



Research Paper

Reproductive Self-Determination: A Journey from Birth control to Procreative Choice

-Chhanda Bhowmik¹

Abstract:

Various International Conventions like ICPD has recognized the Reproductive Rights in recent times but the struggle for the same is not recent one rather the struggle for the recognition of reproductive rights is going from historical time even before when Alexandra Kollantai started advocating for reproductive rights. Reproductive rights converse about that horizon of procreative freedom which includes freedom to make decision regarding procreation and also includes the right to have all information and means concerning procreation. To understand the ambit of reproductive rights at present day it is pertinent to know how the notion of reproductive rights has reached to this thought which is prevailing in present days. In early society there was less awareness regarding the rights of woman and there were less numbers of women participated in professional life due to social structure. It was the sole unpaid duty of women to do all household work with perfection. The women who wanted to work outside they had to struggle to maintain the overburdened duties of house and work and this scenario is continuing till the present day from that period when women started working. There were various religious or social beliefs which made barrier whenever women claimed for any of her rights including reproductive rights. Hence this paper would be focused on searching the wave of reproductive movements of woman which transformed to reproductive rights to individuals.

(**Keywords:** Reproductive rights, procreative choice, ART, Surrogacy)

Received 01 May, 2022; Revised 10 May, 2022; Accepted 12 May, 2022 © The author(s) 2022.

Published with open access at www.questjournals.org

I. Introduction:

Human rights and reproductive rights are indivisible and inextricable from one another because the realization of some human rights like right to life, right to education, right to adequate housing, freedom from discrimination, right to health care and services cannot be realized without acknowledging the importance of reproductive rights.

International Conference on Human Rights, 1968 was the first International conference, in which reproductive rights got the recognition as part of human rights. Thereafter reproductive rights as human rights have been recognized in many International documents. In International Conference on Population and Development (ICPD), reproductive rights have been defined in paragraph 7.1 as a state of complete physical, mental and social well-being which not only includes the reproductive health but safe and satisfying sex life also and to make decision concerning the time and method of procreation. Again in Beijing Declaration and Platform for Action, reproductive rights of couple as well as of individual got recognition where the freedom to make decision concerning the procreative choices about the time, partner, spacing and method of procreation has been recognized as reproductive rights.

Since reproductive rights as a new dimension of human rights have been recognized and on the other hand medical science and technology has also introduced various medications and mechanisms which have its own advantages and disadvantages,² there should be a balancing way to provide access to medical invention for realizing reproductive rights and to minimize the disadvantages of technologies. For instance, prenatal screening test is required to identify certain birth defects of fetus but such technology cannot be used recklessly in a

¹ Ph.D Scholar, ICAFI LAW SCHOOL, ICAFI UNIVERSITY TRIPURA, mail: bhowmikchhanda196@gmail.com, ph-9366946713

² Upadhyaya Deepak, Dhar Jayanta, *Socio-Legal Aspects of Surrogacy arrangement: From Indian Perspective*, IAHRW International Journal of Social Sciences Review, 2019, 7(5-11) 1406-1410

society where a curse like female feticide exists. Thus for the benefit of the concerned society such medical services should be provided with proper rules and regulations to minimize or prevent the disadvantages. Likewise, assisted reproductive technology is such a technology which is proved as ultimate blessing in the horizon of reproductive rights. Thus the services under this technology need to be provided under proper legislation. The scope of reproductive rights can be analyzed by emphasizing the evolution of reproductive rights.

