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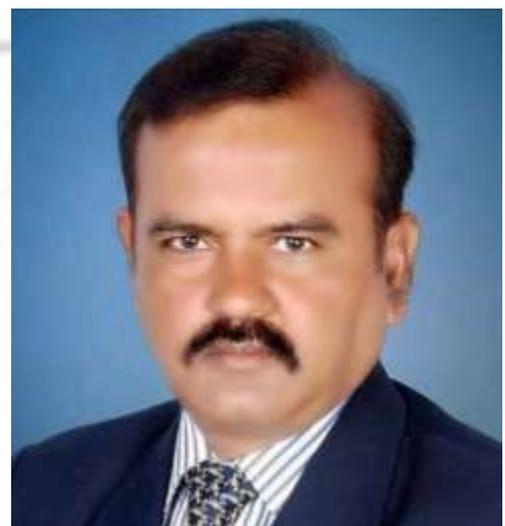


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

DELINEATING THE BOUNDARIES OF REPRODUCTIVE RIGHTS OF WOMEN

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ABSTRACT:

Reproductive rights, encompassing the right to access contraception, abortion, and maternal healthcare, are a critical aspect of bodily autonomy and gender justice. In India, these rights are embedded within a complex legal, cultural, and political framework. While the Indian Constitution does not explicitly recognize reproductive rights, the judiciary has played a pivotal role in interpreting Article 21 — the right to life and personal liberty — to progressively include elements of reproductive autonomy. This paper examines the evolution of reproductive rights jurisprudence in India, with a specific focus on the role of Indian courts in shaping and safeguarding these rights.

The study traces landmark judgments from the Supreme Court and various High Courts to analyse how the judiciary has responded to issues such as forced sterilizations, access to safe abortions, reproductive healthcare for marginalized communities, and the rights of minors and rape survivors. Key cases such as *Suchita Srivastava v. Chandigarh Administration (2009)*, *Justice K.S. Puttaswamy v. Union of India (2017)*, and more recent decisions under the Medical Termination of Pregnancy (MTP) Act provide critical insights into how courts have recognized reproductive choices as intrinsic to the right to privacy and dignity.

By engaging with both legal texts and judicial decisions, this paper aims to offer a comprehensive account of the reproductive rights landscape in India through the lens of the judiciary. It concludes with recommendations for strengthening judicial approaches, promoting reproductive justice, and aligning legal interpretations with international human rights standards. Ultimately, the paper contends that reproductive rights in India remain a contested terrain, where courts have immense potential to advance gender equity, provided they adopt a more inclusive and rights-affirming approach.

Keywords: Reproductive rights, Indian judiciary, Constitutional law, Gender justice, Right to privacy, Abortion law in India, Women's rights

1.1 INTRODUCTION

“You cannot have maternal health without reproductive health. And reproductive health includes contraception and family planning and access legal, safe abortion”

-Hillary Clinton, Former US Secretary of State

In the absence of adequate legal framework for the protection of reproductive rights of women an inevitable task has been left to the judiciary to solve the issue of reproductive rights. Today, with new reproductive technologies, the face of reproduction has changed totally. The matter of reproductive rights not only deals with legal questions but also with ethical and moral issues. In India, very few cases have come before the judiciary concerning reproductive rights. But, there is no doubt that in future judiciary will have to face new challenges on variety of these aspects. There are many reported and unreported cases which obviously thrash the heart of the academicians, law makers, judiciary etc. There is a need to be prepared for the critical issues which underlie with the reproductive rights and the reproductive technologies. Furthermore, there is host of complex issues embedded with these new trends of reproduction. Therefore, there is a call for a multi-pronged policy and programme within judiciary and other organs have imperative task to occupy for themselves.

The Supreme Court being the caretaker of the public rights and the High Courts established in every state have been empowered to issue appropriate directions/ orders etc. It has shown its concern towards women's rights dealing with various issues that are important part of women's life. Rights of women can be guaranteed only in an atmosphere where women will be treated equally and when women will acquire equal position in the society.

