed to serve the interests of the family planning programs rather than to allow women to regain control over their bodies. The Medical Termination of Pregnancy Act (henceforth MTP Act) was passed in 1971¹¹. Under this act, women have a restricted right to abortion. The declared objects of the Act are to help women who become pregnant as a result of rape, marital rape; married women who are pregnant due to contraceptive failure or to reduce the 'risk' of severely handicapped children being born. As

⁷ Asit K. Bose, "Abortion in India: A Legal Study, 16(4) JILI 535-548 (1974)

⁸ AIR 2006 Raj 166, 2006 WLC Raj UC 411

⁹ Daniel Callahan, *Abortion: Law, Choice and Morality*, 460 (Macmillan Publishing, New York, 1979)

¹⁰ AIR 2010 SC 235

¹¹ Medical Termination of Pregnancy Act, 1971. Department of Women and Child Welfare, Ministry of Human Resource Development, Government of India. 1971.

with the family planning programs, the right to contraception is seen legitimate only when applicable to married women and marital sexuality alone. Despite the existence of abortion law in India the women of India still don't have full control over their bodies. The society and family pressures stop most women from taking the first step towards a clinic and even if she makes such a decision there is a huge scarcity of decent medical facilities that provide the necessary service. Furthermore, the Act leaves unwed pregnant women and victims of marital rape stranded unless it is a case of actual rape.

IX. LEGAL PROVISION IN INDIA

In 1971 the Indian parliament passed the Medical Termination of Pregnancy Act. The Act is based on the Abortion Act passed by the UK Parliament in 1967. Section 3 of the Act lays down the basic rules and conditions regarding abortion.

A. PRE-1971 POSITION

In India, the Indian Penal Code prohibits "miscarriage". Keeping in line with the Victorian mores, Macaulay's code prohibits all kinds of harm to an unborn child, unless the mother's life is in danger. Section 312 IPC - Under the Indian Penal Code (45 of 1860) inducing abortion or causing "a woman with a child to miscarry" is a criminal offense except when it is done in "good faith to save the life of the woman". Thus, causing an abortion has been legal in India since 1860 when the continuation of pregnancy poses a threat to the life of the mother and if it is considered essential to terminate the pregnancy to save the life of the mother. This was, and still is, a blanket provision for the therapeutic abortion without any stipulation as to who can do it, where it can be done or up to what stage of pregnancy it can be done. The only stipulation provided is that it has to be to "save the life of the woman". These missing stipulations are now provided under section 5 of the MTP Act.

B. REPRODUCTIVE RIGHTS OF MENTALLY RETARDED WOMEN:

In India, a disabled girl-child is usually at the receiving end of a lot of contempt, neglect and has been consistently denied their rights. The 19 year old mentally challenged orphan girl at Nari Niketan, Chandigarh, a government institution for destitute women, was raped on March 2009 in the premises by the security guards. In May 2009, the pregnancy was detected. Four doctors Multi-Disciplinary Medical Board (MDMB) which included a psychiatrist recommended that woman "has the adequate physical capacity to bear and raise the child but that her mental health can be further affected by the stress of bearing and raising her child." Based on these recommendations, the Punjab and Haryana High Court ruling ordered medical termination of pregnancy. On this, the NGO appeal against the High court's order, the Supreme

Court of India gave a landmark decision allowing a 19-year-old mentally challenged orphan girl to carry on with a pregnancy resulting from a sexual assault. This case thus raised fundamental issues relating to consent and to the support required while assessing consent. This case was not about abortion per se, it was about whether the law of this country recognizes and protects the agency of a woman to make decisions for her life and body, especially all its nuances when the woman is a person with mental retardation or any other disability." Legally, MTP Act does not deal with access to abortion of women with mental retardation, and that it wrongly distinguishes between women with mental retardation and mental illness, leaving the former out totally. Also that the Act does not understand that both these kinds of women are more likely than not to be destitute, in which case guardianship is not that simple. This case indicates eloquently that the Indian legal framework has to be strengthened a great deal to bring it in line with international legislation. It also raises the question of whether our government institutions are safe enough to protect women and more so people with disabilities.

