

## WOMEN'S SEXUALITY AND REPRODUCTIVE RIGHTS – A CRITICAL STUDY

Written by **Tanvi Singh**

4th year BBA LLB student, Amity University, Patna, India

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*“If we only think about a women who looks a certain kind of way, how many other women aren't we recognising? True empowerment of women is simply allowing women to be in all their diversity”*

-By **Cleo Kambu**

(Activist for Transgender and Sexual Minority Rights)

### WHAT DO WE UNDERSTAND FROM THE WORD WOMEN'S SEXUALITY?

The term Sexuality is related to a person's sexual behaviour and feelings, being attracted toward someone physically, sexually or emotionally all these things are part of our sexuality. Women sexuality is very less concerned topic for world specially in the country like India. Why India? It is because may our society give women a prior position like goddesses but still, stuck in that stereotype where women's need and desire doesn't concern other at all. We assume she like this or like that but never come up with an idea to simply ask her about what she may actually like or want. All women's desires cannot be summarized in one, it varies from each woman as an individual. In the interview with BBC news Rutgers University Professor **Beverly Whipple** says: *“Every woman wants something different.”*<sup>i</sup> There is need to understand that women may have preference like men do in their sexual life and it's fine to have, they cannot force to be of one kind irrespective of her choices. Her sexual choices must be respected as an individual choice. A women may like to be with someone one or may not throughout her entire life, or may she like another woman as her partner these all are part of her sexuality. Any individual should not be judge for this. Women's sexuality may change over time, it is possible

for a woman to feel primary attracted to men, but may later feel attracted to women. it is normal like anyone else. The important thing is to feel respected and safe whatever decision you made. The 1995 UN fourth World Conference on women in Beijing define Reproductive rights in a broader context as “*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, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences*”.

## **PANDEMIC EFFECT ON WOMEN’S REPRODUCTIVE RIGHTS**

Every female has the right to have sexual and healthy reproductive life which include access to health services like safe abortion, choice of pregnancy, contraception as well as right to choose their partner, number of children to have and when, with whom. On the occasion of world Population Day, the UN chief called for closing gaps in access to sexual and reproductive health services which the crisis has created.<sup>ii</sup> He simply indicated that the women situations are become worst in pandemic time. When whole world is fighting against covid pandemic there is one group which again left behind fighting alone to against domestic violence as women are victimize of unwanted or forced pregnancy and suffered from lack of health services which required during or after pregnancies. Women are always subject to being a kind of reproductive mechanism to produce child specially - a male child, but in this process a female health is totally neglected or compromised. A female face greater barriers than men and boys do in accessing health care information and services. Some of the most common barriers faced by females are restrictions on mobility, lack of access to decision-making power, lower literacy rates, societal inequalities, lack of training and awareness amongst healthcare providers and poor health systems in locality and challenges of women and girls. As per United Nations data during pandemic around 14 million women lost access to contraception, and specialized services, when they were needed the most. The UN Secretary General said that “In every corner of the world, we are seeing a reversal of hard-won gains and an erosion of women’s

reproductive rights, choices and agency. With the onset of the pandemic, resources for sexual and reproductive health services were diverted”. Restrictions putted in the purview of COVID-19 shattered the access to essential sexual and reproductive health services which lead to arise in unwanted pregnancy, degradation of women’s health, unsafe abortion etc. The most common obstacles which women faced in exercising her right to health is patriarchy, colonialism and societal inequities. Denial or restriction on sexual and reproductive rights and criminalize same sex acts or gender diverse identity through laws and policies in current time is all part of colonialism and societal inequities which put barriers to a person in enjoyment of sexual and reproductive rights.