Among various women's rights, today, reproductive rights occupies significant place in achieving all other rights. As woman's life revolve around mostly with the role she plays in reproduction and it is a woman who has to take the hardship in reproduction. Therefore, no other rights can be achieved without having or guaranteeing reproductive rights. However, in India issues on reproductive rights has been so scanty and issues on reproductive technologies has been. hardly dealt with by the judiciary. The reasons for very few cases on reproductive

rights of women are various. Such as-

- i. Women's subordinate position in the society.
- ii. Cultural attitude of the society.
- iii. Son-preference
- iv. Lack of legal awareness
- v. Illiteracy and ignorance.
- vi. Limited exercise of informed choice
- vii. Limited access to Health care

Reproduction is fundamental to the very existence and survival of mankind. Consequently, any questions related to human reproduction are of crucial importance and involve both the family unit and society as a whole. Ever since, time immemorial, human being has endeavoured to protect the most uncomplicated impulse to reproduce. In primitive societies and subsequent civilizations this desire have been gradually transformed into rights and obligations, materialized and protected by customary, religious norms and later on by legal system.¹

Women's problems in the context of reproduction are rooted in their status of being dependent from the very beginning of her life. They are in the custody of their father till their marriage and than in the custody their husband after marriage. Their individuality, rights and needs are always subject to their father, husband and later son. Despite laws to provide some relief to them in case of marital or other violence they are still silent victim of social and religious norms. In spite of the avenues open to them to seek redressal of grievances in the Court of Law, practically they are constantly urged to submit, adjust and to have patience.

1.2 Reproductive Rights for Women in India

Historically, the reproductive rights movement in the U.S. has seen many controversies due to the moral, ethical, and religious undertones of birth control, abortion, and family planning. Today, the subject of reproductive rights continues to be an emotionally and politically charged issue.

Right of all couples and individuals to decide freely and responsibly the number, spacing and

¹ MAJA KIRILOVA ERIKSSON, REPRODUCTIVE FREEDOM IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS 166 (1st ed. 2000).

timing of their children. It also includes Right to information and means to do so right to highest standard of reproductive health, right to make decisions concerning reproduction free of discrimination. Empirically, Courts have been at the forefront of expanding, protecting, and promoting reproductive rights.

Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception, women and girls continue to experience significant barriers to full enjoyment of their reproductive rights, including poor quality health services and denials of women's and girls' decision-making authority. Historically, 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 maternal healthcare, in practice India continues to account for the highest number of child marriages and 20% of all maternal deaths.

Although India's National Population Policy guarantees women voluntary access to the full range of contraceptive methods, in practice state governments continue to introduce schemes promoting female sterilization, including through targets, leading to coercion, risky substandard sterilization procedures, and denial of access to non-permanent methods. Also, courts in India have an important role to play in ensuring women's reproductive rights as guaranteed by their constitutional and human rights. Empirically, Courts have been at the forefront of expanding, protecting, and promoting reproductive rights.

1.3 New Emerging Issues On Reproductive Rights And The Role Of The Judiciary

1.3.1 Response of Judiciary on Gender Issue

The debate on gender issue is the recognition of the equality in dignity and human rights of women and men. The concern of gender equality comes from the protection of women from sexual harassment and the right to work with. Dignity which is recognized as basic human

rights and has been accepted almost by all the countries of the world.²

The Supreme Court of India has always shown positive attitude towards the issue of gender equality. It has actually taken various bold steps to eradicate the menace of gender biases from the society. Various reforms have been made by the judiciary to protect the dignity of women, such as - protection of woman against sexual harassment at the workplace.

The Supreme Court of India has always responded to the issues of gender discrimination in an optimistic manner. There are many cases where the court has significantly advance the cause and dignity of women. In *C.B. Muthama v. Union of India*³ a service rule whereby marriage was a disability for appointment to Foreign Service was declared unconstitutional. Similarly, in the case of *Air India Nargesh Meerza*⁴ the court declared pregnancy disqualification to continue in public employment was ultra vires under Article 14 and 16 (1) of the Constitution.

In the case of *Bodhisatwa Gautam v. Subhra Chakraborty*,⁵ the Supreme Court observed that rape in criminal law is not only an offence but also violation of fundamental right to life and liberty under Article 21 of the Constitution. Also, the *Vishaka v. State of Rajasthan*⁶ where the Supreme Court has given landmark judgment forwarding application of international law and gender equality in India.

The decision pronounced by the Supreme Court is based on the provisions of the International law instruments, Conventions and Declaration of which India is the party and has ratified it. The Supreme Court has done every possible effort to implement the provisions of international law and constitutional law for securing the equality of women.

Despite the fact that the Supreme Court has shown dynamic attitude in ensuring gender equality, judicial activism is yet to flourish to the lower levels of the judicial system. Moreover, some of the much talked about reforms are safeguards to working women against sexual harassment at work place, women's right to privacy, equal pay for equal work, prohibition of dowry system etc. which has been achieved through judicial intervention. But, women's access

² J. PALOK BASU, LAW RELATING TO PTOTECTION OF HUMAN RIGHTS 92 (1st ed. 2002)

³ AIR 1979 SC 1868.

