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Research Article

Reproductive Rights of Women in India

Aboli Jakhar

Research Scholar,

University of Mumbai,

Mumbai, India

Email: abolijakhar12@gmail.com

Abstract

The paper elaborates on the existing and available reproductive rights and choices to women in India and the deprivation and negligence still faced by women in the sphere of reproductive and sexual autonomy. Though rights in the reproductive sphere are relatively new to India, India has made significant progress in this concerned field when compared to many developed countries of the world. Drawing on the right to privacy, dignity and bodily integrity, reproductive rights are firmly inter-wined within the broader framework of reproductive justice and human rights. Paper also concentrates on various concepts concerning sexual rights of women like sexual autonomy, reproductive choice and reproductive justice. Ruling under the cases of Suchitra Srivastava and Laxmi Mandal formed the bedrock of India's reproductive rights jurisprudence leading to flourishing of laws concerning reproductive rights in India. Various legislations and judicial interventions at various stages have been instrumental in securing and furthering the reproductive rights of women in India. Various actions and decisions by concerned authorities have provided the needed support and assistance in doing away with the realm of obliviousness that is still considered as a major barrier in enjoyment of these rights by community of women. In recent decade there have been various constitutional underpinnings, advancement of the scope and imposition of duties on the state to formulate policies and take decisions that respects and acknowledge sexual autonomy of women. The paper touches on various aspects that are related to the sexual rights and autonomy of women in India such as marital rape, menstrual and maternal health, right to abortion, adultery and so on. The paper also focuses on the existing constitutional rights and human rights in India like right to life, equality, freedom and privacy, that are strongly inter wined and could realise their true meaning only when the reproductive rights are acknowledged and receives their due recognition. The writing also focuses on various legal and societal challenges that women still face in the realisation of sexual choices and right to bodily integrity in India. Finally, the paper

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also discusses the need for the gender sensitive policy formulation and implementation that takes into consideration special rights and freedoms of women in India and build an inclusive environment that would lead in true empowerment and emancipation of women.

Keywords: Reproductive Rights, Gender, Sexual Autonomy, Privacy, Patriarchy

1. Introduction

Within the identity of gender binary, women have always been categorised as the “other” gender and the ‘other’ being synonymous with the inferior and subordinate position that women tend to hold and embrace within the society. The social standing and position of women gets institutionalised, formalised, systematised, and manifested in varied ways that tend to further marginalise the status of women, depriving them of their independent and autonomous existence. One such domain where women are deprived of their basic rights and liberties is with regards to their sexual and reproductive autonomy, placing them at the mercy of various societal complexities and challenges. The societal configuration i.e. the laws, societal expectations, norms and values intersects with the everyday experiences and lives of women, dispossessing them of their choices and opportunities that are prerequisite in enabling them to lead a meaningful and a dignified life (Gawri, 2024).

2. Reproductive Autonomy

The concept of reproductive rights is considered synonymous with the idea of reproductive autonomy and choice. Reproductive autonomy is a vital aspect of individuals personal liberty and personal choice and it is intrinsically attached with multiple human and constitutional rights like right to life, freedom, equality, privacy, health and so on. Reproductive rights refer to an individual’s ability to choose whether and when to have children or not and to maintain their reproductive health. This includes the right to start a family, terminate a pregnancy, use contraception, and obtain reproductive health care (Agrawal, 2023). Various Constitutional provisions and judicial interventions at varied intervals have acknowledged women’s reproductive autonomy and have provided much needed impetus to normalise it within a patriarchal society that seeks to discipline and control women. One such landmark judgement was the Puttaswamy vs Union of India 2017, seeking to preserve personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Through this judgment women’s right to reproductive choice and bodily integrity was recognised and made part of Article 21 of Indian Constitution (Singh I. , 2024) (Khaitan A. G., 2017).

The K S Puttaswamy v Union of India judgement of Supreme Court passed in the year 2017, accorded constitutional recognition to the “right to privacy”, holding it as an intrinsic part of right to life and personal liberty and autonomy under article 21 of the Indian Constitution. The SC judgement pronounced that both right to life and personal liberty are “significant for dignified human existence and are inherent in each individual being inseparable part of the human element which dwells within”. Moreover, the judgement added that “privacy

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includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation”. The judgement relying on Amartya Sen’s idea of development, evidently states that there is a close interrelationship between the idea of development and freedom, which in turn relies on freedom of choice that is enabling individual to do what they have reason to value (Bhaskar, 2017). Granting of constitutional status to personal liberty naturally led to acknowledgement of reproductive choices of women as a constitutional right (Khaitan, 2017).

