
Aftermath of the Puttaswamy Judgement: Reproductive Rights in India

Shefalika Narain*

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Abstract

Historically, the reproductive rights movement has seen controversies due to the moral, ethical, and religious undertones of contraception, abortion, and family planning and it continues to be an emotionally and politically charged debate due to new technologies and recent judgements. Reproductive rights in India have been recognized since the 1970s, however due to various coercive techniques of family planning, rights were often not as accessible as the legislation laid out. Until the Supreme Court recognized these coercive practices as violate of Article 21, women often had no recourse against programs of forced sterilization. Recently, an interesting development in the field of reproductive rights has taken place as the Supreme Court in the Puttaswamy judgement has recognized privacy as a fundamental right, privacy necessarily intersects with almost all reproductive rights. This note seeks to provide a brief background on reproductive rights in India and the impact of this judgment and the right to privacy on these rights. Part I will examine the existing case law recognizing reproductive rights, along with regulations surrounding abortion and surrogacy while Part II will discuss Puttaswamy and its implications on existing laws in India.

Keywords: *Reproductive Rights, Abortion, MTP Act, Surrogacy, Puttaswamy, Privacy.*

* Director, Institute of Research for Innovative Strategies, Indian School of Management and Entrepreneurship.
Email : shefalika@ismc.co.in

INTRODUCTION

Reproductive rights include an individual's right to family planning, terminate pregnancy, use contraception and access reproductive health services. It encompasses a wide range of civil, political as well as socio-economic rights, ranging from the most basic right i.e. the right to life (Article 21) and extending to rights that guarantee non-discrimination and equality (Article 14), privacy as well as the right to information.¹ Recently, in Justice K.S. Puttaswamy (Retd.) v. Union of India ('Puttaswamy') a nine-judge bench of the Supreme Court ('SC') has unanimously recognized the right to privacy as a right that falls within the purview of Right to Life under Article 21 and should therefore be regarded due constitutional protection. Right to privacy according to the SC falls not only under Article 21 but is also derived from other rights and freedoms encompassed in the Part III (Fundamental Rights) of the Constitution.² The bench in particular acknowledged that personal life and liberty as guaranteed under Article 21 includes the reproductive choices of women.³ This note seeks to analyse the Indian position on reproductive rights available to women before and after the Puttaswamy decision.

REPRODUCTIVE RIGHTS IN INDIA

While India was one of the first countries that developed a legal framework permitting abortions and making contraception accessible, there still exist several obstacles that prevent a women from enjoying these rights. These obstacles manifests themselves in the form of substandard health services or denial of women's decision making authority.⁴ For instance, if we look at India's National Population Policy, it is implemented through schemes formulated by the government that promotes female sterilization, where in some states these schemes included targets that resulted in health care professionals adopting coercive practices which led to dangerous and poor quality procedures of sterilization, and lack of access to methods that are non-permanent. These schemes effectively led to the

1 Arijeet Ghosh Nitika Khaitan, 'A Womb of One's Own: Privacy and Reproductive Rights' available at https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights?0=ip_login_no_cache%3D8351b9219a9c6844365396c6457bffff ; United Nations Human Rights, Office of the High Commissioner, 'Sexual and reproductive health and rights' available at <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>

2 Justice K.S. Puttaswamy (Retd.) v. Union of India, Writ Petition (Civil) No 494 of 2012 available at https://supremecourtfindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf ; Global Freedom of Expression, 'Puttaswamy v. India' available at <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/>

3 *Id.*

4 Dewika Biswas v. Union of India.

denial of the initial objective of the Policy that had envisioned voluntary access to wide range of contraceptives being made available.⁵

In this part, we shall first look at case law recognizing reproductive rights followed by discussing the MTP Act, which is the legislation regulating abortion, and then examine regulations surrounding surrogacy in India.

A. ***RECOGNITION OF REPRODUCTIVE RIGHTS BY INDIAN COURTS***

Over the last decade the SC along with several high courts has recognized the that not acknowledging women's rights related to reproduction amount to a violation of both fundamental as well as human rights. This key focus of this part are the judgements (prior to Puttaswamy) passed in the areas of Maternal Health, Contraceptive Access, Abortion and Forced Pregnancy where courts stepped in to delineate women's and girl's legal reproductive rights.

