LIBERTY AND REPRODUCTIVE HEALTHCARE JUSTICE: INDIAN PERSPECTIVE

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ABSTRACT: Reproductive and sexual rights constitute important rights of mankind. The right to reproductive freedom has become universal fundamental right of life and liberty. Through judicial process the right to health care and reproductive rights has been brought into the ambit of liberty, equality and privacy in India. The studies reveal that in India cultural, social and ethical values play an important role in determining and regulating the reproductive healthcare, therefore it needs the right based, integrated and interdisciplinary approach to give treatment to the problem.

Key words: liberty, equality, privacy, sexual rights, reproductive rights, health care justice and ethical values.

INTRODUCTION

The death of 31 year old Indian woman Savita drew the global attention in the month of November, 2012, because doctors in Ireland expressed their inability to perform abortion since the legal regime of their country regulates the medical practitioners to consider the consequences of taking of life of a foetus, even if it costs the life of the mother. It is perceived that Ireland is governed by the ideals of catholic constitution. On the other hand a woman in India from a social institution had become pregnant due to rape. The Chandigarh administration approached the High Court for approval of termination of her pregnancy as she was mentally retarded and an orphan having no parent or guardian to look after her or her prospective child. Medical experts opined that she was suffering only from mild mental retardation and was physically capable of continuing pregnancy. There was no indication of congenital defects in child and had completed nineteen weeks of pregnancy and moreover she did not consent for termination. Despite High Court directed the State to terminate pregnancy

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by invoking of doctrine of *parents partriae*. Obviously, we are living in societies where political, economic, cultural and social factors come together to influence woman’s health and determine understanding of fertility, sexuality, reproductive and gender roles. These are two different instances that an Indian woman’s life and liberty was subject to the policies of the country. It is pertinent to note that abortion is not merely a techno-medical facet but it generates intense social, moral, ethical and legal issues.

Indian constitution is a social document and *grundnorm* of the nation. India, the world’s, most populous democracy, constitutes to have significant human rights problems despite making commitments to tackle some of them most prevalent abuses. The country has thriving civil society, free media and independent judiciary, but long standing abusive practices, corruption and lack of accountability for perpetrators factor human rights violation. One of these perpetrators is violation of liberty and reproductive freedom. The right to reproductive freedom has become universal fundamental right of life, liberty, equality, privacy and health. The studies on reproductive rights in India reveal that some socio-economic, cultural and ethical values play predominant role in determining and controlling reproductive health.

The studies also reveal that due to gender discrimination, violence, coercion and absence of decision-making, the woman in India is unable to exercise the reproductive rights. Apart from these, child marriages, low level of education, early pregnancies, non-access of contraception, inadequate medical care etc., are causative factors for failure of self-determination and reproductive rights of woman. This paper explores some issues of affirmative obligation of the state and individual rights, consequences of health regulations, the impact of state’s support on the ability of woman in decision-making and enjoyment of reproductive rights and contribution of Indian Judiciary for development of health care justice.

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2 *Suchitra Srivastava v Chandigarh Administration*, AIR 2010 SC 235: The doctrine of *parents Partriae* invoked by the High Court was rejected by the Supreme Court and held that personal liberty in Article 21 includes right to make reproductive choice. The Supreme Court also stated that the doctrine is applicable in case of those persons who are minors or those who are found mentally incapable of making informed decisions for themselves. The court also referred the principle contained in United Nations Declaration on Right to Mentally Retarded Persons, 1971. In the given case the chairman of the National Trust for Welfare of persons has taken an affidavit to look after the interest of pregnant woman


4 Dr. S.N. Dhyani, *Fundamental of Jurisprudence-The Indian Approach* – (Central Law Agency, 1992) P 134. Dr. Dhyani remarked: Kelson’s Pure Theory of Law the basic norm of Grundnorm supplies the legal order with a hierarchy of norms which derive the validity from the basic norm itself. It should be remembered that the original norm-the Grundnorm—the basic norm-determines the content and gives validity to other norms derived from it

CONCEPTUAL FOUNDATION OF REPRODUCTIVE RIGHT

Reproductive and sexual rights constitute important rights of mankind. Though, these two rights are in existence since the evolution of mankind, their origin and development in the international scenario is of recent origin. Reproductive rights are a broad spectrum of rights. They consist a number of rights such as health, nutrition, rights of the couple about the spacing of children, protection of women during pregnancy, right of the foetus against unauthorized abortions etc., Under International human rights law, women’s reproductive rights are a composite of a number of separate human rights namely, the right to equal treatment, the right to privacy, the right to reproductive health and family planning, the right to decide the number and spacing of children, the right to marry, to find a family, the right to life, liberty, security, the right to freedom from sexual exploitation, assault, the right to freedom from torture and ill treatment. Ronald Dworkin defines reproductive autonomy as the right of individuals to control their own role in procreation unless the state has compelling reasons for denying them that control. The United Nations held a series of International Human Rights and population conferences directly related to reproductive rights. Much literature is available from Tehran to Cairo, Beijing and beyond. The concept of universal human rights was first applied to family at the 1968 International Human Rights Conference in Tehran. Couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect.