## **INTERNATIONAL RECOGNITION ON REPRODUCTIVE RIGHTS**

**In early 1946** the Commission on the Status of Women was established to deal with women’s issues. The UDHR affirmed the principle of the inadmissibility of discrimination and proclaimed that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth without any discrimination including discrimination of sex. Yet there was discrimination against women and girls and they faced multitude of constraints imposed by society, not by law. **Recognition of Reproductive rights** as a part of human rights began at the United Nation’s International Conference on Human Rights, Tehran 1968. Proclamation of Tehran was the first international document to recognize these rights as a basic human right and it state that: *“Parents have a basic human right to determine freely and responsibly the number and the spacing of their children”*. Later on, in the 1969 Declaration on Social progress and Development reproductive right was affirmed by the United Nations General Assembly which states *‘All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities toward the community’*<sup>iii</sup>

The 1994 International Conference on Population and Development in Cairo is the first international document which define reproductive rights as *“reproductive rights embrace*

*certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community".* In the same International Conference "Cairo Programme of Action" was adopted and certain recommendations are made which include governments responsibility to meet individuals' reproductive needs, family planning services to be provided in the context of other means of reproductive health services, included services like safe and healthy child birth, prevention of unwanted pregnancies, post abortion care, sexually transmitted disease care, etc. Issues like sex trafficking, violence against women, women status in society and family were addressed.

The General Assembly on **November 7, 1967** adopted a **Declaration on the Elimination of Discrimination Against Women**, and in order to implement the principle set forth in the Declaration, a Convention on the Elimination of All Forms of Discrimination Against Women was Adopted by the General Assembly on **December 18, 1979** after 5 years of consultation with the Commission on the Status of Women (CSW). The Convention known as International Bill of Rights for Women came into force in **1981**. The CEDAW is established with the aim to monitor the implementation and progress of the women's convention and also to check the reports submitted by the states parties on works they have done to implement provisions of the women's convention based on these reports committee make general recommendations to the state parties. As of September 17, 2020 the Convention has **189 parties**. The CEDAW Committee's General recommends that States shall prioritise the "prevention of unwanted pregnancy through family planning and sex education". The Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) have clearly stated that women's right to health also include their sexual

and reproductive health. It means states are obligated to respect, protect and fulfil women's rights related to sexual and reproductive health.

## **REASONS FOR VIOLATION OF REPRODUCTIVE HEALTH RIGHTS**

Irrespective of having these laws and obligations women's sexual and reproductive rights are often violated due to deep rooted beliefs and societal values pertaining to women's sexuality. Patriarchal concepts fixed the role of women within the society and family. Women plays multiple roles in the society such as service provider by becoming employed, caretaker as a mother, wife, daughter, breadwinner for family etc despite all these fact women still mainly known for birth giving. Many women die every year due to lack of health services during pregnancy. Death rate of women due to pregnancy related problems are increasing as per one of the World Health Organization (WHO) report. Early marriage and pregnancy or forced pregnancy to produce male offspring, forced abortion, and forced virginity examination without women's prior consent has a devastating impact on women's physical and mental health. The other reasons for violation of this right are lack of information and education on sexual and reproductive health, lack of access to contraceptive methods, third party dependency etc.

## **REPRODUCTIVE RIGHTS IN INDIAN LEGISLATURE AND ITS APPLICABILITY**

Reproductive rights have been recognized as basic and fundamental rights of a human being by international and regional laws. It covers a range of civil, political, economic, and social rights, from the rights to health and life, rights to equality and non-discrimination, privacy, information, and to be free from torture or ill-treatment. States have obligation to make necessary amendment in their respective laws to implement the provisions of international women laws in their domestic laws to ensure every girl and women have access of these rights which are provided to them globally. The implementation of reproductive rights must be seen

in reproductive health outcome such as lower rate of unsafe abortion, child marriage, force pregnancy and there must be availability of health services, sex education, opportunity to make fully informed decision etc.

The reproductive rights are those rights which enable an individual to procreate their offspring. In India there is no legal definition of reproductive rights. However, The Constitution of India recognizes these rights in gender justice and women equality as fundamental rights, provisions for same can be seen in Article 14, Article 15 and Article 21 the right to equality, non-discrimination and the right to life respectively. The rights to health, dignity, freedom from torture, ill treatment, and right to privacy are included in the Article 21 of the Constitution. In *K.S Puttaswamy (Retd.) v. Union of India*<sup>iv</sup> the Supreme Court has said that “Privacy is based on the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also comprises a right to be left alone. It comprehends physical as well as mental aspects. The court has also said that Article 21 talk about an individual personal liberty not liberty” Through the analysis of this case, it can be said that, the reproductive rights of women have been recognised as fundamental rights as part of Right to Privacy and personal liberty. The right to reproduction and abortion is the right of a woman and are private issues that concern her and not the community states Right to Privacy. India has signed many international treaties which obligates its government to policies to work in women’s best interests such as such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), all of which recognize reproductive rights.