In 2008, the Human Rights Law Network (a non-profit NGO) filed petitions in several high courts seeking accountability for pregnancy related deaths, these cases resulted in judicial recognition of women's rights to survive pregnancy and childbirth as a fundamental right. One of these cases was before the Delhi High Court in 2011 and the Court cited international obligations such as the Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**") and the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") and stated, "*no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background...This is where the inalienable right to health which is so inherent in the right to life gets enforced.*"⁶ Subsequently, a year later the High Court in Madhya Pradesh followed suit in Sandesh Bansal v. Union of India as they acknowledged a violation of Article 21 when a woman was unable to survive childbirth and pregnancy.⁷

In 2016 a petition was filed before the SC claiming a violation of women's reproductive rights as a result of coercive and substandard sterilization procedures being adopted by healthcare professionals appointed by the State. In this case, the SC delved deeper and looked further than just the health framework for reproduction. The SC recognized bodily autonomy and, in this context, held that gender equality and specifically women's autonomy lies at the core of "constitutionally-protected reproductive rights" available to

5 *Id.*

6 Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.

7 Jaitun v. Maternity Home, MCD, Jangpura & Ors.

women. While holding that coercive sterilization practices violate a woman's fundamental and human right to health, the Court also highlighted the importance of a woman exercising "meaningful choice."⁸ The principle underlying 'meaningful choice' has also been reiterated in judgements and orders pertaining to abortions and forced pregnancies. Courts have recognized that an abortion is a woman's choice as part of personal liberty independent of her husband's consent and this right is guaranteed under Art. 21.⁹

B. THE MTP ACT AND ITS CRITIQUE

The Medical Termination of Pregnancy Act, 1971 ('MTP Act'), regulates terminations of pregnancies and abortions in India. Legal abortions are permitted only under certain conditions set out in the legislation. Section 3 of the MTP Act provides for a pregnancy to be terminated only by a medical professional if they believe in good faith that continuing would be a risk to the woman's life or if it may injure her mental or physical health gravely; or in the event that the child will be "*seriously handicapped by physical or mental abnormalities.*"¹⁰

Further distinctions are made on the basis of the stage of pregnancy; pregnancy below 12 weeks only requires consent from one medical practitioner while pregnancy between 12 to 20 weeks requires two medical practitioners to authorize the abortion.¹¹ The procedure for pregnancies after the expiry of 20 weeks is regulated under section 5 of the MTP Act, that allows termination in situations necessary to save the life of the mother i.e. only when the medical practitioner is convinced that the life of the woman cannot be saved without terminating the pregnancy.¹² Despite the existence of a legal framework for abortions, statistics indicate that 6.4 million terminations of pregnancies that account for nearly 56% of all abortions in India in a year are dangerous and account for 9% of maternal fatalities.¹³

Criticisms of the MTP Act are based on the arguments that Section 3 and 5 infringe a woman's right to exercise reproductive choice. Under the MTP Act, at no point can a woman choose to get an abortion on her own, thereby preventing her from making free

8 Devika Biswas v. Union of India.

9 Suchita Srivastava & Anr v. Chandigarh Administration.

10 The Medical Termination of Pregnancy Act, 1971, Section 3.

11 *Id.*

12 The Medical Termination of Pregnancy Act, 1971, Section 5.

13 Report on Medical Certification of Cause of Death, 2015, New Delhi: Registrar General of India, 2015 available at http://www.censusindia.gov.in/2011-Documents/mccd_Report1/MCCD_Report-2015.pdf

choices and exercising bodily integrity. All abortions under the MTP Act, are doctor-centric with the legislation recognizing solely medical reasons as justifications for a legal abortion, delegitimizing and taking away from any other possible circumstance or situation due to which a woman would want to undergo an abortive procedure. It is interesting to note that this right, the right to make a choice was held to fall under the ambit of the right to privacy as a fundamental right in the Puttaswamy judgement. The constitutional validity of Section 3 and 5 could be challenged on these grounds, and while the state is permitted to restrict fundamental rights, these restrictions must pass the tests laid down in constitutional jurisprudence as per Puttaswamy. For instance, in this scenario, if Section 3 and 5 are challenged on the basis of an Article 21 violation, the provisions will have to pass the test for validity as laid down in *Maneka Gandhi v. Union of India* that stated that any law restricting Article 21 must be “just, reasonable, and fair” to remain constitutionally valid. Further, it also placed a burden on the state to prove a rationale nexus between the objective they sought to achieve and the law that was being challenged. Thus, it is argued that post the Puttaswamy judgment if these provisions are challenged, the state would have to show that there exists a rational nexus between its interests in protecting women’s health and potential human life and preventing women from deciding on abortions on their own.

