

CHAPTER 1

DELINEATING THE BOUNDARIES OF REPRODUCTIVE RIGHTS OF WOMEN

1.1. Introduction

There has been a constant struggle for women's rights in the history of civilization. These struggles include (among various issues) the understanding of women's sexuality and women's reproductive role as a prerequisite factor in achieving women's right as well as freedom. There is a need to open a debate on these highly sensitive and personalized issues and their relation with the socio- economic and political structure of the society.¹

There is always interconnection between health, reproduction and women's rights. Therefore, the involvement of women in every sphere has been a delineating factor for women's rights and freedom. Though, women have been participating in the making of the government but it has not changed the stereotypes of women. Today, women's position is slightly better but it still has to go a long way. In the movement of women's rights, reproductive health of women plays the crucial role.²

It is said that "*there is no freedom, no equality, no full human dignity and personhood possible for women until they affirm and demand control over their own bodies and reproductive process*". The reproductive right is for the conscience of every individual and conscious choice of all women.³

¹ Imrana Qadeer "*Reproductive Health- A Public Health Perspective*" Oct 10 Economic and Political Weekly 2675 (1998).

² Instruments on Women's Rights, (FEMNET), by Keroline Kemp www.reproductiverights.org

³ Monaj Sharma "*Right to life Vis-à-vis Right to abortion, An Analytical study*" 18(3&4) Central India Law Quarterly 410 (2005).

There is no doubt that the reproductive health care is an assessable mechanism to determine the status of women in any society. Women's sexual and reproductive health is to be respected and protected in order to achieve women's rights. In reality, women bear an inconsistent burden because of their capacity to reproduce and fail to participate effectively in the development endeavor.⁴

The reproductive rights and the freedom requires three things –

1. That woman must have right to make decisions that affects her reproduction;
2. There must be least interference of state in relation to reproduction; and
3. Conducive social atmosphere to exercise reproductive freedom.

These three elements have to be guaranteed by the law of the state.⁵

Till this date, women's reproductive rights have been protected by the courts through intervention into the constitutional right to privacy. But there is lack of governmental intervention into this area. At present, a woman's right and/or decision to bear a child or not is significant for women as they equally participate in all the fields including the economic field. A pregnancy affects their capacity of working as an individual.

It is notable that in many feminist theories the reproductive capacity of women is connected with their subordinate position in the society. Biological reproduction is an area of concern for women as it is women who menstruate, become pregnant and give birth to children. This capacity of women has made man and woman biologically different and socially unequal.⁶ The struggle of women for autonomy and freedom in the society can be realized only when their reproductive right to decision making will be protected.

⁴ An interim at the African Women's development and Communication Network (FEMNET) www.reproductiverights.org by Ritu Anyumba.

⁵ Rachael N. Pine "Principles Governing Reproductive Freedom" November The Lawyers 13 (1993).

⁶ Jyotsna Agnihotri Gupta, *New Reproductive Technologies Women's Health and Autonomy* 37 (1st Edition 2000).

The reproductive rights not only deal with the status neither of women nor with their role as mother or their restrictions to a domestic sphere, but also whether or not women control their reproductive capacity.

The traditional values show that the relationship between woman and man is governed by the cultural constraint which has its impact from biological sexual identities. Nevertheless, biological factor seems to be invisible in determining the status of woman and man in the society. But it has explicitly or implicitly played an important role in determining the status of woman and man in the society so far.

The concern of reproduction has always been the prime factor to women's lives. In all ages women have hardly any say in conception, or to get away with unwanted pregnancy, to remain childfree or to deal with childlessness. Thus, interference in reproductive capacity of women is as old as the history of civilization.⁷

Measures of preventing conception like contraception, abortion, menstrual extraction etc. were known for a long period of time. But women hardly have any choice to adopt these practices as they were never considered as decision makers in the household. It was at the option of the male partner the reproductive decisions were taken. The things have not yet changed even though various convenient mode of reproduction has been established now with the invention of various reproductive technologies. Hence, the issue today is do women has control over their reproductive capacity? Whether women are decision maker in the exercise of their reproductive capacity? Whether reproductive technologies have good or bad impact on women's lives?

Research in human reproductive technologies has made great bang on the society. The control of reproductive capacity through these newly arrived technologies have been rampant for the management or control of fertility. This advancement has brought some changes in the concept of health. The attention on hygiene and infectious diseases, immunization on large scale has contributed to a large extent to a reduction of

⁷ *Supranote* 6 at pg.13.

infant mortality. With this advancement there arises the use of reproductive technologies immensely for various purposes.⁸

This has brought many social, legal and ethical issues before the society. The reproductive technologies have brought new possibilities for women to shape their lives and make it possible to have choices for them. This has also paved the way for emancipation of women through the instrument of reproductive technologies.

1.2. Meaning of Reproductive Rights:

Reproductive rights of women have its roots in the already existing human rights instruments of women. In the age of the constant movement for women's right, reproductive rights occupy a central position both at the International level and at the national level.

What are reproductive rights? What ought to be the range of reproductive rights? These are the crucial questions to be answered first before embarking into future. The Reproductive rights of women means the right of women to attain the highest standard of sexual and reproductive health and at the same time achieving full participation in the social and economic life.⁹ It includes various human rights of women such as- right to abortion, right to make her own decision regarding her body and her reproductive life, right to safe sex, right to procreation and to have family etc.

Women are vulnerable to health complications due to their reproductive capacity sometimes. Their capacity to give birth, which is said as blessings, may sometimes turnout to be a curse for them. There are instances of death or injury to the women during child birth. Thus, the right to reproductive health care gives rise to a governmental obligation to provide adequate reproductive health facilities that include, measures to promote safe motherhood, care for those with HIV/AIDS or sexually

⁸ *Supranote 6* at pg. 14.

⁹ www.reproductiverights.org

women's life and let silence speak and the margin becomes centre than and only than transmitted infections, infertility treatment and a full range of quality contraception including emergency contraception.¹⁰

It also means a state of complete physical, mental and social well being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its processes. Reproductive health, therefore, implies that people are able to have satisfying and safe sex and that they have the capacity to reproduce and the freedom to take decisions as to when and how often to do so. It also impliedly provides the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as other methods of their choice for regulation of fertility which are not against the law and the right of access to appropriate health facilities that help woman to have pregnancy and childbirth and also helps a couple to have a healthy child.¹¹

Reproductive rights or freedom has brought new revolution in the society assuring equality of relationship between men and women, respect for the integrity of the person, consent and responsibility for sexual behavior and its consequences. Moreover, the places from where the base of reproductive rights arise and can be exercised stand occupied by the pharmaceutical industries, medical education and profession and public health specialists.¹²

Women's self-determination stand together with this and trapped in these variety of places. The reproductive rights self determination must necessarily take into account the conflicts, contradictions and collisions among the production of spaces for activism and the places which furnish sites of its insurrection. To justify the subject of reproductive self determination, it is necessary to make visible those invisible factors of

¹⁰ Civil and political rights Covenant as referred in using legal Advocacy to advance reproductive rights, Gaining grounds. www.reproductiveright.org

¹¹ International Conference on Population Development Program of Action, paragraph 7.2

¹² Upendra Baxi "Gender and Reproductive Rights in India: Problems and Prospects for the New Millennium" October Kali's Yug 24 (2000).

women's life and let silence speak and the margin becomes centre than and only than women's reproductive rights can be realized.¹³

Henceforth, a reproductive right means right to decide whether when and how to have children. The ability of women to control their own fertility forms an essential basis for the enjoyment of other rights and lays down the foundation for equality between women and men. The right to free choice in the matters of sexuality and reproduction is of fundamental value which must be guaranteed by the state.¹⁴ Thus, rights involving to reproduction and sexual health care are originated in a variety of International sources.