An U N Symposium on Population and Human Right held in Vienna in 1981 declares that “Both the compulsory use of abortion and its unqualified prohibitions would be a serious violation of human rights”, and three international conferences associated with the UN Decade for Women were more evasive in their recommendations, the plan of reproductive rights did not appear in the Plans of Action adopted at each Conference. However, the 1975 International Women’s Year Conference in Mexico, women denounced coercive practices in contraceptive research and services such as forced sterilization and incentives for contraceptive acceptors as human right abuses.

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9 Mexico City, 1975; Copenhagen, 1980; and Nairobi, 1985.
In the history of reproductive health, reproductive rights attracted the attention of the world community in 1994 due to the extensive pressure of various women’s organizations and movements across the world. As a response to the pressure of the women’s movements, the United Nations International Conference on Population and Development (ICPD) was held in Cairo, Egypt, during 5-13 September 1994. Its main contribution was the adoption of an Action Plan (Cairo Programme) which among other things adopted a general definition, reads as:

“Reproductive rights embrace certain human rights that are already recognized in National Laws, International Human Rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.”

The Cairo conference marked the acceptance of new paradigm in addressing human reproduction and health. The programme not only manifests the existing relationship between human rights and reproductive rights, but also establishes a clear definition of reproductive health is, and recognized to fundamental rights namely; the right to reproductive choice and to have access to sexual and reproductive health. But the definition adopted in the conference is of generic nature recognizing the reproductive rights being a joint responsibility of both the spouses and there is no specific emphasis laid in explicitly defining the choice of women. Further, in many developing societies since women have limited choice in exercise of their rights, women are targeted with violence and forced to accept the choice of the husband. Women’s organizations demanded for a women centric definition with free choice of women to decide their rights. In response to such a demand, the Fourth Conference on Women took place in Beijing, China on 4-15 September 1995. A Declaration and an Action Plan (Beijing Platform) were adopted and the international commitment to protect women’s rights was strengthened. Beijing Conference on Women adopted a definition that specifies exclusive rights for the couples and extended protection to women from coercive aspects.

\[\text{12} \text{ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, September 5-13, 1994.}\]

According to the Programme of Action, “Reproductive rights also referred to as sexual rights include the right to be free from sexual violence and coercion and the right to the highest standard of sexual health. Sexual health implies a positive approach to human sexuality and includes the freedom from sexual abuse, coercion or harassment, protection from sexually transmitted diseases, and success in achieving or in preventing pregnancy.” The convention and the Cairo Programme have recognized the importance of gender equality and the significance of women’s health and the reproductive health. These rights are recognized based on theoretical framework of various human rights treaties.\footnote{International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child.} The most important among these Conventions, is the Convention on All Forms of Discrimination against Women (CEDAW). Further, the International Planned Parenthood Federation (IPPF) has summed up the results of all top level international meetings and introduced the IPPF Charter on Sexual and Reproductive Rights in 1996.

The Charter has developed twelve rights as sexual and reproductive rights. They are right to life, right to liberty and the security of person, right to equality and to be free from all forms of discriminations, right to privacy, right to freedom of thought, right to information and education, right to choose whether or not to marry and found a family, right to decide whether or when to have children, right to health care, right to benefit of scientific progress, right to freedom of assembly and political participation and the right to be free from torture and inhuman or degrading treatment.\footnote{See the IPPF Charter on Sexual and Reproductive Rights, IPPF Annual Report 1995-96 at 6 (London).}

**EQUALITY, LIBERTY AND PRIVACY - INDIAN CONSTITUTION**

India is a state party to four particularly relevant UN treaties: the Convention on the Elimination of All forms of Discrimination Against women (CEDAW), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. The Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any
international conference, association or other body. Further, the constitution directs the state to foster respect for international law and treaty obligations.

International Conventions and norms are great importance in the formulation of guidelines of the National Law. The edifice and superstructure of the Constitution is based on four important pillars i.e., Justice, Liberty, Equality and Fraternity. Through Judicial process the provisions of the Indian Constitution has brought a new dimension to sexual and reproductive rights in India.

EQUALITY:

The preamble of the Constitution speaks of equality of status and opportunity. The first and the foremost right which guaranteed to all the persons are right to equality. The principle of equality runs like a golden thread throughout the Constitution. Article 14 declares that ‘the State shall not deny to any person equality before law or the equal protection of the laws within territory of India’. Article 15 specifically prohibits discrimination on the grounds of sex. “Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belong to the rule of law in a republic while the other, to the whim and caprice of an absolute monarchy. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and therefore violative of Article 14.”