C. SURROGACY IN INDIA

With an advent in Assisted Reproductive Technology (‘ART’), surrogacy has gained immense traction in the last few years. The Surrogacy (Regulation) Bill, 2016 that is pending before the Parliament prohibits any form of commercial surrogacy and restricts both individuals that are entitled to engage surrogacy services in addition to those that provide surrogacy services.¹⁴ It is pertinent to note that the bill has been heavily criticized for basing these restrictions on eligibility not on any scientific study or data but on conceptions of “public morality.”¹⁵ For instance, the bill takes into account factors including the age, commissioning parents existing children, marriage etc which may be susceptible to challenge before a court on grounds of violating the right to privacy.

IMPACT OF PUTTASWAMY ON REPRODUCTIVE RIGHTS

The Puttaswamy judgement provides a wide affirmation of individual liberty and recognizes the right to privacy as safeguarding an individual’s autonomy by seeking to

¹⁴ The Surrogacy (Regulation) Bill, 2016.

¹⁵ *Id.*

protect the person's bodily integrity as well as her autonomous decision making capacity.¹⁶ The SC unanimously was of the view that right to privacy includes personal autonomy of the mind and body and is not limited by informational privacy.. Such a holding may result in constitutional challenges to several existing laws.¹⁷ In this section, we will look at which laws would be liable to be struck down as a result of the privacy judgement and what the basis for such a challenge could be.

The judgement itself recognizes that the Suresh Kaushal v. Naz Foundation judgement upholding Section 377 of the Indian Penal Code was a "discordant one" and none of the reasons in the judgment can be regarded as a valid justification for disregarding privacy claims. (Part I, Para 126). Further implications of the judgement will also be echoed in the Protection of Children from Sexual Offences Act, 2012 ('**POCSO Act**') and the Criminal Law (Amendment) Act, 2013, that has made changes including increasing the age at which consent for sex can be given to 18 years from 16 years. This ground for challenge will be based on the fact that, such a law results in complete denial of sexual autonomy for persons under the age of 18. Such denial becomes extremely important due to Section 19 of the POCSO Act that directs healthcare personnel to inform the police about any sexual assault or abuse that may have taken place or in case there exists a possibility of it taking place. A necessary consequence of the same is that in case a minor seeks help for an abortion, contraception or any other pregnancy related care, the obligation on the healthcare personnel is to compulsorily report it to law enforcement authorities, regardless of what the girl may want. It has been argued that this will result not only in preventing young adults from exercising personal choice and breaching their right to informational privacy but it will also severely hamper the access to reproductive and sexual health services. Likewise, the same arguments can be raised to challenge Section 357C of the Criminal Procedure Code that require healthcare professionals to disclose to the police sexual assault/violence cases that pertain to adult women. Similar challenges can be applied to regulation of sex work in India, that falls under the legislative framework given by the Immoral Trafficking (Prevention) Act, 1986, wherein it prohibits solicitation and thereby reducing the bodily autonomy individuals desirous of undertaking sex work. Whether these prohibitions can be justified based on a rational nexus is a question that courts may have to answer in the future. The notion of reproductive autonomy forms the central theme of the right to privacy as recognized in the Puttaswamy case.¹⁸ Thus, decisions based on reproductive choices are

16 Pooja Saxena and Amber Sinha, 'The Fundamental Right to Privacy', available at <https://cis-india.org/internet-governance/files/amber-sinha-and-pooja-saxena-the-fundamental-right-to-privacy-a-visual-guide>
Madhulika T, 'What the Right To Privacy Judgment Means for India's Marital Rape Exception' available at <http://ohrh.law.ox.ac.uk/what-the-right-to-privacy-judgment-means-for-indias-marital-rape-exception/>

17 *Id.*

18 Aparna Chandra, Privacy and Women's Rights available at <https://uniteforreprorights.org/wp-content/>

protected by privacy and can challenge rules that enforce two-child polices like the Haryana Panchayati Raj (Amendment) Act, 2015.