1.3. Reproductive Rights – A Part of Human Rights

From the mid-nineteenth century, feminist and socialists advocated for the right to reproductive choice as a basis of women's personal and political liberation. Modern technique of reproduction makes it possible for couples to plan to have child and when to have and also how many children to have. A reproductive right inevitably touches the susceptible issues of the rights of women, their autonomy and the right to decide about their body. In all the liberal societies reproductive rights has been recognized as a part of human rights.¹⁵

From Tehran to Cairo, Beijing and beyond, there has been a constant effort to establish the reproductive rights of women as a part of human rights. There has been an effort to create an environment favorable for women to take decisions in matter of reproduction. It becomes essential to encourage and create a legal and social structure where women have freedom to take decision whether to bear a child or not. It is the women who have to undergo a physical pain in their pregnancy and they have to bear and carry the pregnancy for nine gestational months. So, women's health and human rights are interconnected and the promotion of one depends upon another.

¹³ *Supranote 12.*

¹⁴ Subhash Chandra Singh "*Reproductive Rights as Human Rights: Issues and Challenges*" 31(1&2) *Indian Socio-Legal Journal* 59 (2005).

¹⁵ *ibid*

The Final Document of the Tehran Conference on Human Rights, 1968, provides the “*basic human right to decide freely and responsibly the number and spacing of children and the right to adequate education and information in this respect*”. The Cairo program further expanded the content of reproductive rights as a “*state of complete physical, mental and social well-being*”. The infant concept of reproductive rights matured with the Beijing Platform where it was held that “*the reproductive health to women’s rights means to have control over matters relating to their sexuality free of coercion, discrimination and violence*”.¹⁶

In Vienna in 1981, there was a UN Symposium on Population and Human Rights which declares that *the compulsory use of abortion and its unqualified prohibitions would be a serious violation of human rights*.¹⁷

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further provides, “*the obligation to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights of gender equality where man and woman have equal rights*”¹⁸. There is a general obligation to respect, protect and promote human rights of women.

Similarly, the International Planned Parenthood Federation (IPPF) in its meeting in Manila in November, 1995, adopted a new Charter on *Sexual and Reproductive Rights* which is meant to promote and protect sexual and reproductive rights and freedom in political, economic and cultural aspect¹⁹.

Reproductive rights are expressively the human rights and are inalienable and inseparable from basic human rights such as right to food, shelter, health, sexuality,

¹⁶ www.reproductiverights.org International Conference on Human Rights in Teheran in 1968.

¹⁷ *Supranote 14* at pg 60.

¹⁸ *Supranote 12*.

¹⁹ Subash Chandra Singh “*Reproductive Rights, A part of Human Rights*”³ Supreme Court Cases Journal 13 (2002).

livelihood, education etc. The sexual and reproductive rights included under International Instruments are derived from universally recognized human rights instruments and have high ethical values.²⁰

The ability of women to control their own fertility is an essential criterion to enjoy all other rights and lays down the foundation for the equality between men and women.²¹ Reproductive Rights include various human rights recognized under International Instruments. These are as follows:-

- 1) Right to Health, Reproductive Health and Family Planning.
- 2) Right to decide the number and spacing of children.
- 3) Right to marry and found a family.
- 4) Right to be free from gender discrimination.
- 5) Right to be free from sexual assault and exploitation.
- 6) Right not to be subjected to torture or other cruel, inhuman or degrading treatment.
- 7) Right to life, liberty and security.
- 8) Right to privacy.
- 9) Right to modify customs that discriminate against women.
- 10) Right to enjoy scientific progress and to consent to experimentation.

1.3.1. Right to Health, Reproductive Health and Family Planning:

The human rights instrument provides right to health as a basic human right which includes reproductive right as well. The health is the core to the dignity of a person and the state is committed towards the health of the individuals as a fundamental right.²² It

²⁰ *Supranote 14.*

²¹ *Supranote 14 at pg. 59-60.*

²² Right to health has been included under Article 21 of the Indian Constitution.

is not possible to realize all other human rights if an individual cannot maintain his or her own health.

The reproductive health is a new concept in the area of International human rights law. The method of expressing it clearly is still going on. Now a days even government is showing its concern towards health, shifting its priority from demographic problem to concern about the needs of the people for their reproductive health such as- providing facilities for safe and affordable measures of family planning like contraceptive, maternal and child health care services etc. The concept of right to health is much wider than this. It means having social and economic condition to exercise choice in reproduction and reproductive health services.²³

The term 'reproductive health' was first time mentioned in an international document in Chapter VII of the 'International Conference on Population and Development' (ICPD) Programme of Action. After the Cairo Conference, the concept of reproductive health has been increasingly used in the international debate. It has again pointed out in the Beijing Declaration and Platform for Action.²⁴

However, reproductive health not only means fertility regulation and family planning, it means much more than that. It implies and incorporates an awareness of social and cultural context in which reproduction and child bearing is carried out, attainment of gender equality and emancipation of women. In other words, to address reproductive health issues, we must address the reproductive rights of women and men and the social and cultural environment that touches reproductive health ends.²⁵

The health policies of the government are mostly concerned with the population problem of a country and have always neglected the reproductive health care of women. Here, it is to be noted that women has a right to informed choice and consent in the health care facilities. It is important that women should be well informed of

²³ Maja Kirilova Eriksson, *Reproductive Freedom in the context of International Human Rights and Humanitarian Law* 170 (1st Edition 2000).

²⁴ *ibid* at pg.171.

²⁵ *ibid* at pg.174.

health services and they should understand the information imparted to them. They must have an informed consent in any medical procedure and they must be informed of its consequences too.²⁶

With the concept of reproductive health, the concept of family planning emerges automatically. The concept of family planning as basic human right is relatively recent in International scenario. The term was introduced after World War II, and it was first used in the United Nation Resolution adopted in 1965 by the United Nation Commission on the Status of Women. There it was stated that: “married couples should have access to all relevant educational information concerning family planning”. It was for the first time in United Nation Conference on Human Rights held in Teheran, 1968 that matters of procreation and family planning were specifically related to human rights was mentioned. Article 16 of the Proclamation adopted at this Conference provided that “parents have a basic right to determine freely and responsibly the number or spacing of their children. Thereafter, it has been mentioned in various human rights documents.”²⁷

1.3.2. Right to Decide the Number and Spacing of Children:

The World Population Conference in Bucharest in 1974 stated that: “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 couple’s right to decide the number or spacing of the children was approved in the International Conference on Population Development final document Beijing Declaration. Further, the Convention on Elimination of All Forms of Discrimination against Women (Article 16(1) (e)) creates an obligation on the state party to take all appropriate steps to guarantee that women have the same right as men to decide freely and responsibly on the number and spacing of their children and to have means to exercise this right.²⁸

²⁶ The Dictionary of Demography 172(Cristoper Wilson ed, 1985) as referred in Rrethinking Population Policies: A Reproductive Rights framework. www.reproductiverights.org by Ronald Prersant.

²⁷ Maja Kirilova Eriksson, *Reproductive Freedom in the context of International Human Rights and Humanitarian Law* 183 (1st Edition 2000).

²⁸ *ibid* at 184

The new age has given woman access to plan her pregnancy through various measures of family planning. But an estimated 350 million couples worldwide do not have access to family planning services they require. In many countries, access to contraception is prohibited by laws and policies and above all there is lack of concentration on the part of the government towards the protection of reproductive rights.²⁹

International Community has articulated the right to plan pregnancy as important human rights of women. They have right to determine freely and responsibly the number and spacing of their children. Worldwide there are number of cases of violations of women's rights involving coercion in the use of contraception.

International human rights instrument has always respected and protected independence in decision- making process. It provides for the freedom of the bodily integrity and health. If a pregnancy is unwanted, women must not be legally bound to carry it to term. There has been international acknowledgement of the right to decide freely and responsibly their family size. As decision one makes about one's body especially one's reproductive capacity laid in the domain of private decision- making.

The burden of bearing and rearing of children mostly lies on women's shoulder which affects their personal development and imposes inequitable workloads on them. The decision on number or spacing of children have direct impact on their physical and mental health, thus the right to decide on number or spacing of children must be entrusted within women's reproductive rights.