3. Theoretical Perspective

Non recognition and curtailment of reproductive rights by women is very much related to the idea of “disciplinary power”. The theorisation of disciplinary power by Michael Foucault in his work ‘Discipline and Punish’ focuses on how an individual’s power can be harnessed and controlled in the interests of the existing system. Discipline “is a specific technique of power that regards individuals both as objects and as instruments of its exercise”. By controlling “the body”, its location and actions, disciplinary power makes it possible to extend the effects of power into the most infinitesimal elements of people’s everyday life. Idea of disciplinary power is contextualised along with the idea of ‘docile bodies’ where bodies become entities on which dominant actions are imposed. Bodies need to be docile so that they respond and accept the forces that act upon it. Training is prerequisite for a body to be docile and this is achieved through various institutions like schools, religious institutions and others. In the words of Foucault “A body is docile that may be subjected, used, transformed and improved”. Docility represents a ‘way of control’ that entails continuous, ongoing compulsions that is used in compliance with a protocol that divides time and space. Docility can only be achieved through disciplining. Disciplining is a method through which the body is controlled. Foucault proposed four ways through which body is controlled – the art of distribution where spaces inhabited by bodies are distributed; control of activity which focuses on controlling the gestures of the body; organisation of geneses where bodies undergo specialised training transforming them into disciplined bodies and composition of forces (Lane, 2023) (Lavoie, 2014).

The idea of disciplinary power forced individual to accept standards of behaviour that is believed to be a “norm”, making individual to act as if they are always under ‘surveillance’. This dimension of power conditions individual by dictating their desires and coercing them into particular ways of acting (Leonard Lawlor, 2014).

4. Medical Termination of Pregnancy (MTP) Act

MTP Act, 1971 amended in the year 2021, is considered as a historic and most progressive legislation initiated by Indian parliament ever. It played role in legalising abortion and asserting reproductive and bodily autonomy of Indian women (Ferguson, 2022). The amendment to the act in the year 2021 further emboldened the Indian women to uphold and reaffirm their liberty and freedom in the society that is deeply identified with its conservative and orthodox demeanour. One important facet attached to right to abortion is that it plays a potent role in exemplifying the ideas of reproductive freedom and justice. It was not easy path

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for the legislation to transform itself from an idea into a reality, overcoming various hurdles linked to diversified Indian cultures, traditions, beliefs, schools of ideologies and values. Challenge to the act was not just confined to Indian value and belief system but even various ethical considerations confronted it with sturdiness. Ethical dimension attached to the act revolved around the tussle between two contrasting ideologies, with one an ardent supporter of pro-life and the other one inclining heavily towards pro-choice. Pro-choice narrative prioritises health of a pregnant women and reproductive rights of women. One significant aspect of the MTP Act was also to champion the cause of the pro-choice argument by not conferring any rights to the unborn foetus. The Act has its various positive fallouts like ending preventable maternal mortality rate, preventing unsafe abortions performed by unqualified persons often at unequipped locations using unscientific methods. The act further empowers women by increasing the accessibility of women to the comprehensive abortion care. The 2021 amendment introduced to the 1971 Act addressed various drawbacks and shortcomings that were attached to the 1971 Act. The MTP Act 2021, now allows MTP to be performed with the opinion of a single registered medical practitioner (RMP) till 20 weeks of gestation, compared to earlier limit of 12 weeks. It also allows MTP to be performed between 20-24 weeks of the gestation based on the opinion of two RMPs in special categories of women including the rape survivors and other vulnerable women. The act furthers its coverage by including unmarried women within its ambit by extending the right to reproductive care and bodily autonomy to women with various intersecting identities (Chandra, 2023).

But the act fails in addressing the diverse and specific needs of women. The 'conditional' access to safe abortion restricts women to get an abortion on her own preventing women from exercising their right to reproductive autonomy and integrity. The doctor centric nature of abortions in India relying on medical opinion severely curbs the right of women over her body and choice. Moreover, the law recognises only medical complications and risk to life as rationale behind an abortion, turning blind eye to the miserable conditions of women who are forced to conceive and carry pregnancy against their will. Need is to align the MTP Act with various judicial judgements which have over an again emphasised on respecting the reproductive autonomy and choice of women and their right to self-determination. This may help in doing away with various legislative shortcomings and drawbacks (Khaitan A. G., 2017)

