
CONSTITUTIONAL AND CRIMINAL PERSPECTIVES OF WOMEN'S REPRODUCTIVE RIGHTS

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ABSTRACT

The idea of having rights and fighting for them makes us hopeful that rights exist, to provide guarantee and spread awareness about these rights. Rights are provided in all forms to all the people, there are also sometimes special rights to certain people in the group. Women comes under this domain, all around the world women are controlled by male autocrats which gives women no liberty and freedom. Indian Constitution emphasizes on the issue to protect against discrimination and make special provisions for women. These steps to protect women against different abuse against women in physical and sexual form. But still these acts by men against women takes away the freedom of the women over their body and particularly over their reproductive right of women. These rights just not only focus on women having control over their parts but also about the health care, family planning, privacy of her body. This debate is not only restricted to the above but also expands to the question of religious and community's approach, the crime conducted against women which directly infringe their right of reproductivity. And another question that we must answer is that how crime against women can infringe right to reproductivity. In this paper, I would like to answer these questions within two parts. In, first part deal with Constitutional aspect and second part of it deal which this issue would explain how sexual crime against women deteriorates her right over reproductive parts.

INTRODUCTION

The idea of having rights and fighting for them makes us hopeful that rights exist, to provide guarantee and spread awareness about these rights¹. Rights are provided in all forms to all the people, there are also sometimes special rights to certain people in the group. Women comes under this domain, all around the world women are controlled by male autocrats which gives women no liberty and freedom. But as developing and becoming liberal there has been a development of rights for women. This problem was recognized at the international level 1993 and to make sure that such acts against women could be reduced for which United Nations general assembly passed a Convention on the Elimination of All Forms of Discrimination against Women² which would help in making development for women in all different aspects of the society. This convention was adopted by most countries around the world. India also adopted different measures to protect the rights of women.

Article 15 of the Indian Constitution emphasizes on the issue to protect against discrimination and make special provisions for women. These steps to protect women against different abuse against women in physical and sexual form. But still these acts by men against women takes away the freedom of the women over their body and particularly over their reproductive right of women³. These rights just not only focus on women having control over their parts but also about health care, family planning, privacy of her body. This debate is not only restricted to the above but also expands to the question of religious and community's approach, the crime conducted against women which directly infringe their right of reproductivity. And another question that we must answer is how crime against women can infringe right to reproductivity.

CONSTITUTIONAL PERSPECTIVE ON REPRODUCTIVE RIGHTS FOR WOMEN

“Reproductive rights are about women's ability to control what happens to their bodies and their persons through legal and ethical principles which protect and enhance their ability to make and implement decisions about their reproduction⁴” These rights are observed and accepted by the United Nations in 1994 in United Nations International Conference on

¹ Moodley A, “Defining Reproductive Rights” <<https://www.jstor.org/stable/4065965>> accessed May 2, 2022

² Nations U, “Declaration on the Elimination of Violence Against Women” (OHCHR2010) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women>> accessed May 10, 2022

³ Kapoor, Varun and Dhingra, Kanika, Sexual Harassment Against Women in India (February 2, 2014). OIDA International Journal of Sustainable Development, Vol. 06, No. 10, pp. 85-92, 2013, Available at SSRN: <https://ssrn.com/abstract=2389784>

⁴ Moodley A, “Defining Reproductive Rights” <<https://www.jstor.org/stable/4065965>> accessed May 2, 2022

Population and Development (UNPIN 1994). These rights provide people to have power to access to use of contraception, rights to have power take abortion, right in having decision making power to bear a child (including their spouses), to prevent from harmful practices against women's reproductive parts and make autonomy over her body.

Development of reproductive rights for women took after the landmark judgement of US Supreme Court in the case of *Roe vs Wade*⁵ where the court held that "right to privacy" that protects a pregnant woman's choice...., this right is balanced against the government's interests in protecting women's health and protecting "the potentiality of human life." This judgment made reproductive rights for women acceptable in the society.

In India Article 21 of Indian Constitution gauntness and protects these rights by providing 'personal liberty' to every citizen. Supreme Court of India has expanded the scope of this article, which gives freedom to people to take reproductive choices and which are taken with the scope of privacy of an individual. In landmark judgement *K. S Puttaswamy vs Union of India* it held by the Supreme Court that Right to Privacy is an inalienable right which can't be declined. These rights are observed by courts. It also expanded the scope of women's right to have proper reproductive choices as a part of personal liberty under Article 21 of the Indian Constitution.

The bench also reiterated the position adopted by a three-judge bench in *Suchita Srivastava v Chandigarh Administration* (2009), which held that reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children; and that these rights form part of a woman's right to privacy, dignity, and bodily integrity⁶.