1.3.3. Right to Marry and Found a Family:

The origin of family formation may be either marriage or parenthood or both. International document guarantees right to marry and found a family to every individual.³⁰ The Human Rights Convention expresses its concern on early marriage

²⁹ International Conference on Human Rights in Teheran in 1968.

³⁰ Article 12, Convention on Elimination for all forms of Discrimination against Women, Article 6 (a)-(c) International Covenant on Civil and Political Rights.

and stated that the high maternal mortality rate may be the consequence of early marriage. The marriageable age of a girl and a boy has been fixed by a law mainly to avoid childbearing at early age as it may result in mental and physical health risk of both mother and child.³¹

Article 12 of the Women's Convention provides that "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". It means that men and women have right to marry and found a family and the state is under obligation to provide condition conducive to exercise this right. However, this right is subject to wider interpretation but till now, the Court has not been willing to accept that the right to found a family means right to found a family in the absence of a marriage.³²

The right to found a family implies the right to procreate. In the past few years, the new technological improvement has totally changed the face of reproductive rights by providing large arena for choice in reproduction. Some scholars have put forward an argument that the right to found a family embraces the right to have access to the medical technology in order to ensure procreation.³³

The essence of the right to marry is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter an association in circumstances where they cannot cohabit. However, there is no solution provided for those who are single, unmarried and homosexuals; how they will exercise right to found a family.³⁴

The biotechnology has totally impinges the concept of marriage and family which is the very basis of the social organization. Science has over-powered the nature which will surely open the way for disturbance in the society in future. The new reproductive technologies such as cloning, amniocentesis, IV F, surrogacy has raised many ethical

³¹ www.reproductiveright.org.

³² Durga Das Basu, *Human Rights in Constitutional Law* 435(1st Edition 1994).

³³ Article 28(2) of CEDAW

³⁴ *Supranote* 32 at pg.437.

and legal challenges before the society. The mysteries of heredity and procreation has merely made more difficult.

However, right to found a family is provided under Article 12 of the Women's Convention but for some couple the chance will be an empty one because of their incapacity to procreate. In such situation state has to provide either facilities for adoption or artificial technique to produce children. Recently, attention has been switched to artificial reproduction. Though, it cannot be said that Convention positively imposes obligation on a state for accessibility of those measures except why married person may not avail those facilities? Hence, there has been unbeatable debate going on between intellectuals regarding recognition of right to marry and to found a family.

1.3.4. Right to be Free from Gender Discrimination:

The United Nations Charter provides for the co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all human beings without distinction as to race, sex, language and religion. The United Nation is firmly committed to gender equality and its Charter is the first universal law-making treaty explicitly to mention the principle of equality between men and women.³⁵

The Women's Convention provides that the discrimination against women includes laws that have either the effect or the purpose of preventing women from exercising any of her human rights or fundamental freedom on a basis of equality with men. Right to reproductive freedom also extends to the legal protection against gender-based violence, such as marital rape, domestic violence, sexual harassment both at home and at work place etc.

The gender based- violence causes an effect on women's physical and mental health. It has been recognized as a major concern and a serious violation of human rights. According to the world report on Violence and Health (2002), out of 69 percent 10 percent of women are molested by their intimate partner in their lifetime. Other

³⁵ Maja Kisilova Erikson, *Reproductive Freedom in the context of International Human Rights and Humanitarian Law* 21 (1st Edition 2000).

population based studies have experienced some attempted and completed forced sex act by an intimate partner or ex-partner at some time in their lives.³⁶

Article 24 of the Convention on the Rights of Child provides rights of the children as well as gender rights of women. It provides that the pregnant women are entitled to appropriate pre-natal and post-natal health care during child birth.³⁷

It is evident that men and women are not in the same position with respect to procreation right. Does women's child-bearing function justify special treatment? However, the United Nation Commission on Human Rights in its Resolution 1995/85 reaffirmed that discrimination on the basis of sex is contrary to the Charter of the United Nation.³⁸

The Convention for Elimination of all Forms of Discrimination against Women (CEDAW) defines discrimination against women as "any discrimination, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field". The state party with the ratification of the Convention has the responsibility to take a series of measures in order to eliminate discrimination against women. Such measures include³⁹:-

- a) to incorporate the principle of equality of men and women in the legal system;
- b) to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;

³⁶ World report on Violence and Health 2002 "Intimate partner Violence" www.who.int

³⁷ United Nations Population Fund, "The State of world population 2000". Chapter 6: Women's rights are human rights. <http://www.unfpa.org>.

³⁸ *Supranote* 35 at pg. 65.

³⁹ Yamini Mishra "Unsafe Abortions and Women's Health" Oct 6 Economic and Political Weekly 3814-15 (2001).

- c) to establish such institutions to ensure the effective protection of women against discrimination; and
- e) to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

Despite several efforts by international instruments, there is still gender discrimination existed in the society. Thus, there is a need to take more constructive efforts by the government as well as by the individuals to have society free from gender discrimination.

1.3.5. Right to be Free from Sexual Assault and Exploitation:

Reproductive rights also include right to be free from sexual assault and exploitation. Here, a sexual assault and exploitation extends to both the public and private sphere such as – domestic violence, marital rape, sexual harassment at the workplace etc.

Though, there are certain laws under International and national community to curb these evils but still such sexual violence is prevalent almost in every society. A reproductive right means right to respect and protect one's own body. This cannot be achieved without guaranteeing right to be free from sexual assault and exploitation to every woman.

The existing human rights instruments never defined or address the sexual assault or exploitation or in other words violence against women clearly. This gap was especially existed because of the fact that there existed distinction between the abuse in the public sphere or private sphere. The private violence such as- domestic abuse, marital rape, and harmful traditional practices are not mentioned under international, national and regional laws.⁴⁰ The measures to protect women from sexual assault and exploitation require visible legal framework and effective enforcement machinery.

The Convention on Rights of Child (CRC), however, requires the state party to “protect the child from all forms of physical or mental violence, injury or abuse, neglect

⁴⁰ The Protocol on the Rights of Women in Africa, February 2006. www.reproductiverights.org

or negligent treatment, maltreatment or exploitation”. Similarly, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) Committee states that “the definition of discrimination includes gender based violence”. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.⁴¹

1.3.6. Right to Modify Custom that Discriminate Against Women:

Being part of the human rights, reproductive rights guarantees rights to modify custom that discriminate against women. It therefore, ensures women right to be free from harmful practices such as female circumcision and female genital mutilation etc. An effort has been made to eliminate harmful social and cultural practices that affect the dignity, respect and development of women.

In January 1994, International Conference on Population Development (ICPD) Programme of Action issued a Declaration to all the state members that women are entitled to bodily integrity which must ensure that there shall be no violence against women and harmful practices like female genital mutilation or female circumcision. Government should take measures to combat such practices and will be held responsible for such instances.⁴²

The Convention on Elimination for all forms of Discrimination against Women (CEDAW) requires the state parties to take all the necessary steps to eliminate social and cultural patterns and practices that are discriminatory to women. The Convention on Rights of Child (CRC) requires the state parties to take all possible measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. Since women are underrepresented in the judiciary and legal fraternity, there is a need to address such social and cultural practices that discriminate against women, thus, tradition ends where discrimination against women begins.⁴³

⁴¹ *Supranote 40.*

⁴² Subhash Chandra Singh “*Reproductive Rights as Human Rights: Issues and Challenges*” 31(1&2) Indian Socio-Legal Journal 59 (2005).