C. TERMINATION OF PREGNANCY RESULTING FROM RAPE:

Due to stigma and personal risks, many victims of rape only come forward to request an abortion, either directly or through their parents, once their pregnancy is identified through medical testing or made public.¹² Minors do not even realize they are pregnant until beyond the 20 week mark because of a lack of awareness of the possibility of becoming pregnant from rape or the symptoms of pregnancy.¹³ Furthermore, delays in detecting pregnancy may be compounded where state authorities fail to properly respond to, and investigate charges of rape; fail to offer pregnancy testing kits to rape victims as required under national guidelines; or question petitioners' rape allegations.¹⁴ Several petitioners in cases seeking approval for abortion after 20 weeks have emphasized the psychological trauma and suffering, including suicidal thoughts, caused by being forced to continue their pregnancy.¹⁵ Indian courts have recognized the severe physical and mental health risks that pregnancy can cause women and girls.¹⁶

X. BARRIERS TO ABORTION

A significant barrier women face in accessing abortion services is due to inadequate registered health care providers and dearth of properly equipped facilities to perform the procedure. They

¹² Abortion in India: A Literature Review, *supra* note 27 at 17.

¹³ Alakh Alok Srivastava v. Union of India & Ors. W.P.(C) 565 of 2017, S.C.C. 28 July 2017.

¹⁴ R v. State of Haryana, W.P.(C), 6733 of 2016, H.C. P.& H., at 9, 30 May 2016

¹⁶ X v. Govt of NCT of Delhi, W.P.(CRL) 18262 of 2013, H.C. Del., at 3, 6 Dec. 2013

also face delays due to lack of awareness about their legal rights, societal stigma and confusion about law.¹⁷ In Bihar, upto 75% of women are unaware that abortion is legal.¹⁸ The misconceptions concerning the law also contribute delay in accessing to abortion, including the spousal consent requested by providers despite not mandated under the law and the courts requirement to prove the rape allegation before permitting to access abortion.¹⁹ Further, the providers' fear of prosecution under Protection of children from sexual offences act 2012 and Pre-Conception and Pre-Natal Diagnostic Techniques Act lead to request for judicial authorization therefore deny the access to abortion.²⁰ Delays are also caused by misconception on part of the providers that abortion prior 20 weeks requires judicial authorization.²¹ The providers also fear investigation arising for not reporting any sexual assault of minor. The law mandates reporting of any pregnant adolescent even if she is seeking an abortion as stated in the Protection of Children from Sexual Offenses Act of 2012.²² These barriers delay the access to abort by women and young girls.

XI. WOMAN RIGHTS TO REPRODUCTIVE HEALTH

Women's reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination. Both the committees' i.e. The Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) have indicated that women's right to health includes their sexual and reproductive health. This means that States have obligations to respect, protect and fulfill the rights related to women's sexual and reproductive health. The broad components of reproductive health care are:

- Accessibility to good quality family planning services, counseling to suit the reproductive needs of individuals and couples, and prevention of unwanted pregnancy
- Provision of safe motherhood services and infant care during and after pregnancy and services related to infertility
- Prevention and management of the consequences of unsafe abortion

¹⁷ Government of India, Framework for Implementation: National Health Mission 2012-2017 2, 32 (2014)

¹⁸ Mary Philip Sebastian, et al., Population Council, Unintended Pregnancy and Abortion in India: Country Profile Report, 54 (2014). [hereinafter Unintended Pregnancy and Abortion in India: Country Profile Report]

¹⁹ Ms. Z v. The State of Bihar and Others, C.A. 10463 of 2017, at 19, S.C.C. 17 Aug. 2017

²⁰ Lalita Panicker, Hindustan Times, The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed (2017)

²¹ Vijender v. State of Haryana and others, CWP No. 20783 of 2014, October 7, 2014

²² The MTP Act 2014 Makes Safe Abortion Easier, It Should Be Passed, supra note 20.

- Prevention and management of reproductive disorders, including sexually transmitted disease, and prevention of HIV/AIDS
- Empowering adolescents by giving them reproductive and sexual health information and education in a comprehensive and sensitive way
- Ensure regular and uninterrupted availability of contraceptives, and quality family planning services, including counseling to individuals.