The Concept of equality, right to marriage and liberty for procreation has been categorically explained by the Supreme Court in two landmark rulings. In C.B

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16 Article 253 of the Indian Constitution
17 Article 51(c) of the Indian Constitution
18 Vishaka v State of Rajasthan, AIR 1997 SC 3014: Gender equality includes protection from sexual harassment and right to work with dignity; this is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose.

19 Preamble of the Indian Constitution.

20 Article 15 states: 1) the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. 2) No citizen shall, on grounds only of religion, race, caste, sex place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to a) access to shops, public restaurants, hotels and places of public entertainment, or b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. 3) Nothing in this article shall prevent the State from making any special provision for women and children. 4) Nothing...Scheduled Tribes.

21 E.P. Royappa v State of Tamil Nadu, AIR 1974 SC 555. This ruling was followed in Maneka Gandhi v Union of India, AIR 1978 SC 597 and R.D. Shetty v Airport Authority, AIR 1979 SC 1628.
Muthamma, a service rule requiring a female employee to obtain written permission of the
government before the solemnization of her marriage and denial of right to be promoted on
the ground that she was a married women, was held to be discriminatory. On the same note
the validity of Air India Regulation under which an air hostess could be retired at the age of
35 years or if they got married within 4 years of their service or on first pregnancy was
challenged in the famous Air India case. The court held that the provision relating to
pregnancy bar and retirement at the option of Managing Director, were unconstitutional as
being unreasonable, arbitrary and violative of Article 14. However it upheld the validity of
provision prohibiting the air hostess to marry within 4 years of their service as there was no
unreasonableness and arbitrariness in that provision.

LIBERTY AND PRIVACY

The evolution of the individual as an ultimate measure of things is a universally
accepted standard of democratic society. But the concept of society based on well-defined
rights is a special idea of democracy. The main function of democratic government is to
safeguard the liberty. In fact, the greatest heritage of democracy to mankind is the right of
personal liberty. Article 21 of the Constitution mandates ‘No person shall be deprived of his
life or personal liberty except according to procedure the established by law.’ The procedure
prescribed by law has to be fair, just and reasonable not fanciful, oppressive or arbitrary.
Reiterating the same view the Court in Francis Coralie v Union Territory of Delhi, said that
the right to live is not restricted to mere animal existence. It means something more than just
physical survival. The right to ‘live’ is not confined to the protection of any faculty or limb
through which life is enjoyed or the soul communicates with the outside world but it also
includes “the right to live with human dignity”, and all that goes along with it, namely, the
bare necessities of life such as, adequate nutrition, clothing and shelter and facilities for
reading, writing and expressing ourselves in diverse forms, freely moving about and mixing
and commingling with fellow human being. Through judicial process the Right to health,
education, protection against injurious drugs, X-ray radiations and pollution-free environment, livelihood, shelter has been included in life as defined under Article 21 of the Constitution. Further, the court in India has regarded this article as one of the luminary provisions of the Constitution apply to protection of woman from sexual and reproductive abuses.

INSTANCES OF PRIVACY AND COURT RULINGS

- **Neera Mathur v LIC.** In this case, the Supreme Court was shocked to learn that an LIC questionnaire sought information about the date of menstrual periods and past pregnancies, and the petitioner was terminated for not providing correct information to the LIC. The Court held that the questionnaire amounted to invasion of privacy and that, therefore, such probes could not be made. The right to personal liberty guaranteed under Article 21 included that right to privacy. Information about health could be sought where such information was relevant. It was relevant for selling insurance cover, but not for the person seeking employment.

- **Goutam Kundu v State of W.B.** In this case the Supreme Court ensured that an application for a blood test to disprove paternity of a child in a maintenance suit was rejected. It was held that a child born of a married woman is deemed to be legitimate, unless the contrary is proved. A strong preponderance of evidence and not a mere balance of probabilities could rebut such a presumption.

The court laid down the following principles;

- Courts in India cannot order a blood test as a matter of course.
- An application for subjecting a child to a blood test, made in order to have a roving enquiry, cannot be entertained.

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- There must be a *prima facie* case for suspecting the fatherhood of a child, which can be established by proving non-access.
- The court must carefully examine as to what would be the consequences of ordering a blood test—whether it would have the effect of branding a child as a bastard and its mother as an unchaste woman.
- Permitting blood tests to prove or disprove paternity unless there is a strong case and access was ruled out would be slanderous, embarrassing and humiliating for the woman.