⁴³ The Protocol on the Rights of Women in Africa, February 2006. www.reproductiverights.org

In various International treaties, it has been encompasses that the state parties must take steps to modify the social and cultural practices that discriminate against women through public awareness, information, education and communication strategies, with the purpose to eliminate harmful traditional practices and all other practices based on the discriminatory roles of women.⁴⁴

1.3.7. Right to Life, Liberty and Security:

Right to life is the most important human rights without which no other human rights can be realized. The right to life and security includes right of everyone to bodily integrity which provides the right to make decisions concerning reproduction and to security in and control over their bodies. It provides women the freedom to take the decision whether to have sex or not, whether to carry child to term or not in case of pregnancy.⁴⁵

The right to life, liberty and security does not only mean physical integrity. It also means mental and psychological freedom and security to life. Right to choose hardly means anything when there is no sense of security among women.

It is provided that right to procreation and right to have control over reproductive organs are included in the broader concept of right to life. Every person including a girl has a right to marry and thereby to conceive a child. The right to life also includes that no woman's life should be put at risk by reason of pregnancy. Further, the right to liberty and security of the person recognizes that all persons must be free to enjoy and control their sexual and reproductive life and that no person should be subjected to forced pregnancy, sterilization or abortion.⁴⁶

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) Committee, the treaty monitoring body that monitors government

⁴⁴ *Supranote 43.*

⁴⁵ www.reproductiverights.org

⁴⁶ Manoj Sharma "Right to Life vis-à-vis Right to Abortion: An Analytical Study" 18 (3&4) Central India Law Quarterly 412 (2005).

compliance with Convention on the Elimination for all forms of Discrimination against Women has framed the issue of maternal mortality due to unsafe abortion as a violation of women's right to life.⁴⁷

The right to life is protected in many international instruments. But in the preview of life threatening risks that women take in their reproductive age, especially, cases acknowledging unsafe and unhygienic condition of abortion, right to life hardly appear to be meaningful.⁴⁸ The right to life means to establish such condition where women's life is not under threat by reason of pregnancy.

The International Convention on Civil and Political Rights also provides that every human being has inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life.⁴⁹

1.3.8. Right to Privacy:

The right to privacy means the right to be left alone. It provides that certain sphere of an individual's life remains free from state interference. It has been rightly stated in *Eistenstadt versus Baird*⁵⁰ by the United States Supreme Court that "*if the right to privacy means anything, it is the right of an individual married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether in the judiciary or in the legal fraternity*".

The right to privacy imposed the respect for private and family life which is recognized and protected under International Human Rights Instruments. It is immensely significant to incorporate reproductive rights into the right to privacy.

Instances, like lack of respect of confidentiality can prevent women from taking advice and treatment relating to their health and well being. It is necessary to protect

⁴⁷ The Protocol on the Rights of Women in Africa, February 2006. www.reproductiverights.org

⁴⁸ Safe and Legal Abortion is a human Right, 6 August 2004. Center for Reproductive Rights www.reproductive rights.org

⁴⁹ Prashanth S.J. "*Right to Life of Foetus*" AIR Journal 212 (2005).

⁵⁰ *Eistenstadt v. Baird*.

the privacy of women. In 1973 the Hon'ble Supreme Court of United State in its decision in *Roe v. Wade*⁵¹ recognized that a woman has the right to decide whether to continue with her pregnancy or not and was protected under the Constitutional provisions of individual autonomy and privacy. The choice of maternity is an essential element to recognize the attribute of private and family life.

Medical science has developed many novel techniques to help the couple who were disappointed by nature. With the help of infertility clinics, one can go for measure suitable to their situation for having child. However, it cannot be denied that these reproductive technologies have brought ethical and legal issues with it. One such issue is that of right to privacy of individual to use reproductive technologies for reproduction.

It is not easy to define the term "privacy". It simply means a right of an individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information. It is a basic human right and the reasonable expectation of every person. The right to privacy has been recognized in many countries. The Universal Declaration of Human Rights under Article 12 provides that.⁵²

"No one should be subjected to arbitrary interference with his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks".

Similarly, the European Convention for the Protection of Human Rights and Fundamental freedom protects the right to privacy under Article 8 of the Charter stated as follows:

"Everyone has the right to respect for his private and family life, his home and his correspondence. Also, there shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

⁵¹ *Roe v. Wade* (1973 USA)

⁵² Dr. George Joseph "*Artificial Reproductive Techniques- The New Horizon of The Right to Privacy and Right to Know*" 4:98 Journal of Indian Law Institute 102 (2006).

*well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.*⁵³

The right to privacy is essence in the foundation of an environment where women have reproductive autonomy. Reproductive autonomy will be meaningless where enabling conditions are absent. This includes, among other things, genetic information, genetic counseling, abortion, health services free from legal and cultural barriers. The subject of information and confidentiality is very important for recognizing the reproductive rights of women.⁵⁴

1.3.9. Right not to be Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment:

The above right is one of the few absolute rights under International Human Rights Instrument where no restriction is permitted to be imposed on. Traditionally, this right was implemented only to protect the persons in jail who could be treated in cruel way.⁵⁵

However, today in border sense, this right include right to protect both the dignity and the physical and mental integrity of the individual. This amplification is significant to women’s reproductive rights protection. It laid emphasis on the respect, protection and the fulfillment of the inherent dignity of women in relation to reproductive rights. The coercive practices in case of reproduction such as forced pregnancy, pregnancy resulting from rape etc., are extreme form of violation of reproductive rights of women. It forces a woman to be subjected to torture or other cruel or inhuman or degrading treatment.

1.3.10. Right to Enjoy Scientific Progress and to Consent to Experimentation:

Human Rights Instruments also provides for the right to enjoy scientific progress and to consent to experimentation which is one of the major concern of reproductive

⁵³ *Supranote 52* at pg 103.

⁵⁴ Subhash Chandra Singh “*Reproductive Rights as Human Rights: Issues and Challenges*” 31(1&2) Indian Socio-Legal Journal 68 (2005).

⁵⁵ International Covenant on Civil and Political Rights, Article 7.

rights. The scientific progress in reproductive technologies has made reproduction an easy venture. The quality and the status of foetus can be easily detected. Technologies, such as ultrasound, scan; amniocentesis and chronic villi biopsyscan help in detecting the genetic disorders and abnormalities. It can also be used to detect the sex of the foetus.

There are various reproductive technologies which helps couple to have baby in case of infertility of both or anyone of the couple. Techniques like invitro- fertilization, surrogacy, cloning etc have solved the problem of infertility of couple. Scientific techniques also help women to prevent unwanted pregnancies through the methods such as- sterilization, abortion, contraception etc. These scientific experiments and progress have become instruments in the hands of women to control their body or reproductive capacity. These progresses have given women sense of freedom to enjoy their reproductive capacity but there is also a fear of use of such technologies against women's rights and freedom.

The Universal Declaration on the Human Genome and Human Rights (UNESCO, 1997) provides that the practices which are contrary to the dignity of human being such as human cloning should not be permitted. Later on; in 1988, the European Convention on Human Rights and Biomedicine was amended to include ban on cloning.⁵⁶

The above discussed rights have clear implications on all aspects of women's reproductive rights which results into freedom of choice in matters of sexuality and reproduction. There is no doubt that the reproductive rights are human rights which are inalienable and inseparable from basic rights. The reproductive rights are directly derived from human rights instruments and thus are the part of human rights. However, it is also true that without breaking the barriers of cultural values and religious belief the making of reproductive rights as part of human rights is not possible.⁵⁷

⁵⁶ S.K. Verma "Cloning: Controversies and Law" 21(1-3) Indian Journal of Criminology and Criminalization 200 (2000)

⁵⁷ Dr. Subash Chandra Singh "Reproductive Rights, A part of Human Rights" 3 Supreme Court Cases Journal 14-15 (2002).