SEXUAL CRIMES AGAINST WOMEN

Crime against women can be defined in various forms and types. Violence is one of the types of crime that male autocrats make up against women in India. As per the World Health Organization Violence is: "*The intentional use of physical force or power, threatened or actual... that results in or has a high likelihood of resulting in injury, death, psychological*

⁵ 410 U.S. 113

⁶ Ghosh A and Khaitan N, "A Womb of One's Own: Privacy and Reproductive Rights" (2017) 52 *Economic and Political Weekly*

harm, maldevelopment or deprivation.” Violence can further be divided into 2 forms. One is physical violence, which consists the use of ‘force’, ‘aggression’, and ‘coercion’. Here is “violence is to be recognised as human phenomenon which comprises an act of violence from the individual to the women on something that she does not want to give of her own free will and which causes her either physical injury or emotional trauma or both⁷.” Another form of the violence is sexual violence where crime makes up of forced sexual act which disharmonies the dignity of women by outraging her modesty. Most of sexual crime against women are done by intimate male partners as domestic sexual violence or in form forceful sexual assault against women. Other forms of sexual assault can be as sexual violence, human trafficking or prostitution. As per Global study conducted by different health, medical, women and legal organisation it has seen that –

- There are between 10% and 69% of women which are physically abused by their intimate partner.
- There is around 6% and 59% of women who had faced forces sexual activity by their intimate partner.
- Around 1% and 28% of women has faced physical abuse by their intimate partner.
- And about 7% and 48% of adolescent girls have reported to have their experienced their first sexual intercourse to be forced⁸.

Sexual crime in India is also increasing at a rapid rate, rape alone constitute of 12% of the crime against women⁹. As per the data of National Crime Records Bureau in 2018 there were 3,78,236 number of cases of out of which 33,356 cases only constituted of rape¹⁰. Indian Penal Code has defined has various sexual crime against women these constitute of Rape, Sexual harassment, Outraging women modesty. Let’s try understand some of the crimes that constitute against the women in India.

1. Molestation–Sexual abuse or sexual assault against women by a male with force is referred as molestation. Molestation is sexual exploitation of women, minor girl or any child by an adult by various ways of sexual gratification it can in a through act of fondling, mutual masturbation, sodomy by showing pornography and other act which take one person’s modesty

⁷ <https://ijcst.journals.yorku.ca/index.php/ijcst/article/download/23401/21601>

⁹ Bandyopadhyay S, “A Closer Look at Statistics on Sexual Violence in India” (*The Wire* May 8, 2018) <<https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>> accessed May 10, 2022

¹⁰ “A Closer Look at Statistics on Sexual Violence in India” (*The Wire* September 30, 2020) <<https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>> accessed May 8, 2022

and dignity. One more form of molestation which takes place in the Indian society is within a marriage. This act is referred as Spousal Sexual Abuse, in this act of molestation husband physically and sexually abuses the wife. These acts cause a lot of traumas and emotional damage to the victim and with spousal sexual abuse, women also suffer with the act of domestic violence, although there are not separate acts which cover molestation.

However, section 354 of Indian Penal Code, 1860 which states that— ***“Assault or criminal force to woman with intent to outrage her modesty — Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, I [shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine].”***

This Penal provision explains the assault the punishment for the act of molestation for outraging modesty of women. In 2013 this section was amended by Criminal Law (Amendment) Act 2013 which increased the punishment for the molestation from two years to five years, this was done to ensure and safeguard women from inhuman acts done to her which caused her trauma, emotion and psychological damage. And the other major is to protect and develop women’s rights in the country. Although there are not a lot of cases regarding molestation but in a recent judgment by Supreme Court with ***Attorney General of India vs Satish and Anr***¹¹ it held by the hon’ble court that *“intent of doing sexual assault is not done via direct Skin-to-Skin but also whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, would be committing an offence of “sexual assault”. Similarly, whoever does any other act with sexual intent, which involves physical contact without penetration, would also be committing the offence of “sexual assault”.*

2. Rape

There was an average of 87 rape daily in India, India constitutes to in higher ranks in case of sexual crime against women. In 2018 country recorded around 3,78,236 cases crime against women. And as per NCRB in 2019 alone there were around 32,033 cases of rape in country which constituted around 7.3% of rape cases in the country. In 2018, 33,356 rapes were recorded across the country, up from 32,559 in 2017, according to the data from corresponding years¹², these cases are which are reported, there lakhs of number cases which goes unreported.

¹¹ CRIMINAL APPEAL NO. 1410 OF 2021 (SPECIAL LEAVE PETITION (CRL) NO. 925 OF 2021)

¹² “A Closer Look at Statistics on Sexual Violence in India” (*The Wire* September 30, 2020) <<https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>> accessed May 8, 2022

Rape is the one most heinous crime which is conducted against women, in the case of *State of Punjab v. Gurmit Singh*¹³ it was held by the hon 'able court that “Of late, crime against women in general and rape in particular is on the increase... Rape is not merely a physical assault. It is often destructive of the whole personality of his victim. A murder destroys the physical body of the victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape.”