- **State of Maharashtra v Madhulkar Narain;**[^36] In this case a police Inspector visited the house of one Banubai in uniform and demanded to have sexual intercourse with him. On refusing he tried to have it by force. She raised a hue and cry. When he was prosecuted he told the court that she was a lady of easy virtue and therefore her evidence was not to be relied upon. The court rejected the argument of the applicant and held that the ‘right to privacy’ is available even to a woman of easy virtue and no one can invade her privacy.

- **Mr. ‘X’ v Hospital ‘Z’;**[^37] In this case the appellant was asked by the doctors to donate blood for the patient. When his blood samples were taken the doctors found that the appellant’s blood group was HIV (+). In the meantime the appellant settled his marriage with one Miss ‘Y’ which was to be held on December 12, 1995. But the marriage was called off on the ground that the blood test of the appellant conducted by the respondent’s hospital was found to be HIV (+). As a result of this, he contended that his prestige among his family members was damaged. The Court held that although the right to privacy is a fundamental right under Art. 21, but it is not an absolute right and restrictions can be imposed on it. The right to marry is an essential element of right to privacy but is not absolute. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. Every system of matrimonial law provides that if a person is suffering from venereal disease in a communicable form, it will be open to the other partner in the marriage to seek divorce. If a person is suffering from that disease even prior to the marriage, he has no right to marry so long as he is not fully cured of the

[^36]: AIR 1991 SC 207
[^37]: AIR 1995 SC 495
disease. As such when the patient was found to be HIV (+), the disclosure by
the Doctor was not violative of either the rule of confidentiality or the
patient’s right to privacy as the lady with whom the patient was likely to be
married was saved by such disclosure or else she too would have been infected
with the dreadful disease, if marriage had taken place.
Moreover, where there is a clash of two Fundamental Rights as in the instant
case, namely the patient’s right to privacy as part of right to life and his
proposed wife’s right to lead a healthy life, which is her Fundamental Right
under Art. 21 the right, which would advance the public morality or public
interest, would alone be enforced through the process of Court. The Court
said that moral considerations cannot be kept at bay and the judges are not
expected to sit as mute structures of clay in the Hall, known as Court Room,
but have to be sensitive, “in the sense that they must keep their fingers firmly
upon the pulse of the accepted morality of the day.”

➤ Surjit Singh Thind v Kanwaljit Kaur\(^{38}\): In this case the Punjab and Haryana
High Court has held that allowing medical examination of a woman for her
virginity amounts to violation of her right to privacy and personal liberty
enshrined under Article 21 of the Constitution. This is a case, where the wife
filed a petition for a decree of nullity of marriage on the ground that the
marriage has never been consummated because the husband was impotent.
The husband had taken the defence that the marriage was consummated and he
was not impotent. In order to prove that the wife was not virgin the husband
filed an application for her medical examination. The Court held that allowing
the medical examination of a woman’s virginity violates her right to privacy
under Article 21 of the Constitution. Such an order would amount to roving
enquiry against a female who is vulnerable even otherwise. The virginity test
cannot constitute the sole basis, to prove the consummation of marriage.

➤ In Rayala M. Bhuvaneswari v Nagaphamender Rayala,\(^{39}\) the petitioner filed a
divorce petition in the court against his wife and to substantiate his case
sought to produce a hard disc relating to the conversation of his wife recorded
in U.S, with others. She denied some portions of the conversation. The court
held that the act of tapping by the husband of conversation of his wife with

\(^{38}\) AIR 2003 P&H 353, See also Sharda v Charmpal, 2003 AIR SCW 1950.
\(^{39}\) AIR 2008 AP 98.
other without her knowledge was illegal and amounted to infringement of her right to privacy under Article 21 of the Constitution. These talks even if true cannot be admissible in evidence.

The wife cannot be forced to undergo voice test and then asked the expert to compare portion denied by her with her admitted voice. The court observed that the purity of the relation between husband and wife is the basis of marriage. The husband was recording her conversation on telephone with her friends and parents in India without her knowledge. This is clear infringement of right to privacy of the wife. If husband is of such a nature and has no faith in his wife even about her conversations to her parents, then the institution of marriage itself becomes redundant.

In *Ramkanya Bai v Bharatram*, the Supreme Court set aside the order of the High Court allowing a DNA test of the paternity of the child only on the ground that there will be a possibility of reunion of the parties, if it was found from the outcome of the DNA test that the son was born from the wedlock of the parties. In the absence of any reason, especially when no prayer for a DNA test was ever made by the husband, nothing could be found which could invite the High Court to allow such an application. Also it was against the settled presumption of legitimacy under Sections 114 and 50 of the Evidence Act, 1872.

The right to protection of life and personal liberty under Article 21 of the Indian Constitution includes the woman’s right to make reproductive choice. It is important to recognize that reproductive choices can be exercised to procreate and to abstain from procreating.