1.4. Women's Reproductive Health Needs and Health Care

The scripting of reproductive rights into international human rights instrument is a major gain. The effort to expand its range is still continuing. This constant effort towards recognition of reproductive rights has made the progress in feminist's movement. The constructive steps for emancipation of women from the human rights point of view has totally changed the face of woman's rights and made reproductive health of women an integrating part of women's life. The right to life, right to privacy, right to health etc, has been woven in the supple hands of women's rights perspective.⁵⁸

There has been neglect on the reproductive health and the consequences of this neglect have been unredersseible mainly for women. There is a necessity for a change in current health policies, programmes and laws in India. The health policies and programmes has to be shifted from demographic target to much wider aspect of health concerning reproductive health needs of women and the services they require for the purpose. Taking into consideration, the present socio-cultural restraint that women and adolescent girls are facing in acquiring health services, there is an urgent need for the government to take necessary steps.

There is health programme- such as National Family Welfare programme, National Family Health Survey etc. that has been launched for providing health care measures. But these programmes fail to focus on the health of women especially reproductive health. What are the inadequacies in women's reproductive health and what are the priorities for reshaping the health programmes to respond to the present reproductive health needs of women?

As reproductive health means that people have the capacity to reproduce and to regulate their fertility. It, moreover, implies that women have right to undergo pregnancy and child birth safely. It further, provides that in case of any gynecological or other disorder there has to be facility for the medical services. The state must provide

⁵⁸ Upendra Baxi "Gender and Reproductive Rights in India: Problems and Prospects for the New Millennium" October Kali's yug 23 (2000).

condition where every individual can enjoy sexual relations free from the fear of disease.⁵⁹

The fact that India's population has increased from 36 crores in 1951 to over 102 crores in 2001 has worried everyone including politicians, administrators, development planners, public health experts, demographers, social scientists, researchers and even common people. An uncontrollable population explosion has become the obstacle for country's progress. The government was so much occupied with solving the issue of population explosion that it has totally forgot the importance of good health of the mother for the good health of the infant.

Reproductive health suffers by a variety of reasons such as- poor health infrastructure, quality of the delivery system and its responsiveness to women's needs.⁶⁰ There are various social, economic, cultural and biological factors which are responsible for the slow growth and development of the reproductive rights in India which are underlined as follows:-

1.4.1. Gender Inequality

Gender is socially, economically and culturally imbibed in any society. In studying demographic figures, fertility, mortality, and migration, mostly focused on women being child bearers. No doubt, women have been the passive victim of patriarchal system where women have little choice in procreation. As reproduction exists in close interrelation with social, cultural and political context; without having condition for gender equality, it is not possible to have reproductive rights.⁶¹

There is no doubt that unequal sex ratio and higher female –infant and child mortality rate in large parts of our country reflect the general devaluation of women. A female literacy and enrolment rates lag far behind than that of males in most sates.

⁵⁹ Shireen J. Jejeeboy "Addressing women's reproductive Health Needs" March Economic and Political Weekly 475 (1997).

⁶⁰ *ibid*

⁶¹ Tulsi Patel, "Gender Relations, NRTs and Female Foeticide in India" in Tulsi Patel (ed.) *Sex-selective Abortion in India* 27-28 (2007).

Gross enrolment ratio suggest that even in the 1990s, only 88 percent of all girls aged 6 to 10 (compared to over 100 percent of all boys) are enrolled in school. Only about one in three girls aged 6-14 actually attended school, comparing to about three in five boys.⁶²

In fact, according to the 2001 Census there were 49 districts in the country, where for every 1000 male children aged 0-6 years, there were less than 850 female children. The neglect and discriminatory behaviour against girls leading to excess female mortality has been widely documented by several studies. The release of 2001 Census results has brought harsh reality and a need for serious concern on this area.⁶³

The majority of Indian women are economically active but there is lack of control over economic resources by them. No more than one in five women are reported to be working and no more than one in seven working women is in the organized sector. There are several government sponsored poverty alleviation schemes such as Integrated Rural Development Programme where women are underrepresented among the beneficiaries. For e.g., in 1987-88, against a target of 30 percent female beneficiaries predictable by the Integrated Rural Development Program, Rajasthan achieved as little as 15 percent. They are considered as unskilled, ignorant and pitiable debtors and hence incompetent⁶⁴.

The discrimination of women at household level has severally affected their ability to acquire good health and the facilities for healthy living. These disparities have brought lack of autonomy and control over their own bodies. Women lack decision-making power and freedom of choice in relation to their own health. Violence against women are rampant, rape and incest are all part of women's lives and yet invisible. They are the victim of age old usages and traditions which are the product of gender discrimination in patriarchal society.

⁶² *Supranote 59.*

⁶³ Leela Visaria, "Deficit of Girls in India: Can it be Attributed to Female Selective Abortion" in Tulsi Patel (ed.) *Sex-selective Abortion in India* 61 (2007).

⁶⁴ *Supranote 59.*

There is no denying that one of the reasons for poor reproductive health of Indian women is gender discrimination. The reasons of gender discrimination are complex and to point out the most important reasons is the poor status of women in the family, attitude of the society towards them, low level of education, cultural norms, limited access to resources, poor health and nutritional status etc.

1.4.2. Health Care Programmes:

The health care programme in India functions in the context of the Primary Health Care approach. The broad purposes of the policy of health care delivery system are to provide universal coverage and to enable the whole population to have access to the services. The health care programme made for women are-Maternal and Child Health Services, Reproductive and Child Health Project (RCH) and the Family Welfare Programme. These programmes aim at providing better reproductive services to women encouraging them institutional deliveries and spacing between children.⁶⁵

These programmes also take initiative towards health education. The health education components of these programmes is addressed by the Information, Education & Communication Activities (IEC). Through health education, the government aims to positively intervene in improving the status of women in the sphere of family planning and maternal and reproductive health. There has been an improvement in living conditions and medical facilities throughout the country.⁶⁶

However, despite all the programmes to improve the condition of women, there has been decline in the sex ratio which shows conditions not favourable for women. Health and family planning services have not been sensitised to the situation of women or to the problems they face in seeking or even expressing health care needs.

The main disadvantage of the family planning programme is that it concentrated on population and lacks health service delivery system and communication strategies.

⁶⁵ Reema Bhatia "Health Policy, Plan and Implementation" in Tulsi Patel (ed.) *Sex – selective Abortion in India 205* (2007).

⁶⁶ *Supranote 65* at pg.205-6.

There is a need for such a programme which focuses on what women want and need and the sensitive ways of addressing them.

India's maternal mortality ratio is estimated at 555 per 1, 00,000 live births; about 50 times higher than that of many industrialized nations and six times as high as that of neighbouring SriLanka⁶⁷. It is estimated that India accounted for 19 percent of all live births worldwide and as much as 27 percent of all maternal deaths.

1.4.3. Pre-natal and Post-natal Care:

Lack of care during pregnancy and childbirth including both the obstetric conditions and gynecological conditions, such as reproductive tract infections, cervical cell changes and genital prolapse are very much persistent. About 92 percent women suffer from gynecological disorders such as – genital tract infections, pelvic inflammatory diseases etc, out of these only 8 percent undergo for gynecological examination and treatment⁶⁸.

Unsafe motherhood is a reality in much of India, especially in its rural areas. Few women have access to antenatal care, high risk cases go undetected, anemia is acute during pregnancy, deliveries are conducted largely by untrained attendants in unhygienic conditions and knowledge of health and nutrition needs during pregnancy and the post-natal period are poorly understood. Maternal health facilities are unbalanced, focusing on immunization and provision of iron and folic acid, rather than on sustained care of women during pregnancy and after delivery.

In developing countries including India, many births take place outside modern health care facilities especially in rural areas. The modern health facilities are beyond the reach of grass root level that are in large size. As a consequence, most of these deliveries are attended by untrained traditional birth attendants.⁶⁹

⁶⁷ UNICEF 1991.

⁶⁸ www.reproductiverights.org

⁶⁹ Peter Olasupo Ogunjuyigbe "The Risks Involved in Pregnancy and Child Delivery: Strategies for Prevention in Nigeria" 17.no.3 IASSI Quarterly 125 (1999).