Inadequate reproductive health care for women results in high rates of unwanted pregnancy, unsafe abortion, preventable death and injury as a result of pregnancy and childbirth. Violence against women, including harmful traditional practices like female genocide, takes a steep toll on women's health, well-being and social participation. Violence in various forms also reinforces inequality and prevents women from realizing their reproductive goals. Men also have reproductive health needs, and the involvement of men is an essential part of protecting women's reproductive health. Providing quality reproductive health services enables women to balance safe childbearing with other aspects of their lives. It also helps protect them from health risks, facilitates their social participation, including employment. Reproductive health does not affect women alone; it is a family health and social issue as well. Gender-sensitive programs can address the dynamics of knowledge, power and decision-making in sexual relationships, between service providers and clients, and between community leaders and citizens. A gender perspective implies also that institutions and communities adopt more equitable and inclusive practices. As the primary users of reproductive health services, women have to be involved at all levels of policy-making and program implementation. Policy makers need to consider the impacts of their decisions on men and women and how gender roles aid or inhibit programs and progress towards gender equality. Reproductive health care should include following components;

Family planning which involves strong government support, service providers who are well trained, sensitive to cultural conditions, listen to clients' needs, and are friendly and sympathetic, Services are affordable and a choice of contraceptive methods is available, Counseling ensuring informed consent in contraceptive choice, ensuring privacy and confidentiality, comfortable and clean facilities and prompt service.

- A. **SAFE MOTHERHOOD PROGRAM** should provide access to emergency obstetric care, including treatment of hemorrhage, infection, hypertension and obstructed labor. Life-saving interventions, like referring to medical centers. A community based system for ensuring rapid transport to an equipped medical facility. Training Community health

workers to detect and treat postpartum problems, as well as to counsel on breastfeeding, infant care, hygiene, immunizations, family planning, and maintaining good health.

- B. ABORTION AND POST-ABORTION CARE:** Abortion is an important public health issue. Family planning services ensure reduction in unwanted pregnancies and prevent abortions. In circumstances where abortion is not against the law, quality health services should ensure safe abortion practices and effective post-abortion care would significantly reduce maternal mortality rates.
- C. PREVENTION AND TREATMENT OF SEXUALLY TRANSMITTED DISEASES (STDS AND HIV/AIDS):** Because of culture as well as biology, women are more vulnerable to STDs than men. The integration of family planning and STD/HIV/AIDS services within reproductive health services can reduce levels of STDs, including HIV/AIDS, by providing information and counseling on critical issues such as sexuality, gender roles, power imbalances between women and men, gender-based violence and its link to HIV transmission, and mother-to-child transmission of HIV; distributing female and male condoms; diagnosing and treating STDs; developing strategies for contact tracing; and referring people infected with HIV for further services. In May 2017, an HIV-positive destitute rape victim approached the Patna High Court with a plea to terminate her pregnancy. The apex court granted permission to abort the 26-week old fetus and stated that "a woman, who has already become a destitute, being sexually assaulted and suffering from a serious ailment, should not go through further suffering. The quintessential purpose of life is the dignity of life and all efforts are to be made to sustain it." ²³
- D. INVOLVEMENT OF MEN IN REPRODUCTIVE HEALTH PROGRAMS:** Greater involvement of men in reproductive health decisions will give more power to women, not less. The common aim is the well-being of all family members. Men can advance gender equality and improve their family's welfare by protecting their partner's health and supporting their choices. Adopting sexually responsible behavior; communicating about sexual and reproductive health concerns and considering adopting male methods of contraception, Confronting their own reproductive health risks, refraining from gender violence, practicing responsible fatherhood, promoting gender equality, health and education.

²³ Correspondent, Legal (4 May 2017). "SC considers abortion plea of HIV victim". The Hindu. ISSN 0971-751X

XII. CONCLUSION:

Reproductive right/autonomy and right to reproductive health is not only a woman's issue it is a family health and social issue. The ultimate aim of the right to reproduction is well being of the family, woman and individuals. At the same time it becomes the responsibility of the government or the state to give quality reproductive health care and protect the individual reproductive rights while being sensitive to local and cultural issues. There is increased need for sensitization of the judicial and government while protecting the reproductive rights of people with disability especially mental retardation and mental illness. There is also increased need for sensitization of judicial system on process of consent to abortion. To ensure quality reproductive health services, there is need for active community participation and involvement of men (spouse).