The object of the judgment given in *Budhadev Karmasker v State of West Bengal*, public interest litigation, was to provide a life of dignity to the sex workers in India by giving them technical skills to earn their livelihood respectfully, instead of selling their bodies. A panel on sex workers was appointed by the Supreme Court to get a State-wise figure of sex workers rehabilitated so far. The Supreme Court had, by its earlier orders dated 19 July 2011 and 2 August 2011, directed that certain funds be provided to the panel so that it could work effectively. In its order dated 19 July 2011, the court had directed the States and Union

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41 Criminal Appeal No.135 of 2010, judgment dt.24-8-2011.
territories to carry out surveys to ascertain the number of sex workers, who would like to be rehabilitated, and those who would want voluntarily to continue in the same profession.

In its order dated 2 August 2011, the Supreme Court realized the fact that just by its order, the sex workers in the country cannot be rehabilitated instantly. It is a situation in which the mission has to be carried out patiently. The court involved the Home, Social Welfare and Women’s Welfare Departments of all central as well State Governments and Union territories. It also forwarded a copy of its order regarding identification and rehabilitation to the Chairperson of the National Commission for Women with a request to depute its members and actively participate in the panel, so established by the court.

CHILD MARRIAGES – HARMFUL EFFECTS ON SEXUAL AND REPRODUCTIVE RIGHTS

No girl should be robbed of her childhood, her education and health, and her aspirations. Yet today millions of girls are denied their rights each year when they are married as child bride. Complications of pregnancy and childbirth are the leading cause of death in young women aged 15-19. Young girls who marry later and delay pregnancy beyond their adolescence have more chances to stay healthier, to better their education and build a better life for themselves and their families. Girls aged 14 and younger run a very high risk of complications in pregnancy and childbirth, because their bodies are not yet fully developed. Girls who are married young are also more vulnerable to sexually transmitted infection, including HIV/AIDS. There is a detrimental effect of child marriages which makes girls far more vulnerable to the profound health risks of early pregnancy and child birth. Child marriages also have strong physical, intellectual, psychological and emotional impact, cutting of educational opportunities and chances of personal growth.

UNICEF defines child marriage as marriage before 18 years of age and considers this practice as a violation of human rights. The harmful consequences of child marriage are segregation from family and friends, limiting the child’s interactions with the community and peers, lack of opportunities for education. Girl children often face situations of bonded

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42 Michelle Bachelet, M.D, Executive Director of UN Women. ‘Child Marriages: 39, 000 Every Day’ http://www.who.int/mediacentre/news/releases/2013, visited on 05/12/2013
43 Flavia Bustreo, M.D., Assistant Director-General for Family, Women’s and Children’s Health at the World Health Organization, Ibid
44 Child marriage problem: causes and consequences; http://globaldiscussion.net/topic1425, visited on 17/02/2014
labour enslavement, commercial sexual exploitation and violence as a result of child marriage.\textsuperscript{45}

Child marriage in India is not a new phenomenon. The practice as it prevails now, though, continues to thrive in economically disadvantaged communities, especially those that are colored by customary and cultural practices and perspectives that encourage the early marriage of a girl child. According to UNICEF child marriages constitutes an obstacle to Millennium Development Goals. They are:

- Eradicate Poverty and Hunger\textsuperscript{46}: Poverty is a cause and consequence of child marriage
- Achieve Universal Primary Education\textsuperscript{47}: Girls are compelled to drop out of school in order to get married;
- Promote Gender Equality\textsuperscript{48}: Girls face economic and cultural pressure to drop out of school, and face social isolation;
- Reduce Child Mortality\textsuperscript{49}: Babies born to adolescent mother have higher risk of dying;
- Improve Maternal Health\textsuperscript{50}: Pregnancy at a young age jeopardizes the health of young mothers;
- Protection from violence\textsuperscript{51}: Girls may be exposed to violence when married at a young age into the groom’s household with little decision making power.

The Government of India in order to give effect to international instruments and to protect the girl child from sexual and reproductive abuses has designed and articulated the national commitments as:

- Ratified Articles 19, 24, 28 and 34 in the year 1992 of Convention on Rights of the Child 1989.\textsuperscript{52}
- Ratified Article 16 in the year 1993 of Convention on Elimination of All Forms of Discrimination against Women 1979.\textsuperscript{53}
- Brought structural changes in the Dowry Prohibition Act 1961.\textsuperscript{54}