5. Surrogacy Act

With the advancement of the Assisted Reproductive Technology (ART), surrogacy has been commonly accepted as a method of reproduction. Surrogacy in India is regulated through a legislative provision of the Surrogacy Act of 2021, which aims at safeguarding the rights of surrogates, intended parents and surrogate born children deviating from traditional norms of early marriage and childbearing (Priyam, 2024). Moreover, the act disproportionately favours married couples or divorced/widowed women, sidelining single, never married women and same sex couples from accessing surrogacy resulting in deprivation of their reproductive rights and autonomy. Surrogacy is a practice that allows an individual to fulfil their dreams and aspirations to attain parenthood, which for them would have remained unfulfilled. The

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exclusion based on the status of marriage of women reveals the entrenched societal stereotypes and embedded biasness of the legal regime in India against single women robbing off them of their reproductive choices. The discriminatory nature of right to access surrogacy infringes many fundamental rights of individual enshrined in the Constitution such as right to life, liberty, equality, privacy and so on. The surrogacy law in India rests on the archaic nature of parenthood and family system in India tying the right to surrogacy to institution of marriage, placing undue significance to the institution of marriage as a prerequisite for child rearing. The government has an argument that single women is not capable of raising a child completely by herself. Justification for this exclusionary nature of legislation lies in the accepted belief that biological bonding connection and emotional bonding formed through gestation are superior and more valid forms of attachment that those developed through other means such as surrogacy or adoption (Singh I. , 2024) (Kothari, 2024).

The need of the hour is to frame laws that are more equitable, sensitive and inclusive towards the needs and requirements of single women, enabling them to make informed choices about their reproductive health and rights. There is also an urgent need to change the ideal notion of family that is both sanctioned by the state as well as society that conditions women at every step of their life. It is the prerogative of the government to establish a society that is just and fair towards the needs of minority section of the society who are considered ineligible to access this service (Kothari, 2024).

6. Menstrual Leave

Issue of menstrual leave in recent decades have gained huge momentum globally as well as at a state level, though is still an undiscussed topic at a societal level. India still is deprived of any centralised policy decision on the matter, showcasing the backwardness and orthodox nature of Indian legislative framework. Various attempts have been made in past to formalise it but getting lapsed every time. Supreme Court of India has repeatedly asked the central government to frame a model policy that can enable in doing away with various discords associated with the issue of menstrual leave. Certain progressive steps have been taken by the states like Bihar and Kerela, the only states to introduce menstrual leave policies for women in India and various companies at workplace level have also proactively introduced menstrual leave policies. The major barrier in formulation and implementation of the policy, is the deep-seated prejudices, societal stigma and taboos associated with it, refraining people from talking about it in both public and private space (Aggarwal, 2024).

There is an urgent need for the recognition and acknowledgement of the spillover effects that the introduction of this policy can have like promoting workplace inclusivity, increasing the productivity and retention rates, reduction in gender gap, prioritisation of health and wellbeing of women, respecting the autonomy and dignity of women, prioritising their reproductive health, empowering them and finally bringing into praxis the ideals and principles mentioned within the Constitution of India. It is true that there are various risks and challenges associated with granting of this kind of leave to female employees, now it is the task and the responsibility of the policy makers to strike a balance between the concerns about workforce

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participation and giving due respect to the needs, autonomy of body, choices and realities of women. One larger perspective it will enable in creating an egalitarian society that is sensitive towards the gendered needs and requirements of women (Bhutani, 2024).

7. On Marital Rape Exception

Marital Rape Exception (MRE) in India is a colonial relic originating from the “doctrine of coverture” in English common law, severely curtailing the legal autonomy of a married women assuming that after marriage men and women are transformed into a single entity ending the legal existence of women or at least getting it incorporated and consolidated into that of the husband (Bhaumik, 2024). Major hindrance towards criminalisation of marital rape lies in the argument by the government that it violates “sanctity” of marriage, rooted in the conservative and traditional way of thinking of Indian society. The regressive law is based on the archaic patriarchal notion that women irrevocably consent to a sexual intercourse once she enters matrimony (Akram, 2023). Recently the constitutional validity of Exception 2 to Section 375 of the Indian Penal Code and the Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 has been challenged in the Supreme Court for granting legal immunity to Indian husbands by stipulating that “sexual intercourse or acts by a man with his wife, provided she is not under 18 years of age, do not constitute rape” (Bhaumik, 2024).