**Abortion laws of women in India** are deals under the provisions of Indian Penal Code, 1809 (IPC) and Medical Termination of Pregnancy Act, 1971 (MTPA). Abortion is a criminal offence under section 312 to section 316 of the IPC. The code has used the word miscarriage instead of abortion in its provisions and it criminalize voluntary miscarriage. Provisions of Abortion under MTPA must be read with the provisions of IPC. Recently in March 2021, Rajya Sabha has passed the Medical Termination of Pregnancy (Amendment) Bill, 2021. The Act has come into force with effect from 24 September, 2021. This bill has passed to enhance the

Reproductive rights of women in India. The need of amendment in MTP Act had arises due to failure of old provisions to deal with cognisance of current scenario. Amended MTP Act allows abortions at advance stages of pregnancy.

## **CHANGES IN MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2021**

The major Amendments that has been made in new MTP Act are in the provisions of section 2, section 3, section 6 and a new section 5A has been inserted. Section 2(e) of the Act define termination of pregnancy as ‘a procedure to terminate a pregnancy by using medical or surgical methods’<sup>v</sup>. The Act has extended the upper limit of abortion up to 20 weeks on the advice of one medical practitioner and abortion between 20 to 24 weeks on the advice of two medical practitioner. The extension on the abortion of the pregnancy period up to 24 weeks is given for special categories of women such as rape/incest victims, and other vulnerable women like differently-abled women and minors etc. The conditions for considering termination of pregnancy under 24 weeks are: when the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality mentioned in section 3 (2)(i)(ii) of the Act<sup>vi</sup>. Termination of pregnancy can only be performed by the doctors with specialisation in gynaecology/obstetrics.

Termination of pregnancy beyond 24 weeks can only be done when the state level medical board permit it, in case of substantial foetal abnormalities. However, in case of rape survival if desire of abortion is arising after exceed of 24 weeks, the only manner would be through writ petition. The board shall be consisted a gynaecologist, a paediatrician, a radiologist or sonographer and any other number of members as notified by the state government or Union territory.

Section 5A of the Act deals with **Protection of Privacy of a women**. Provision of this section states that no registered medical practitioner shall reveal name and other particulars of a woman whose pregnancy has been terminated, except to a person authorised by law. Whoever breach

the provision shall be liable for the punishment of imprisonment which may extend to one year, or with fine, or with both.

The new Amendment Act has replaced the term ‘any married women and her husband’ with the term ‘**by any women and her partner**’. This means now the Act has also recognized the reproductive rights of unmarried women by allowing them to terminate their unwanted pregnancy legally and ensures their privacy under section 5A of the Act. The Act has also ensured that if life of any pregnant women is in danger and required immediate abortion, at any stage of her pregnancy then, it is allowed to be performed by one doctor. In previous Act abortion of minor pregnant women is only allowed when consent of guardian is given in written for the same with the current amendment it has been repealed.

## **INDIAN COURTS INTERVENTION IN WOMEN’S REPRODUCTIVE RIGHTS**

The Indian Courts have always been highlighting the government’s failure in implementation of its health services and non-discrimination for all. Through its cases or by exercising its judicial power Courts have always worked in best interest to protect citizen’s rights. The Supreme Court has played an important role in adoption of international Conventions laws in domestic laws. The Courts have recognized these rights of women as a part of ‘inalienable survival rights’ protected under fundamental right to life. In *B.K. Parthasarthy v. State of Andhra Pradesh*<sup>vii</sup> the Supreme Court held that, “the right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Such right necessarily includes the right not to reproduce”. Through its judgment the Supreme Court state that right to reproduction is a part of right to privacy as it is matter of individual interest. The Supreme Court has also protected the reproductive right of a disabled person. In the famous case of *Suchita Srivastava v. Chandigarh Administration*<sup>viii</sup> the Supreme Court said that even mentally challenged women have the right to decide about her pregnancy and a reproductive right cannot be deprived from her. Challenged person can also claim their



reproductive right however certain restrictions can be imposed on the ground of disability, in the natural upbringing and care of child taking consideration in the child interest.