\textsuperscript{45} http://www.unicef.org/protection/index.html, visited on 17/2/2014.
\textsuperscript{46} Goal 1.
\textsuperscript{47} Goal 2.
\textsuperscript{48} Goal 3.
\textsuperscript{49} Goal 4.
\textsuperscript{50} Goal 5
\textsuperscript{51} Millennium Declaration.
\textsuperscript{52} India Ratified on 11 December 1992.
\textsuperscript{53} It came into force in India on 8\textsuperscript{th} August 1993.
• Repealed the Child Marriage Restraint Act 1929 and enacted Prohibition of Child Marriages Act 2006.\textsuperscript{55}
• Right to Education is now recognized as Fundamental Right under Article 21-A.\textsuperscript{56}
• Enacted Right to Free and Compulsory Education Act 2009.\textsuperscript{57}
• Eleventh Five Years Plan 2007-2012 calls for compulsory Registration of Marriages and verification of Age at the time of Marriage.\textsuperscript{58}
• Ministry of Women and Child Welfare has taken a number of initiatives to prevent decline sex ratio and discrimination.\textsuperscript{59}
• Ministry of Department of Education has taken a number of schemes for promotion of Girl Child Education.\textsuperscript{60}
• The National Commission for Women has taken nationwide awareness programme against the child marriages.\textsuperscript{61}
• The Central and State Governments have launched incentives programmes for the overall development of the girl child.\textsuperscript{62}

\textsuperscript{54} The Dowry Prohibition (Amendment) Act, 1984.
\textsuperscript{55} The Act came into force with effect from 10\textsuperscript{th} January 2007.
\textsuperscript{56} The Indian Constitution (86\textsuperscript{th} Amendment) Act,2002
\textsuperscript{58} Marriageable age is 18 years & 21 years respectively in case of bride and bridegroom
\textsuperscript{59} For example: The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection)Act,1994
\textsuperscript{60} Ministry of Women and Child Development introduced Dhan Laxmi Scheme (2009) conditional each transfer scheme to encourage retention of the girl in school; Balika Samridhi Yojana (BSY) (1997) scheme to address the problem of declining sex-ratio and gender discrimination through cash transfers at different stages; Integrated Child Protection Scheme (ICPS) (2009) promotes convergence of services for children in need of protection and care at all levels; Kishori Skakti Yojana (Adolescent Girls Scheme) (2001) focusing on improving the nutritional and health status of adolescent girls between 11-18 years of age and promoting school attendance; Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (SABLA) (2011) – recently launched with the objective of promoting empowerment, better nutrition and healthy habits, including reproductive health, education and life skills. Similarly, Department of Education introduced Mahila Samakhya (Education for Women’s Equality) (1989) – Scheme which promotes residential and bridge schools for girls called Mahila Shikshan Kendra. – Sarva Shiksha Abhiyan – SSA (Education for All) (2010) programme which aims to universalize elementary education for all children in the 6 to 14 age group through community-ownership of the school system. – National Programme for Education of Girls at Elementary Level (2003) – a component of the SSA which provides additional support for education of underprivileged/disadvantaged girls at elementary level beyond the normal SSA interventions; Kasturba Gandhi Balika Vidyalaya (KGBV)(2007) a component SSA for setting up residential schools at under primary level for girls belonging predominantly to the Scheduled Castes, Scheduled Tribes and Other Backward Castes and minorities in difficult areas.
\textsuperscript{61} National Commission for Women introduced Bal Vivah Virodh Abhiyan (Child Marriage Protest Programme (2005) – a nationwide awareness-raising programme against child marriage.
\textsuperscript{62} Some State Governments introduced incentive programmes for girls in place since the 1990s, such as the Rajasthan Raj Lakshmi Scheme launched in 1992 and Haryana’s Apni Beti, Apna Dhan – ABAD scheme (MY Daughter, My Pride) initiated in 1994. After 2000, additional State Governments have put in placed conditional cash transfer schemes for girls, such as Delhi, Haryana (2005) and Madhya Pradesh (2006) and Karnataka.
THE PROHIBITION OF CHILD MARRIAGE ACT, 2006

The Child Marriage Restraint Act, 1929 was enacted with a view to restraining solemnization of child marriages. The Act was subsequently amended in 1949 and 1978 in order, *inter alia*, to raise the age limit of the male and female persons for the purpose of marriage. The Act, though restrains solemnization of child marriages, yet it does not declare them to be void or invalid. The solemnization of child marriages is punishable under the Act. There has been a growing demand for making the provisions of Act more effective and the punishment there under more stringent so as to eradicate or effectively prevent the evil practice of solemnization of child marriages in the country. This will enhance the health of children and the status of women. The National Commission for Women in its Annual Report for the year 1995-96 recommended that the Government should appoint Child Marriage Prevention Officers immediately. It further recommended that a) the punishment provided under the Act should be made more stringent; b) marriages performed in contravention of the Act should be made void; and c) the offences under the Act should be made cognizable.