There is a need for adequate care to the women during pregnancy and after delivery as well. But in traditional families there is no excuse for women, they have to take care of domestic work at home and sometimes they may even go to the field to support the family financially.⁷⁰

The International instruments have provided that the state parties shall ensure that the women must be given right to health, including reproductive health. In order to promote and respect this right it must guarantee the following⁷¹:-

- a) the right to control fertility;
- b) the right to decide whether to have children, the number of children and the spacing of children;
- c) the right to choose any method of contraception;
- d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices;
- f) the right to have family planning education.

The state party must ensure health care programmes for women for the promotion and protection of the above given rights.

1.4.4. Medical Facilities:

In India, medical facilities are poorly equipped to deal with reproductive health problems. There are very few diagnostic centers and moreover, service providers are not well-trained and there is no availability of drugs to treat in case of detection of any abnormalities. There is also no means of sensitive family counseling relating to medical facilities like family planning for limiting the size of the family and for proper spacing of children.

⁷⁰ *Supranote 69.*

⁷¹ www.reproductiverights.org

There is no access to safe abortion which is a part of reproductive health strategy. Despite the fact that abortion has been made legal, there is limited knowledge in regard to access to the facility and above all, high price for good quality has kept safe abortion beyond the reach of poor women.

Another problem is that by sophisticated prenatal diagnostic technique there is increase of abortion of female foetuses. As a result, there have been unsafe abortions and repeat abortions. The complications resulting from such unsafe abortion cost a heavy price on women's life and, thus, constitute a major source of mortality and morbidity and thus cause female foeticide.

The illegal practice of sex determination tests leading to female foeticide is common in almost all the parts of a country. There is mushroomed growth of such clinics. The fact that an ultrasound machine is registered as required by law does not guarantee that it is not misused. There is now a trend of eliminating daughter in mother's womb after determining it through various tests.⁷²

However, over 10 percent of all maternal death is due to abortion. The safe abortion services are available only in urban areas, since registered practitioners are rarely available in rural areas. There is a need to pay more attention in providing safe and affordable abortion services as a part of primary health care.⁷³

One more underlying factor in regard to the reproductive health facility is treatment for infertility (of both men and women). There are various reasons for infertility in women such as women's poor health and malnutrition, repeated miscarriage and foetal wastage, unhygienic obstetric and abortion procedures. Women's infertility can have serious consequences for her family and herself. Though, there are measures to cure infertility of women through reproductive technologies, but

⁷² Ashish Bose, Female Foeticide in Tulsi Patel (ed.) *Sex Selective Abortion in India* 83 (2007).

⁷³ Shireen J. Jejeebhoy "Reproductive Health Information in India- What are the gaps?" October Economic and Political Weekly 3076 (1999).

these techniques are beyond the reach of common people. Besides, there is no proper channel to provide information and counseling to the infertile couples.⁷⁴

1.4.5. Reproductive Health of Adolescents:

There has been a huge gap of legislative concern on reproductive health of adolescents. It is a known fact that adolescents are highly sexually active which sometimes results into pregnancy at a tender age of her life. They are most vulnerable and are neglected once they become pregnant.

It has been found that marriage and child bearing continue to be early and universal despite the banning of child marriage by the Government. At the family level too, girls are highly vulnerable, son preference is pervasive, resulting in gender disparities in health care, food intake, school attendance and labour contribution of children from an early age.⁷⁵

The complications of pregnancy, pre-natal and neo-natal mortality and low birth weight are much higher among adolescent women than among older women. Early marriage not only causes early child bearing but it is also responsible for the decline in reproductive health. As adolescent can hardly have control over their own lives and ability to say in marriage choices or reproductive choices.

Another important issue is that though unmarried adolescents are also sexually active but it is rarely considered a concern in the Indian context. There has been lack of awareness among young people regarding reproductive health and sexual behaviour.

1.4.6. Population Explosion:

According to some estimates, at the period 1991-2001 the proportion of population growth attributable to population momentum was almost 70 percent, while unwanted fertility contributed about 25 percent; only 5 to 6 percent of the population growth was

⁷⁴ *Supranote 73 at pg.3077.*

⁷⁵ *Supranote 73.*

attributed to couples desiring to have more children. This pattern will continue in future also because of the large number of young people.⁷⁶

In India, Apex committee was created known as the Family Planning Research and Programme Committee which sat for its first meeting in July 1953 in Bombay. The Committee took comprehensive view of family planning and suggested that family planning must be defined in a broad sense including not only birth control or the spacing of children, but in a holistic manner. The committee made many recommendations, including that family planning centers be opened around the country for sex education, marriage counseling, marriage hygiene, planned parenthood and infertility issues. Keeping all these issues in view, the Committee gave its recommendations in the year 1953. But unfortunately, such programme has never been materialized and implemented in India.⁷⁷

In brief, the dimension of women's poor reproductive health is behavioral concerns which include lack of autonomy and unequal gender relations. The limitation women face in attaining good reproductive health is because of lack of decision-making power, health care programme, pre-natal and post-natal care, medical facilities and socio – cultural barriers for seeking attention on health problems which are required to be added into the policy- making.

1.5. Expanding Boundaries of Reproductive Rights:

The reproductive rights of women is increasingly used by women for their struggle for self determination and has become an important concept in the women's movement, particularly, since from the World Conference of the UN Decade for Women held in Nairobi 1985. The reproductive rights of women implies-(a) the right of women to choose whether to have children or not, and the right to decide on the number of

⁷⁶ Almas Ali "Population: Myths and Facts" in Shruti Pandey, Abhijit Das, Shravanti Reddy, Binamrata Rani (eds.) *Coercion versus Empowerment* 6 (2006).

⁷⁷ *ibid*

children they want, when and with whom;(b)freedom to choose the means and methods to exercise their choice regarding fertility management, and(c)access to good information on means and methods.⁷⁸

This right is directly related to the women's autonomy and freedom. It is the extension of the principle of self determination regarding one's body which provides that women must be able to decide about their own bodies and reproductive capacities. The social structure of the society has placed women in such position where women generally take care of the children thus women must have choice regarding reproduction. They should be the one to decide about the measures to prevent pregnancy and the time when they want to be pregnant. But the fact is that they hardly have their say in relation to reproduction.⁷⁹

In recent years, there has been a rapid growth of medical technologies which have opened the way for intervention into the reproduction. The technologies which facilitate such intervention and manipulate the reproductive functions are artificial insemination, in vitro fertilization pre-natal diagnosis, embryo transfer, cloning etc. These technologies offers benefits to the couples but however, its side effects are also not unknown. These technologies are prone to misuses and its impact on social relation is a disturbing element.⁸⁰

There has been a debate on how far these technologies enhance women's right or whether it has turn out to be against women's autonomy? There is no denying that these reproductive technologies strongly affect women. At this junction, it is important to analyse whether the reproductive technologies are a source of women' empowerment or their weaknesses.

⁷⁸ Jyotsna Agnihotri Gupta, *New Reproductive Technologies, Women's Health and Autonomy* 22-26 (1st Edition 2000).

⁷⁹ *ibid*

⁸⁰ Asim A. Khan Sherwani "*Illegal abortions and Women's reproductive Health*" 3 Supreme Court Cases Journal 116 (1997).

Even so, these technologies have been commercially published through advertisement in newspapers, in trains, buses, on walls T.V. etc. But these techniques have exposed women to higher risk of reproductive health issues. The pre-natal diagnostic techniques involve the use of technologies, such as- ultra sonography, amniocentesis etc. These techniques help to detect foetal abnormalities and also facilitate the detection of sex of foetus which may cause abortion of foetus especially female foetus.⁸¹

Another important aspect is that there is great difference between women who are affluent and can go for the services of qualified medical practitioners with handsome perk and the poor women with marginalized income who do not have financial assistance to do so. Consequently, in case of abortion, poor section of the community hardly has any chance of safe and hygienic abortion.