Indian Penal Code defines rape in section 375 which goes as –

375. Rape¹⁴.—A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First.—Against her will.

Secondly. —Without her consent.

Thirdly. —With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. —With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. —With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

¹³ (1996) 2 SCC 384: 1996 SCC (Cri) 316

¹⁴ Section 375 of Indian Penal Code 1860

Sixthly. —With or without her consent, when she is under eighteen years of age. Seventhly. — When she is unable to communicate consent.

Explanation 1. — For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2. — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. —A medical procedure or intervention shall not constitute rape. Exception 2. — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Section 375 of IPC explain what rape is and what action done by men constitute to rape and if these are constituted by him then he would hold for the punishment under section 376 of IPC. This went under changes and development in 2013 after Criminal Law (Amendment) Act 2013, it changes broadened the definition of rape. Rape can constitute when a man inserts any object into woman’s vagina, urethra, anus, vulva or mouth for the purpose of penetration into woman’s body. It also increased the age of consent for women to have sexual intercourse. Here the second issue was challenged in the Supreme Court in the case of *Independent Thought v Union of India*¹⁵ where exception 2 of sec 375 was considered contradictory to the Sec 3 of POSCO which state to commit penetrative Sexual assault. Here hon ’able Supreme Court of India declare that exception 2 of the is unreasonable on the grounds that any girl child below 18 years if indulge in any sexual act would consider rape¹⁶.

The Court opined that the right to life included the right to develop physically, mentally and economically as an independent self-sufficient female adult and considered a range of material discussing the deleterious effect of child marriage and young childbirth. The effect of Exception 2 was to debilitate the girl child and negatively impact her physical and mental health, which violated her rights under Articles 14, 15 and 21. The Court thus read down Exception 2 to Section 375 insofar as it permitted a husband to have sexual intercourse with

¹⁵ AIR 2017 SC 4904

¹⁶ Patel M and others, “Landmark Judgments on Section 375 IPC” (*iPleaders* December 29, 2020) <<https://blog.ipleaders.in/landmark-judgments-on-section-375-ipc/>> accessed May 10, 2022

his wife below the age of 18 years of age. The Court was briefly seized with the question of how the right to privacy of a girl child, as recognized by *K.S. Puttaswamy and Anr. vs. Union of India*¹⁷, was violated by Exception 2 to Section 375, IPC¹⁸.

These developments not only broadened and expanded the definition sexual crime but also opened the platform to discuss the health of women and her rights over here reproductive parts. The sexual crime against women induces and disrupt women's psychological, physical and reproductive health. Violence and crime against women open various health care concern for women it could include mild injuries to severe injuries like fracture, permanent ear or eye loss, Chronic psychological disturbance like anxiety disorders to other chronic mental illness. It also increases risk of STV, HIV/AIDS, unwanted or mistimed pregnancies through rape and sexual assault and any other form of reproductive diseases¹⁹. These healthcare issue sums up to become an issue for health and right over once own body and gives and rises question for protection of women right. These rights constitute just not to safeguard the women reputation and maintain her dignity and modesty, it goes further it also its focus on the bodily rights, reproductive rights and other relevant rights of women's bodily independence and freedom.

CONCLUSION

The idea behind justifying these rights has opened a new debate in society. Article 21 of the Indian Constitution has upheld these rights to an extensive and upholding form. But this development of this legal jurisprudence is still lacking. As compared to the other western nation Indian legal system has to still come up with ideas to expand our reproductive rights. Since our independence Reproductive health-related laws and policies in India have failed to take a women's rights-based approach, instead focusing on demographic targets, such as population control, while also implicitly or explicitly undermining women's reproductive autonomy through discriminatory provisions such as spousal consent requirements for access to reproductive health services. Despite a national law penalizing marriages of girls below 18 years of age and policies and schemes guaranteeing women's maternal healthcare, in practice, India continues to account for the highest number of child marriages and 20% of all maternal

¹⁷ (2017) 10 SCC 1

¹⁸ Singh S, Mohan S and Kakkar J, "Year" (*Independent Thought vs. Union of India and Anr.*2020) <<https://privacylibrary.ccgmlud.org/case/independent-thought-vs-union-of-india-and-ors#:~:text=In%202013%2C%20a%20child%20rights,of%2015%20and%2018%20years.>> accessed May 10, 2022

¹⁹ García-Moreno, H. Stöckl / International Journal of Gynecology and Obstetrics 106 (2009) 144–147

deaths globally. These facts and statistics arise with how the Indian Policy makes and Legal structure seems to reframe and re-structure the Indian Reproductive rights for Women.

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