II. Evolution of Reproductive rights:

The roots of reproductive rights can be traced long back history. In discussion of historical movements on women's reproductive rights, it is pertinent to acknowledge the contribution of Alexandra Kollontai, who was described as brilliant 'orator and powerful propagandist'. According to Kollontai, it is a patriarchal forces and structures of the society which excluded women's participation in every aspect of social processes. Kollontai attempted to describe that child bearing and child rearing were not private concern and both should be separated for the overall development of women and state should take the responsibility of children as the member of collective. She further claimed that motherhood is not a private matter rather it is a social obligation as maternity does not mean that the mother entirely devoting herself for the child. It is not duty of the mother only to take care of the physical and moral education of the child rather it is the duty of the state also to take over the functions in order to ensure the healthy members of the state. Kollontai had drawn special attention to the double-burden of working women who were burdened with not only factory work but also with the reproductive labor. She stated that patriarchal exploitation based on unpaid reproductive labor of wife within the relationship of marriage which transforms a relationship to domestic slavery. According to her socialization of the responsibility of child bearing through state's involvement is required to unburden the women.³ Since Kollontai was concerned about various problems relating to working women which was reflected in her various writing also, she highlighted the problem of pregnant women and urged for healthy pregnancy.

2.1 Birth Control: The fight for reproductive freedom was not easy one because organized religions like Roman Catholic Church stood against the use of artificial contraceptive which was sinful according to their beliefs. Margaret Sanger devoted her life to legalize birth control and making it available for all women. She was the founder of Planned Parenthood. She coined the term 'birth control' in 1914 and in 1916 she was arrested for opening the first birth control clinic in the country. She wrote 'What Every Girl Should Know' and discussed the importance of sex education for boys and girls. In her writing she discussed very pleasantly the sudden physical changes in the adolescent period and very nicely connected the mental and moral development of this period with future life. She discussed about various changes of reproductive stages and importance of information regarding reproductive health. Since Margaret was always concerned regarding control on women's own fertility she wanted someone to make a 'magic pill', which will be less costly and easily accessible to women and at the same time which would be effective one. Margaret achieved her dream when she met with Gregory Pincus, who was a medical expert in human reproduction. So with the introduction of birth control pill Margaret worked on a new concept of human rights of every woman to control her own fertility and she worked on that time period when preventing conception was a taboo.⁴

2.2 Abortion Right: After the introduction of birth control in the horizon of reproductive rights the topic of abortion was taken as another battleground for the feminist movement which started approximately during 1970 and continuing as a debatable issue in many nations. Again this movement also faced various anti issues like anti-abortion movements which urged that abortion on demand was selfish. Earlier abortion was banned by the legal system of nations. Then it was legalized only on the medical ground of mother's health or the medical abnormalities of fetus. In 1965, *Griswold v. Connecticut* case the US's Supreme Court held that law preventing contraception is against the couple's right to privacy. Then in the landmark case *Roe v. Wade* the US's Supreme Court has accepted that the concept of quickening of fetus would be considered for abortion matter and has given a balancing solution for protecting right of pregnant mother as well as of the unborn child. Now abortion as a right of women has been recognized in various countries and some countries are giving the access with various restrictions and some countries are restricting the access to abortion right of women.

2.3 Reproductive rights of Individual: The early human society perceived male as the sole contributor in human procreation due to lack of scientific knowledge and women were considered only as fertile field subject to the proprietary privileges of the seed giver which was the basic of one patriarchal society. Thus acknowledging this gender subjugation by suppressing reproductive autonomy, various international human rights law came forward for the recognition of reproductive rights of women. It was also the assumption of feminist theory that women should have reproductive autonomy for realizing of all other basic human rights

³ Lokaneets Jinee, *Alexandra Kollontai and Marxist Feminism*, *Economic and Political Weekly*, JSTOR, 2001, Vol 36 No 17. 1405-1412.

⁴ Wardell Dorothy, Mlitt, 'Margaret Sanger: Birth Control's Successful Revolutionary', *AJPH* July 1980, Vol. 70, No. 7.p-736-740

In Fourth World Conference on Women, Beijing 1995 reproductive health was recognized as a state of complete physical, mental and social well-being in all matters relating to reproductive system.