It is no wrong to say that in the name of 'choice' the position of women is likely to be devalued as women hardly have the freedom to take decision in case of abortion or use of any other reproductive technique. In most of the families, decision as to the bearing of a child will be taken by the male member or husband. So, new reproductive technique rather work as an instrument of suppression to the feminism and further strengthened the control of man over reproductive rights of women in future.

Reproductive rights have been a controversial issue on the face of the recent movement of liberalization of women. There has been a need for a sound atmosphere for pregnant woman to take decision to carry her pregnancy or not. The dilemma touches the most sensitive aspects of human life as reproduction involves both husband and wife and the expectation of other family members as well. It stirs strong emotions and brings fundamental changes in the day to day life⁸². But at the same time; it is the woman who suffers the most so it is a woman who has to be mentally and physically prepared to have a child.

⁸¹ Shireen J. Jejeebhoy "Reproductive Health Information in India- What are the gaps?" October Economic and Political Weekly 3078-3081 (1999).

⁸² Medani Abdul Rabman Tageldin "Right to Privacy and Abortion- A comparative study of Islamic and Western Jurisprudence" xii Alligarh law Journal 133 (1997).

The social attitude has always impairs women's reproductive decision and the right to protect their lives and health. The recognition of reproductive rights by law is an essential starting point from which women may begin to exercise all other human rights.

The major question is does state ensure women the freedom to enjoy reproductive rights? Do women enjoy the freedom to plan their own fertility? What are the reproductive health measures? Whether those health measures are available in India or not? However, the first and foremost necessity is to create an environment where women should be treated equally and they will have their choice in all the matters concerning them. There is a need for the change in the attitude and conservative thinking of the society.

The Medical termination of Pregnancy Act (MTP), 1971 has legalized abortion in India. The Act provides for termination of pregnancy (under certain conditions) where the pregnancy would involve risk to the life of the pregnant women or to her mental and physical health or where there are chances that if child were born it would suffer from such physical or mental abnormalities as to be handicapped.⁸³ But, the saddest truth is that the safe and hygienic abortion is hardly available in most part of India, especially in remotest area.

Various studies show that abortion is the major cause of maternal mortality and the damage done to women's health is unrepairable. It was found that termination of first pregnancy, pregnancy at later ages, at short interval and repeat abortion has caused health hazards to the women. There has been increase in the number of abortions and mostly women themselves are interested to limit the number of pregnancies and they will be ready to undergo abortion even though risking their health and lives.⁸⁴

⁸³ Subhash Chandra Singh "*Right to Abortion: A new Agenda*" AIR Journal 129 (1997).

⁸⁴ Malini Karkal "*Family Planning and Reproductive Health*" 2 April The Indian Journal of Social Work 299 (1993).

Although, the male dominated society does not allow them to act according to their desire when it comes to the exercising of reproductive rights. Therefore, how much women is involved in the decision- making process is an essential feature of expanding horizon of reproductive rights.⁸⁵

The maternal mortality rate is very high in India comparing with many countries in the world. The official figure shows only data on legal abortions. But there is no denial that there are large numbers of illegal abortions. The death caused by such abortion on the health of women has not been taken seriously by the administration. It is so evident that women are undergoing abortions to terminate unwanted pregnancies and there is no adequate facility for safe abortion because of which the health of women is endangered.

In India, there is Maternal Benefit Act, (1961) which provides for the maternity leave and job protection during maternity which is an important step to protect the reproductive roles of women. But in an unorganized sector, women are forced to avail of maternity leave without pay.

In a patriarchal society, women are not treated as equal partners in marriage and family life. Their status is restricted within the primary roles of mother, wife and daughter and their other role in the society is made secondary. The health services for women are only Maternal and Child Health services (MCH). These conditions largely prejudice the status of women in society thereby causing restrictions on their reproductive freedom.

The family planning services targets women to go through family planning to limit the size of the family.⁸⁶ However, the risk of life and health which women undergo through these methods was never attended too. The most of the death of women is

⁸⁵ *Supranote 84 at pg 304.*

⁸⁶ K G Santhya, Shireen J Jejeebhoy "Sexual and Reproductive Health Needs of Married Adolescent Girls" Oct.11 Economic and Political Weekly 4370-4377 (2003).

related to the general health of women, the ante-natal and post-natal care that she receives. These are clear indications of the denial of reproductive rights of women.⁸⁷

Abortion has been used as a spacing method by women in cases where contraception fails or conception takes place by accident. Sometimes, there may be situation where even unmarried women undergo abortion as a result of rape or sometimes they involve in sexual activities which resulted into pregnancy and to save themselves from social stigma of being unmarried mother they rather prefer to go for abortion.

Another weak line of reproductive right is the son preference in the society, the social condition of society or family forced women to undergo abortion as their lives are put at stake if they do not produce son. It is also true that unwanted girls run the risk of severe ill- treatment at their natal homes, causing them emotional and mental distress.⁸⁸

The son preference behaviour lead couples approach for sex determination tests and opt for sex selective abortion if it happens to be female foetus. Women also signify that when they already have a daughter, and when they become pregnant again, there was always some pressure from the elders in the family that the next child should be a boy.⁸⁹

Though, Pre-Natal Diagnostic Technique (PNDT) Act is there to prohibit sex determination tests but so far it is not succeeded in dissuading couples from seeking these tests or preventing the medical practitioner from performing them. So, on the one hand there is strong son preference, on the other hand, the well being and the status of girl is so uncertain once they got married, that couples avoid having girl child at any cost.⁹⁰

⁸⁷ Sunita Bandewar "Abortion Services and Providers 'Perceptions' Gender Discrimination" May Economic and Political Weekly 2076 (2003).

⁸⁸ *Supranote* 87 at pg. 2077

⁸⁹ Leela Visaria "Deficit of Girls in India in Tulsi Patel" (ed.) *Sex Selective Abortion in India* 73-74 (2007).

⁹⁰ *Suypranote* 89.

Though, the Medical Termination of Pregnancy, (MTP) Act has permitted abortion but it does not recognize abortion as women's rights. Abortion is one of the important means to control one's own body and thus women who shoulder the responsibility of child bearing and rearing should have right to decide whether she is ready to have a child or not. Apart from this, new trend arises as regards women's career aspirations, their entry in the workforce and the responsibilities arising out of that were also seen as a reason for women wanted to have right to abortion as reproductive rights.

The reproductive rights ensure that a pregnant woman should not become the prisoner of a foetus which has no meaning for her since she has not accepted it. The majority of women believe that it is up to her to make the decision about bringing a child into the world or not⁹¹. There is a lacuna in the legal framework to answer the questions raised by the new reproductive technologies with the changing horizon of woman's role in her reproductive capacity.

The reproductive health is enormously connected with the contraceptive behaviour and the quality of contraceptive used by women. More than two in five couples in the reproductive ages currently use methods of contraception. The dependable with programme priorities shows that couple largely ignored non-terminal female method and especially male methods, two out of three contraception couples are protected by female sterilization, and almost nine out of ten by a female method.⁹²

The huge emphasis on terminal contraception has resulted into young and low parity women being unprotected from repeated and closely spaced pregnancies, only 16 percent of women below 30 years practice any form of contraception, comparing to 55 percent of all women aged to 30 to 44 years.⁹³

⁹¹ Shakeel Ahmad "*Freedom of Womb, a Human Rights*" 1 Supreme Court Cases Journal 43 (1996).

⁹² Shireen J. Jejeebhoy "*Reproductive Health Information in India- What are the gaps?*" October Economic and Political Weekly 3075 (1999).

⁹³ *ibid*

Here, the main issue to be pointed out is whether the contraceptive behaviour is governing by informed consent or not? Very few women are fully informed of the methods which they choose and their side effects. These issues have never been addressed in any legal documents relating to reproductive health of women. There has been an obstacle women faces while exercising their choice in access to, and ability to take decision regarding reproductive health care, whether relating to pregnancy, childbirth, contraception or abortion.