The National Human Rights Commission undertook a comprehensive review of the existing Act and made recommendations for comprehensive amendments therein vide its Annual Report 2001-2002. The Central Government, after consulting the State Governments and Union territory Administrations on the recommendations of the National Commission for Women and the National Human Rights Commission, has decided to accept almost all the recommendations and give effect to them by repealing and re-enacting the Child Marriage Restraint Act, 1929 and named as The Prohibition of Child Marriage Act, 2006. The important features of the new Act read as:

- The legal age for marriage in India is eighteen for girls and twenty-one for boys, on the lines of what was mentioned in the Child Marriage Restraint Act of 1929.

- Full-time “Child Marriage Prohibition Officers” are appointed in every state. These officers are vested with the authority to prevent child marriages, make documented report of violations, charge offenders that can also include the child’s parents and even remove children from dangerous and potentially dangerous situations.63

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63 Section 16
Child marriages are not considered illegal but merely voidable. The grounds for the declaration as void are laid down in the Act itself. This is done at the option of the child that has been married off allowing her to declare her marriage void at anytime up to two years after reaching adulthood.\textsuperscript{64}

The only exception where a child marriage can be declared as void even before the child reaches the age of 18, is when the child has been abducted, kidnapped, trafficked or been compelled to marry under force, deceit, coercion or misrepresentation.

The legislation also penalizes the arrangement, performance or participation in child marriages. By Section 9, any man who is aged above eighteen who contracts for a child marriage is punishable by imprisonment of up to two years, or may be charged with a fine of up to one lakh rupees, or both.

By Section 10 these penalties are extended to anyone who performs, conducts, directs or abets a child marriage unless he can prove that he had reason to believe that the marriage was no child marriage.

If the child herself contracts for a child marriage, under Section 11, any parent or guardian who actively supports the marriage or negligently fails to prevent it is punishable by way of imprisonment and or a fine. The same provision has a clause namely section 11(2), which speaks of a rebuttable presumption that the child’s parent or guardian negligently failed to prevent the marriage.

In spite of the well designed and stringent legislation, India is unable to prevent child marriages. As per UNICEF in India nearly 43% of women aged 20-24 are married before the age of 18 years. Now this is slowly declining. Poverty, religious customary practices, social norms, dowry, girls education increased cost of wedding ceremonies, illiteracy, wrong doctrines are the main factors for evil practices of child marriage and have negative effect on liberty, equality, privacy, sexual and reproductive rights of a girl child.

**LIBERTY TO ABORT**

An abortion is a procedure that is done to terminate a pregnancy. Before liberalization of abortion law in India, the Indian Penal Code\textsuperscript{65} was regulating the offences relating to causing miscarriage, concealment of birth and other related issues of abortion. Provisions

\textsuperscript{64} Section 3
\textsuperscript{65} IPC is a major substantive law in India which enacted in the year 1860.
deal with causing miscarriage,\textsuperscript{66} causing miscarriage without woman’s consent;\textsuperscript{67} death caused by an act done with intent to cause miscarriage without woman’s consent;\textsuperscript{68} act done with intent to prevent child being born alive, or to cause it to die after birth;\textsuperscript{69} or causing death of a quick unborn child by an act amounting to culpable homicide\textsuperscript{70}, the exposure and abandonment of child under 12 years of age by parent or person having care of it,\textsuperscript{71} concealment of birth by secret disposal of dead body\textsuperscript{72} are some of the problems dealt with under the provisions of the Indian Penal Code.

The above legal framework regarding the termination of pregnancy in the Indian penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It is observed that in a large number of cases all over India the penal law is not strictly followed.

**THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971 (MTPA)**

In the early 1970’s, India was the first country in the world to pass a liberal abortion law. The term ‘Medical Termination of Pregnancy’ (MTP) was used to reduce opposition from socio-religious groups averse to liberalization of abortion law. The MTP Act, passed by Parliament in 1971, legalized abortion in India. Despite more than 33 years of liberal legislation, however, the majority of women in India still lack access to safe abortion care.

MTPA confers full protection to a registered allopathic medical practitioner against any legal or criminal proceedings of any injury caused to a woman seeking abortion, provided that the abortion was done in good faith under the terms of the Act.\textsuperscript{73} The Act allow an unwanted pregnancy to be terminated up to 20 weeks of pregnancy, and requires a second doctor’s approval if the pregnancy is beyond 12 weeks. The grounds include grave risk to the physical or mental health of the woman in her actual or foreseeable environment, as when pregnancy results from a sex crime such as rape or intercourse with a mentally-challenged woman, or on eugenic grounds, where there is reason to suspect substantial risk that the child,

\begin{footnotes}
\item[66] Section 312 of IPC, 1860.
\item[67] Section 313 of IPC, 1860.
\item[68] Section 314 of IPC, 1860.
\item[69] Section 315 of IPC, 1860.
\item[70] Section 316 of IPC, 1860.
\item[71] Section 317 of IPC, 1860.
\item[72] Section 318 of IPC, 1860.
\item[73] Section 3(1) MTP Act, 1971.
\end{footnotes}
if born, would suffer from deformity or disease. The law allows any hospital maintained by the Government to perform abortions, but requires approval or certification of any facility in the private sector. However the penal liability shall not arise in case when the abortion is done to save the life of women.