Convention on the Elimination of All Forms of Discrimination against Women, 1979 is considered as the Magna Carta in the field of rights of women where the scope related to rights of women was expanded. This convention urge for the elimination of all forms of discrimination against women to equalize men and women in every aspects of life. In this convention it is precisely noted that in upbringing of children requires sharing responsibility by men and women and the society as a whole and it is not only the responsibility of mother to look after the physical and mental well being of children. Defining the violence against women it is clearly mentioned in 1993 document of CEDAW that arbitrary deprivation of liberty of women is also violence against women.

In *Vienna Declaration and Programme of Action*, it is mentioned that any type of violence which is gender-based should be eradicated from the society.

The *International Conference on Population & Development* (ICPD) is such a document which has tremendous contribution in the field of reproductive rights and reproductive health. This convention has stated about the need of high quality reproductive health services. While discussing the ambit of reproductive health and rights the convention focused on the availability of the various reproductive health service and access to the same while maintaining the confidentiality and privacy of these services. Crystallizing the idea of reproductive health the convention stated about the complete physical, mental and social well-being of individual. According to ICPD reproductive health and reproductive rights includes sexual health and the purpose of this is to enhance the personal relations and life. this documents converses not only about the reproductive rights of women or couple rather it has focused on the reproductive rights of individual and recognized the procreative rights of individual regarding certain decision related to procreation which includes number of children, spacing and timing of children, partner of procreation, means of procreation, having all information regarding this and availability and accessibility to the services relate to reproductive health.

It is visualized that the notion of reproduction or reproductive health is being changed with the changing notion of society and through the recognition in International human rights law. The notion of procreation established by the early society where male was considered as the sole contributor in procreation and female was considered only as fertile land where their only duty was to give free reproductive labor has changed with the passing time. But in a patriarchy system of society some sole burden from female has not yet eradicated though the society has made advancement in various segment and females have become the contributor in all types of social advancement. The patriarchy system of society has always shifted the burden of reproductive labor to women only in which child rearing is utmost. There are numbers of International documents which stated about the shifting of the burden of child bearing from mother to family or society as a child is a member of society.

III. Scopes of Reproductive Rights under the Patronage of ART:

With the expanding scope of reproductive rights and with the advancement of medical technology, reproductive rights converse about procreative freedom which includes both dimension of procreative choice either to procreate or not to procreate. International Conference on Population and Development conducted in 1993 has recognized the right of reproductive self-determination and extended the scope of reproductive rights by recognizing the decision making rights on procreation regarding time, partner and method of procreation⁵. Now with the advancement of medical technology it has become easier to address the problem concerning procreation and to manage procreation more conveniently. Assisted reproductive technology has provided various reproductive technologies by utilizing which human procreation can be done without sexual intercourse. One technology is artificial insemination which comes under ART through which sperm can be placed inside the uterus which would facilitate the conception and natural coitus is not required for such conception. Another technology come under ART which has ultimate blessing in the reproductive field is in vitro fertilization where oocytes and sperms are combined in laboratory for obtaining embryos which can be places inside the uterus. This ART is such a technology which can change the notion of conception and parenthood because here pure genetic child without natural coitus as well as mixture of genetic and gestation child can be born trough this technology. The assisted reproductive technology is an ultimate blessing for realizing procreative rights to the utmost level because every individual irrespective of man or woman can have their own child who would be genetically their own child through the application of this technology. Thus the single woman or the homosexual women who have no male partner can utilize this technology for having their own biological child through donated sperm as well as the single man or homosexual male who have no female partner can have their own biological child through surrogate mother. Similarly the married/unmarried heterosexual couples having some

⁵ United Nations Population Fund., & International Conference on Population and Development. (1993). ICPD 94: International Conference on Population and Development: Preparatory Committee II. New York, NY: UNPFA

reproductive disorder can opt for any of the assisted reproductive technologies suitable to overcome their biological problem subject to the permission given under the legal system concerned.