Over the past decade the Courts have witnessed the cases where reproductive rights of women have been infringed. These infringements are result of coercion, lack of access to information and education, lack of pre and post pregnancy care, child marriage lack of access to contraceptive methods etc. The Court have given many bold judgments to protect these rights and to serve the justice by eliminating inequalities. In the case of *National Legal Services Authority v. Union of India*<sup>ix</sup> the Supreme Court held that transgender persons are entitled to claim fundamental rights like any other person without any discrimination. The reproductive right should also be available to transgender as it is part of Article 21 under right to personal liberty and privacy. However, the Indian laws are up to the current date silent on the matter of transgender's reproductive rights. Further in the case of *Devika Biswas v. Union of India & Others, 2016* the Supreme Court held that Article 21 includes reproductive rights as both a component of the right to health and an aspect of personal liberty, and defined them as the right to access a range of reproductive health information, goods, facilities, and services to enable individuals to make informed, free, and responsible decisions about their reproductive behaviour. It also includes the right to make a choice regarding sterilization based on informed consent and free from any form of coercion.

In the case of *Vaishali Pramod Sonawane v. Union of India*,<sup>x</sup> the divisional bench comprising of 2 judges passed the order to terminate 24 weeks of pregnancy due to congenital anomaly defect were reported. Due to this defect a lot of babies die within weeks after birth.

## CONCLUSION

The author convey that India still need more appropriate and suitable laws for covering all aspect of women's reproductive rights. The new amendment Act came with many favourable changes like it include unmarried women, increase upper limit of abortion, protect identity of the women still it is still not perfect to cover all issues related to reproductive right. The Medical Termination of Pregnancy (Amendment) Act, is extending exceptions to the provision of Indian

Penal Code but the Act does not give the absolute right of abortion to the women. The act allows abortion only if the medical practitioner is satisfied with the conditions enumerated under MTP Act, 2021 and not at the will of the women. This invalidates the entire debate over the reproductive right of women, which are included under the right to privacy of woman. The Act include provision of termination on medical board advice is unfair for rural areas women as, for them it is even not possible to accommodate with termination on advice of two medical practitioner because in rural area health services are still not developed. Rarely a hospital with full medical facilities can found in rural area of our country. The other loophole of the Act is it exclude transgender from approaching their reproductive rights as the term 'any women' has been used in it. The Act has also not put ease in access of medical equipment.

## ENDNOTES

<sup>i</sup> Rachel Nuwer, *why have scientists been slow to understand women's sexuality, asks Rachel Nuwer*, BBC NEWS (23 October, 2021) <https://www.bbc.com/future/article/20160630-the-enduring-enigma-of-female-desire>

<sup>ii</sup> *Ensure reproductive health rights for all on World Population Day: UN chief*, UN NEWS (24 October, 2021) <https://news.un.org/en/story/2021/07/1095652>

<sup>iii</sup> *Reproductive Rights*, UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (25, October, 2021) <https://www.un.org/en/development/desa/population/theme/rights/index.asp>

<sup>iv</sup> (2017) 10 SCC 1 <https://www.sconline.com/blog/post/2017/12/13/2017-scc-vol-10-november-28-2017-part-1/>

<sup>v</sup> Section 2(e) Medical Termination of Pregnancy (Amendment) Act, 2021

<sup>vi</sup> Medical Termination of Pregnancy (Amendment) Act, 2021

<sup>vii</sup> AIR 1973 SC 2710

<sup>viii</sup> AIR 2010 SC 235

<sup>ix</sup> AIR 2014 SC 1863

<sup>x</sup> [2019] 5 Bom Cr 478