Over the few years, the concept of women's health has been engrossed with the reproductive health of women. The reason for slow progress in this area is women's own silence and their priorities. Women's health problems and the social constraint on women's lives left very less opportunity for women to express their needs especially health care needs.⁹⁴

The health of women is not of any concern to anyone, including women themselves. There is one aspect of women's health that is important and that is her son bearing. Other aspects of women's health are invisible. If she gives birth to a daughter than she will hardly get any attention or care from the family. Physically and mentally she can rest only after she bears a son.⁹⁵

In such a situation, the reproductive illness is confined to the medical domain of infection, sexual or reproductive processes. At times, causes of reproductive illness are not just cured through medical treatment but require psychological treatment or counseling also as it leaves women with life long scar. There is still no means of awareness programme for the people as there is an inadequacy of knowledge in this area.

The couple sometimes takes protection measures where they adopt female sterilization. The sterilization result in ill health or the acceptance of sterilization may

⁹⁴ Imrana Qadeer "*Reproductive Health- A Public Health Perspective*" October 10 Economic and Political Weekly 2675(1998).

⁹⁵ Reema Bhatia "Health Policy, Plan and Implementation" in Tulsi Patel (ed.) *Sex – selective Abortion in India* 218 (2007).

be forced. Sometimes there are chances of failure of sterilization also; in such cases the burden of unwanted baby is questionable. A permanent method of family planning may be desirable from the perspective of family size limitation. It could be the only option available for avoiding unwanted pregnancy. High level of sterilization could be indicative of low quality of services with respect to other methods⁹⁶.

However, the advancement in science and technology has sharpened some of the old issues but has forced us to face new ones. A biological advancement has made it possible to take decision about the kinds of people who are to be born. Here, antenatal test has made it possible to detect the foetus in advance.⁹⁷ Perhaps, in the absence of decision making power of women these facilities are useless.

The medical science has made it possible to determine the genetic defects in advance. Through, prenatal diagnosis test, it is possible to detect the genetic or developmental abnormalities in the foetus. If the test reveals severe malformation or gross malfunctioning in the foetus, abortion is considered. The methods include- ultrasound scanning, analysis of foetus cells obtained either by amniocentesis or at an earlier stage of pregnancy by chorionic villi sampling, a maternal blood tests to measure the level of alpha fetoprotein (which is abnormally high or low in certain congenital conditions) and foetoscopy in which a sample of foetus blood is examined for abnormal cells.⁹⁸

Today with in vitro fertilization, there is the possibility of transferring to the womb 'healthy' embryo rather than others. The childless couple with the problem of infertility can have baby with the virtue of reproductive technology. This advancement in reproduction has taken reproductive rights to a different horizon. Though, these new techniques have raised many socio- legal and ethical issues still it has also relieved the infertile couples who could have face the curse of incomplete married or family life.

⁹⁶ Mala Ramanathan "*Reproductive Health Index*" December Economic and Political Weekly 3104 (1998).

⁹⁷ Dr Subash Chandra Singh "*Genetic Screening and Human Rights, The case of Engenics*" AIR Journal 286 (2003).

⁹⁸ *ibid.*

It is not uncommon to have off springs by hiring in-vitro or donor who is unrelated to woman. It is also not unusual to hire woman who contribute the egg or carry the foetus for gestational nine months and give birth to the child, though she may not have legal connection with either the father or mother but who offers to be a paid volunteer for such service. There is likelihood of commercialization of reproductive capacity like donation of egg or renting of womb is not uncommon in the society. This will mostly affect the grass root level woman as they may fall for such business to run their livelihood. They may be influenced by the elite class people who may offer huge amount of money for their services.

A single woman can have her own biological child with the use of method such as artificial insemination. A single woman who has a desire to reproduce but does not wish to have any sexual involvement with, or a long term commitment to a male partner, is provided an alternative solution through various techniques of reproduction. The legal status of such a single unmarried mother and her acceptance in society has been the serious question that has been knocking at the door of the judiciary.

There are chances of encouraging of non traditional form of family such as lesbian or homosexuals' family as new reproductive technology helps such couple to have a child and complete their family. Such situation may give rise to many social and ethical questions.

Nature has embibed women with the blessing to give birth to a new life. But, it is high time to change this belief and considered children as gift of god since children can be the gift of science also. Medical science has developed many ways to satisfy the parents who were disappointed by nature. The last two decade has witnessed a rapid increase in the number of technologies that assist reproduction increasing the chances of conception and carrying the pregnancy to term. Now, maternal health has to be recognized as a crucial area of concern.

The reproductive right is about having full and complete autonomy over one's body and there can be no second thought on that. Many times, the woman might become pregnant as a result of rape. She may not be in such economic condition where she can

take the responsibility to bring up the child and also that she may not be prepared for motherhood. In such situation, if she want to terminate her pregnancy than there has to be access to all such facilities which is required for doing so.⁹⁹

The society has witnessed a rapid progress in reproductive technologies which helps in conception and delivery of a child. The “Assisted reproductive technologies” has become household term, today. The advancement of such technologies has also influenced the way in which society views pregnancy, reproduction and motherhood.¹⁰⁰

It has been now understood that women’s empowerment is critical to human development. It is also necessary to improve people’s access to quality health care, in particular, the need for essential and emergency obstetric care for women. Programmes that make contraceptives available to all the people should be enlarged and expanded, and community based health initiatives should be revitalized.¹⁰¹

Thus, the reproductive rights have essential value and have elevated not only the level of reproduction but the value of women’s life as well. Today, the new reproductive technology has delineated the boundaries of reproductive rights of women. There are legal concerns surrounding the uses of new reproductive technologies and its impact in the society. The upcoming reproductive technology has redefined reproduction and placed before us new challenges. The absence of legal framework to suit the new changes brought by the reproductive technology has been the fundamental issue before the law makers.

⁹⁹ Ashok K. Jain, *The Saga of Female Foeticide in India* 56 (1st Edition 2006).

¹⁰⁰ Sama Team “*Assisted Reproductive Technologies in India: Implications for Women*” June Economic and Political Weekly 2184 (2007).

¹⁰¹ Almas Ali “Population:Myths and Facts” in Shruti Pandey, Abhijit Das, Shravanti Reddy, Binamasta Rani (eds.)*Coercion versus Empowerment* 76(2006).

1.6. Conclusion

There is however, no denial that the institution of family is as old as humankind. The human civilization developed because of the concept of family. Earlier, there was large family unit as men and women have no idea of family planning. But over the centuries, social, cultural and economic pattern has changed all over the world. People became conscious about the quality of life they are living. This has led to the international and national concern about the reproductive health especially of women and has led to reproductive rights as integral part of human rights. Today, government propagated for the family planning programmes so as to raise the quality of life by raising standard of living.

There has been development of various reproductive technologies also. The new outlook towards reproductive process of women and the advancement of reproductive technologies has made it advent to study the real life situation and its impact on women. It is of paramount importance that these technologies should be used for the betterment of women and thus used as an instrument for the emancipation of women. Women life revolves around the reproduction and they can have their autonomy in life only when their reproductive rights are guaranteed through legal framework.

In the society where women live under a constant fear of being sexually molested both within or outside the family, where the evil of dowry still prevalent despite the dowry prohibition Act, where daughters or daughters in law are thrown out of the house for giving birth to a girl child, where there are no social and economic security for women, where there are no emotional, financial and cultural security for them, reproductive rights can be helpful tool for them to gain self respect and status in the society.

Traditionally, women were always considered as a weaker sex everywhere. Today, there has been a steady growth in the status of women and their rights. There is enactment of various laws and policies for the empowerment of women or perhaps to improve the condition of women in fact. There are gamuts of laws for the protection of

their interests, what is required is the honest intention to serve for the purpose and the serious enforcement of the existing laws. Though, international instruments, national instruments including population planning policies, judicial pronouncements, mass media and global human rights activism do enable reproductive rights but not always in the manner or form that empower women. The need of the hour today is to ensure protection and promotion of reproductive rights of women to a new dimension.