IV. Reproductive Rights in India:

India is among those countries in the world to frame legal policies recognizing various International Human Rights law where upliftment of the position of women has been taken as important consideration for framing policies. But there are some places where the patriarchy system is still reflecting in some law or legal policies. The scope of reproductive rights covers all the reproductive stages, reproductive health, information, access, availability, quality and decision making freedom in procreation. India is always concerned about framing good policies or law ensuring good health services for its citizens so that the quality medical services can be made accessible by common people and for this end health services are being provided in reproductive matters also from government established hospitals and India has good materiality policies as well. In respect of decision making freedom concerning reproductive matters India has recognized this freedom with several restrictions.

4.1 Reproductive rights in Abortion: Since abortion opted by the pregnant mother has been penalized under the Indian Penal Code, abortion in India cannot be visualized as right in India rather it is an option during emergency situation on medical ground. Before the enactment of the Medical Termination of Pregnancy Act, 1971, the termination of pregnancy were dealt only by the provisions mentioned in the Indian Penal Code, 1860. After that the MTP Act was enacted to liberalize the harshness of law regarding termination of pregnancy in medical emergency situation. Right to abortion is related with most basic fundamental rights of women as it has direct effect on right to privacy which emanates from right to life and which is part of right to privacy also. Constitution of India guarantees the right to equality between men and women, but discrimination against women also is not uncommon in the society. Pregnancy may jeopardize the freedom of movement and freedom of participation in the public life. Pregnancy may chain te leg of a woman in economic need as paid maternity relief is not guaranteed in every profession. Most probable impact of restricting Abortion right of a woman can be an unsafe and unhygienic abortion. But section 312 of Indian Penal Code, 1860 deals with the provision of causing miscarriage where a woman causes herself to miscarry has been included under the purview of the section 312. Judiciary has great contribution in Indian legal system for interpreting law. Regarding the concept and ambit of reproductive rights judiciary has given valuable comment while dealing with various cases. In *Doctor Mangal Dogra* case, the court held that a woman should have mental preparation to conceive and she should not be compelled by anyone to do this against her will.⁶ Another case regarding medical termination of pregnancy the court held that reproductive choice of women is essential for their personal liberty which comes under Article 21 of the constitution.⁷ In a sou moto case the court has decided that explanation of section 3 of the MTP Act is restricted only to married couples which should read to mean any couple living together like a married couple.⁸ Puttuswami case is a landmark case regarding right to privacy and the significance of dignified life has been elucidated in this case as the quest for liberty is one of the foundation pillars of Constitution of India. It has been discussed in the puttuswami case that without ability to make choices, the inviolability of the personality and liberty would be in doubt.⁹ Thus it is visualized that judiciary has active role in protecting the reproductive rights of individual which is highlighted through various decisions but abortion as a reproductive choice has not been established in India rather India allows abortion either on medical ground or as a choice made by married couple to control the number of child.

4.2 Reproductive Rights in Procreation: Access to surrogacy or the assisted reproductive technology takes place in a discussion where the discussion is about the procreative right of individual. The technological advancement has done immense development in the field of medical technology. With the contemporary medical technological advancement now it is not impossible to conceive human baby without natural coitus. At the same time infertility is a problem for which the individuals and couples are suffering even before the modernization of the society and for this reason sorrorate union and niyog was present even in the early society to address the problem of childlessness. In sorrorate union a husband engages in coitus or marriages for coitus with the sister of his wife. This practice was usually done either after the death of his wife or if his wife has been proven infertile. Niyog is ancient traditional similar type of practice in which a woman whose husband was either incapable of fatherhood or has died without having children, would request and appoint a person for helping her bear a child. The man and woman would agree to do this only for the sake of child. After assisted reproductive technology is introduced in medical field the number of patients asking for this technology and the persons utilizing this technology is growing both horizontally and vertically. In India also the number is not less even though there was no law passed by legislature on this issue. Only basing on the 2005 guidelines passed by

⁶ *Dr. Mangal Dogra & others v. Anil Kumar Malhotra & other*, C.R. No-6337 of 2011

⁷ *Halo bi v. State of Madhya Pradesh & Ors.*, CRA-273-2015

⁸ *Bombay High Court (on its own motion) v. The State of Maharashtra*, Suo moto PIL no. 1 of 1016