Further, with respect to abortion and use of contraceptives, while courts in the past have recognized the rights of parties to choose not to procreate by using contraceptives, courts have not recognized the right of a woman to abort in absence of the MTP Act. As discussed in the earlier part, the requirement of a medical opinion for termination, that too on limited grounds impedes a woman from making a choice in terminating her pregnancy independently at any stage. Further, scholars opine that the state will have to answer other questions as a result of the Puttaswamy judgement such as : first, at what point does the interest of the State in saving the life of the child intersect with the right a woman has to privacy and integrity of her body?; Secondly, whether the State can question the validity of the reasons a woman decides to terminate her pregnancy, within the framework of the law?; Moreover, further questions can be raised as to the extent of the choice available to women, for instance given that the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 criminalizes sex determination, how will that impact the right available to a woman to choose not to carry a female fetus to a full term, i.e., whether the state can prevent the access of information that will help women make informed decisions.¹⁹ Therefore if reproductive autonomy is to be recognized absolutely, such questions and situations need to be engaged with and addressed.

CONCLUSION

Human rights include a woman's right to make reproductive decisions as well as a wide gamut of sexual rights. These internationally recognized fundamental rights available to all women include the right to be free from torture, the most basic right to life, the right to a safe environment and health and most recently in India the right to privacy. Violations of women's sexual and reproductive health rights are often engrained deeply in patriarchal values of society that are related to controlling sexuality of women. The privacy judgment has rekindled the debate around several laws that seek to control the right of a woman to make a "meaningful choice". The Puttaswamy decision paves a way for future writs to substantially challenge on constitutional grounds the legislations reproductive rights.

uploads/2018/01/privacy-and-womens-rights.pdf ; Pooja Saxena and Amber Sinha, 'The Fundamental Right to Privacy', available at <https://cis-india.org/internet-governance/files/amber-sinha-and-pooja-saxena-the-fundamental-right-to-privacy-a-visual-guide>

19 *Id.*

REFERENCES

Aparna Chandra, Privacy and Women's Rights available at <https://uniteforreproprights.org/wp-content/uploads/2018/01/privacy-and-womens-rights.pdf>

Arijeet Ghosh Nitika Khaitan, 'A Womb of One's Own: Privacy and Reproductive Rights' available at https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights?0=ip_login_no_cache%3D8351b9219a9c6844365396c6457bffff

Centre for Reproductive Rights, 'Reproductive Rights in India Courts,' available at <https://www.reproductiverights.org/document/reproductive-rights-in-indian-courts>

The Criminal Law (Amendment) Act, 2013.

Devika Biswas v. Union of India, W.P. (C) 95/2012.

Global Freedom of Expression, 'Puttaswamy v. India' available at <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/>

Jaitun v. Maternity Home, MCD, Jangpura & Ors.

Justice K.S. Puttaswamy (Retd.) v. Union of India, Writ Petition (Civil) No 494 of 2012 available at https://supremecourtsofindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf

Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.

Madhulika T, 'What the Right To Privacy Judgment Means for India's Marital Rape Exception' available at <http://ohrh.law.ox.ac.uk/what-the-right-to-privacy-judgment-means-for-indias-marital-rape-exception/>

The Medical Termination of Pregnancy Act, 1971.

Pooja Saxena and Amber Sinha, 'The Fundamental Right to Privacy', available at <https://cis-india.org/internet-governance/files/amber-sinha-and-pooja-saxena-the-fundamental-right-to-privacy-a-visual-guide>

Protection of Children from Sexual Offences Act, 2012.

Report on Medical Certification of Cause of Death, 2015, New Delhi: Registrar General of India, 2015 available at http://www.censusindia.gov.in/2011-Documents/mccd_Report1/MCCD_Report-2015.pdf

Suchita Srivastava & Anr v. Chandigarh Administration.

The Surrogacy (Regulation) Bill, 2016.

United Nations Human Rights, Office of the High Commissioner, 'Sexual and reproductive health and rights' available at <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>