Under *Hrishikesh Sahoo v the State of Karnataka* the Supreme Court will soon decide the constitutionality of the marital rape exception (MRE) under the Indian Penal Code, 1860. The reformative *Bhartiya Nyaya Sanhita (BNS)* continue to allow husbands to have sex with their wives against their will or without their consent. The issue of marital rape came to fore in 2017 when *Hrishikesh Sahoo* accused by his wife of multiple offences, invoked MRE which was then rejected by the Karnataka High Court. This led to an appeal in Supreme Court. Challenges to marital rape exception lies in violation of Article 14, 15, 19 and 21 of Indian constitution. MRE contradicts article 15(1) of the constitution, which prohibits sex-based discrimination. More over MRE is also violative of the Right to Privacy under article 21, that was recognised by the 2017 SC ruling in the *Puttaswamy* case (Singh K. , It's about time marital rape was criminalised, 2024).

Though there is lack of availability of comprehensive data on marital rape due to lack of will, awareness, societal norms, stigma, fear, illiteracy and legal barriers, certain reports like that of National Family Health Survey (NFHS-5) reveal that about one third of married women in India have experienced physical or sexual abuse from their husbands. According to the same study among married women in India more than 95 per cent who endured sexual violence identified their husbands as the perpetrators and 90 per cent of married women who experienced sexual violence did not seek remedy from anyone, major reason being non recognition of this act as a crime rather seen as a husband's right, reflecting the patriarchal mindset of Indian society. Marital rape strips women of their agency reducing them to mere objects for sexual gratification within the marriage. It has far-reaching implications on the physical and psychological well-being of a women (Singh, 2024).

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Limited availability of reliable data on marital rape due to entrenched prejudices and legal challenges has been cited as one of the major reasons that has prevented the society in realising the graveness of the prevailing conditions of married women. Data revealed by the National Family Health Survey-5 conducted between 2019-2021, discerns that nearly one-third of married women (18-49 years) in India have been victims of physical or sexual within the institution of marriage (Bhaumik, 2024).

8. Conclusion

The progress that India has achieved with respect to reproductive rights is way ahead of some of the most developed states of the world like United States which recently overturned the 1973 landmark judgement Roe V. Wade, leading to taking back the constitutional right to abortion and backsliding on hard won battles concerning the liberties and personal autonomy of women. Though India has been at forefront in initiating progressive measures that seeks to preserve and respect reproductive and bodily autonomy and integrity of women, much more needs to be done.

Inspiration for India can be some admirable examples like France where abortion recently is made as a constitutional right, which is a step in right direction in increasing the accessibility of women to birth control and maternal health care, furthering the women's right across the world. The amendment initiated by France is historic not merely because the right to abortion had a turbulent history in the country but because across the world there has been vicious relapse with regard the reproductive rights and personal choice of women

Efforts are needed to increase the level of awareness within the society, as a study carried out by the Foundation for Reproductive Health Services (FRHS) revealed that in major Indian states of Delhi, Maharashtra, Rajasthan and Uttar Pradesh only 68% of women consider termination of pregnancy as a women's health right and 95.5% of women were not aware of the newly introduced amendments to the MTP Act, 1971. Moreover, the study makes it very evident that majority of women in are India are unaware that termination of pregnancy in the country is legal. It is not just the service receivers but even the service providers like the doctors, the frontline healthcare providers or the ASHA workers who are unaware about the recent amendments introduced to the MTP Act, 1971. This dismal state of affairs concerning consciousness among the beneficiaries and the providers regarding the abortion laws requires government to deploy mass awareness campaigns within the society on priority basis (Bureau, 2023).

There is also an urgent need to make the data available on marital rape, so that the real situation of a married women within the institution of marriage can be analysed and accordingly decisions can be taken and policies can be implemented. Major issue concerning marital rape in India is that though marital rapes get documented in hospitals, cases are rarely registered, since it is excluded from the Indian penal code's (IPC) definition of rape, resulting in unavailability of data. It is prerequisite for the police and the concerned authorities to be sensitive and responsive towards the cases concerning marital rape enabling in overturning the pattern of silence that still engulfs Indian women. Educating and making women aware of the

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cruelty committed on them will also give them confidence to report the matter and better reporting and recording of data. Criminalisation of marital rape should be the top priority for the policy makers that serves as a catalyst in safeguarding the autonomy and dignity of women in India leading to their empowerment (Srivastava, 2016).

Realisation is needed that the liberty and autonomy related reproductive rights of women is intrinsically attached to the attainment of broader goals and objectives like 2030 Sustainable Development Goals (SDG) and specifically the SDG 3 related to maternal health. Protection of women and creation of a society that upholds the dignity of women can be achieved through institutionalisation and formalisation of the ideals that are mentioned in the Constitution of India such as justice, equality, liberty and life.

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