⁹ *Justice K.S Puttuswami(Retd.) v. Union of India and others*, WP(CIVIL) no. 494 of 2012

ICMR the whole services of ART or Surrogacy were dealt in India in absence of any law. Even after introducing law on this surrogacy or ART the issue regarding the procreative choice of individual irrespective of their marital status or gender has not been recognized yet in India. The law dealing with these issues is not permitting a single man to have his own biological child with the help of this technology and the heterosexual unmarried couple or the homosexual couples are standing in the same position concerning the procreative right of them. The law is allowing only the married couple to avail this technology to address their problem of infertility and single woman can opt for the services of ART.

V. Conclusion:

Discussion on reproductive rights cannot be put forward without covering both the dimension of reproductive choice i.e. either to procreate or not to procreate. It is already recognized under International human Rights documents. In the era of distributive justice or egalitarianism no one can be deprived of basic human rights unless and until the person himself/herself is breaking any law. Before the invention of ART there was no choice except adoption for those who want child. The adoption law in India is permitting both single man and woman to have a child through adoption with some reasonable restriction. But the same notion has not been followed regarding biological child. Now the society has done much advancement in every aspect of life. The struggle for recognition of reproductive rights started with the claim for reproductive rights of woman and in those claims birth control was probably the first generation of reproductive rights movement. Now the social structure has also been changed with the changing notion of work culture and every member of the society has contribution in social development. Thus everyone should have reasonable access to their procreative choice so that every individual can balance between their social as well as personal life.

References

- [1]. Robertson John A., *Procreative Liberty and The Control of Conception Pregnancy and Child Birth*, Virginia Law Review, Volume 69, April 1983, Number 3.
- [2]. Nardelli A Lexa A, Tania Stafinski, Tarek Motan, Krisrin Klein, and Devidas Menon, *Assisted Reproductive Technologies (ART): Evaluation of Evidence to support Public Policy Development*, Reproductive Health, 2014.
- [3]. Kumar Anant, *Role of Males in Reproductive and Sexual Health Decisions*, The Bihar Times, 2007.
- [4]. Nardelli A Lexa A., Stafinski Tania, Motan Tarek, Klein Kristin and Menon Devidas, *Assisted Reproductive Technologies(ART): Evaluation of evidence to support public policy development*, Reproductive Health, 2014
- [5]. Khalid Osman, *Assisted Reproductive Technology*, ResearchGate, December 2020
- [6]. John A. Robertson, *Procreative Liberty and The Control of Conception Pregnancy and Child Birth*, Virginia Law Review, Volume 69, April 1983, Number 3.
- [7]. Kumar Anant, *Role of Males in Reproductive and Sexual Health Decisions*, The Bihar Times, 2007
- [8]. Robertson John A., *Legal Change and Stigma in Surrogacy and Abortion*, Journal of Law, Medicine and Ethics, 43 (2): 2015.
- [9]. Dhar Jayanta, *Procreative Liberty and Surrogacy Arrangement- With Special Reference to Right to Privacy*, Ad Valoram Journal of Law, 2018.
- [10]. Praveen Mishra, Jayanta Dhar, *Ishraz Ahmed, Surrogacy Arrangement in India: A critical Analysis*, Universal Review, Vol.-X, No.-1, 2019
- [11]. Deepak Upadhaya and Dr. Jayanta Dhar, *Surrogacy: A Commentary on the Contemporary Practice*, Suraj Punj Journal For Multidisciplinary Research, Vol 9, Issue 6, 2019.
- [12]. Diaz Diana Guerra, *Psychological and Sociological Aspects of Surrogacy*, Fundacio Victor Grifols Illucas, 3.
- [13]. Gostin Larry., 'A Civil Liberty Analysis of Surrogacy Arrangement', Journal of Law, Medicine and Ethics, 16 (1-2): 7 7-17 (1988)
- [14]. Pande Amrita., *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, Journal of Women in Culture and Society, Vol. 35:4