The object of the Act, besides the elimination of the high incidence of illegal abortions, is perhaps to confer on the woman the right to privacy, which includes the right to space, limit or reject pregnancy, the right to decide about her own body. Another important feature of the Act is to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy of a married woman on the ground that a contraceptive device failed.

After the liberalization of abortion law in India, the courts face some issues to decide the problems arising out of abortion. Of them the most important issues is, whether the woman has absolute right to decide whether or not to terminate a pregnancy? Yes, according to revised rules, a woman desiring to abort an unwanted pregnancy can walk in to a hospital or recognized institution approved by Government offering the facility of abortion and after filing a form, get the pregnancy terminated without her husband’s consent. In theory, the law recognizes the woman’s right, as the medical practitioner has to consider only the woman’s environment and the matter is thus purely between the doctor and the woman.

In reality, however, a woman’s right to abortion is very restricted and in most instances it is invariably the family’s decision. MTPA does not require the consent of the husband in the termination of wife’s pregnancy. However, the desirability of husband’s consent in the matter of termination of wife’s pregnancy has been viewed in some cases. Therefore, the termination of pregnancy without the consent of husband has not been free from controversy.

THE PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994

In the recent past Pre-natal Diagnostic Centers sprang up in the urban areas of the country using pre-natal diagnostic techniques for determination of sex of the foetus. Such centers became very popular and their growth was tremendous as the female child is not welcomed with open arms in most of the Indian families. The result was such centers are

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74 Section 3(2) MTP Act, 1971.
75 Section 4 of MTP Act, 1971.
76 Section 5 of MTP Act, 1971.
promoting female foeticide. Such abuse of the technique is against the female sex and affects the dignity and status of women. Various Organizations working for the welfare and upliftment of the women raised their heads against such an abuse. It was considered necessary to bring out a legislation to regulate the use of, and to provide deterrent punishment to stop the misuse of, such techniques. The matter was discussed in Parliament and the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991. The Joint Committee of both the Houses of December, 1992 and on the basis of the recommendations of the Committee, the Bill was reintroduced in the Parliament with the following objectives.

- Prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;
- Prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;
- Permission and regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;
- Permitting the use of such techniques only under certain conditions by registered institutions; and
- Punishment for violation of the provisions of the proposed legislation.

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill having been passed by both Houses and became statue as the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. By section 3 of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 the nomenclature of the Act has been amended and now it stands as the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (w.e.f 1-1-1996).

**Misuse of Medical Technology**

In *Cehat and Others v Union of India*, a public interest litigation filed for the implementation of the Pre-Natal Diagnostic Techniques (Prevention of Misuse) (PNDT) Act. The Supreme Court came down heavily on the central government and the state government for failure to implement the Act. It stated in its order that the so called economically progressive states were also lagging behind in the female child sex ratio and failed in the proper implementation of the Act. The Act was amended while the petition was pending in the Supreme Court and several directions were passed by the Supreme Court for its proper implementation.

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78 AIR 2003 SC 3309.
implementation. Following are some of the important directions passed by the Apex Court while disposing of the petition:

- For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be constituted till there is awareness in public that there should not be any discrimination between male and female child.
- Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.
- Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.
- The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspections shall continue to function till the Act is effectively implemented. The report of this Committee is placed before the Central Supervisory Board and State Supervisory Boards for any further action.
- Public would have access to the records maintained by different bodies constituted under the Act.

CONCLUSIONS

Reproductive rights are one of the major concerns at the International level. These rights are enshrined in various documents, conventions and instruments. The national laws in India have not considered reproductive rights specifically in any of its law. However, social legislations like The Prohibition of Child Marriages Act, 2006, The Medical Termination of Pregnancy Act, 1971 and Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 are examples of modest and sincere attempts to protect the reproductive rights of women. These legislations are well articulated and designed to protect healthcare justice in general and reproductive rights in particular. Poverty, social norms, illiteracy, wrong doctrines, preference of son over the daughter, forced prostitution, forced pregnancy, other harmful practices and traditions and state’s inability in implementation of laws are some of the reasons for failure of the constitutional vision of liberty, equality and privacy. In the Constitution of India, right to health has been so generally worded, that it took a long time to consider right to health as a Fundamental Right. It was only through judicial process the right to healthcare and reproductive rights has been brought into the ambit of personal liberty. Therefore, India needs right based approach to reproductive healthcare justice. Further, the State should encourage dialogue and collaboration between women organizations, healthcare groups, NGOs and Judges to utilize the legal system more effectively and efficiently.