⁴ 1981 4 SCC 335;AIR 1981 SC 1829

⁵ AIR 1966 SC 922

⁶ AIR 1997 SC 3011

to gender justice is still difficult especially because of the age old cultural barriers rooted in male dominated society.

In *Madhu kishwar v. State of Bihar*,⁷ the court has considered the provisions of the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW) and marked that the Fundamental Rights and the Directive Principles of State Policy of Indian Constitution contains all the elements of the Convention and will be applied with the same spirit.

If gender bias is identified in all its shade and colour which would be a major step in dealing with this dilemma. There is no need of special treatment for woman as for man because such special treatment is not required. Instead, there is a need for the sensitive ways to examine the attitude of the society towards man and woman which has affected the decision making power of both man and woman. Once, this sensitivity is achieved and it is accepted with openness than and only than will the litigants be able to explain their circumstances to a court that is both willing to learn and to judge to achieve a gender neutrality in its judicial system.

In spite of the Supreme Court's efforts, there are lack of concern in certain areas of women's rights and one of such area is women's health especially reproductive health of women. Gender equality as guaranteed by Constitution under Article 14 and 16 (1) and the efforts of the judiciary to realize this right is meaningless without having women's right to health particularly reproductive health.

1.3.2 Justification of right to Procreation

The family formation begins either with marriage or parenthood, or both. The element of right to found or establish a family is related to individual's right to procreate. The new assisted reproductive technologies brought new challenges to the traditional concept of procreation.

As one of the main ends of marriage is the 'procreation of children'. In *White v. White*,⁸ a husband insisted on a particular sexual practice which practice would ensure that the wife could not get pregnant. The court held-that it amounts to cruelty on his part as the wife was very interested to have a child.⁹

⁷ AIR 1996 SC 1864

⁸ (1948) 2 ALIER 141

⁹ J. PALOK BASU, LAW RELATING TO PROTECTION OF HUMAN RIGHTS 124 (1st ed. 2002).

The marriagable age of the girl and a boy has been fixed by law as 18 years for girls and 21 years for boys.¹⁰ In *Leela Gupta v. Lakshmi Narain*¹¹, the Supreme Court held that breach of minimum age condition does not render the marriage void. The Child Marriage Restraint Act, 1929 also does not invalidate the marriage even in case of violation of the minimum age provision but punishes the persons responsible for such violation. Therefore, a girl minor or major possesses equal right to marriage and ultimately thereby to conceive a child.¹²

Even the Indian penal Code permits cohabitation by a husband with his wife when she is below 16 years of age. Woman got an absolute freedom and discretion under law whether to conceive or not. But, when once exercised this option to conceive, termination of the foetus is an offence under the Indian Penal Code under section 312.

The Medical Termination of Pregnancy Act (MTP), 1971 at this stage interferes and allows a woman to go voluntarily for abortion. When the woman is major her decision is final under MTP Act. Nevertheless, when she is a minor she has to come up through guardian for abortion.

The increased concern for women's health and gender equality as contained in various international documents has moved the focus towards the means necessary to exercise reproductive freedom. In other words, the right to procreation will enable the right to take decision as to when to conceive and how to conceive, to limit the number of children and to space the number of children as to one's desire.¹³

The judiciary seems to be not informed of the Indian position in the demographic transition that the growth rates have declined the fertility rate as well. Moreover, such coerced policy will only add misery to women's problems relating to reproductive health.

1.3.3 Right to Abortion

Abortion is an issue misted up with the question of morality, infanticide, suicide, ethics, religious belief and women's rights. Today some 50 to 60 million abortions occur every year throughout the world, up to half of them illegal and dangerous killing about half a million

¹⁰ Hindu Marriage Act, 1955, Sec. 5(3), Acts of Parliament, 1955 (India)

¹¹ AIR 1978 SC 1351.

¹² J.PALOK BASU, LAW RELATING TO PROTECTION OF HUMAN RIGHTS 125 (1st edition 2002)

¹³ MAJA KIRILOVA ERIKSSON, REPRODUCTIVE FREEDOM IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS 240 (1st ed. 2000)

women annually. Apart from this, at least 500 million women around the world are placed at the risk of repeated pregnancies with serious health problems. However, it is shocking that such a basic right as the right to help with planning or preventing the birth of an unwanted child has been denied to women.¹⁴

It emerges that the clash for gaining this right would be earned through the courts rather than Parliament or State Legislation. Sooner or later, the right to life and personal liberty as guaranteed by Article 21 of the Constitution would have to interpret in such a way as to include the right to abortion also.

In *Satya (smt) v. Shri Ram*,¹⁵ the High Court of Punjab and Haryana held that termination of pregnancy at the instance of wife but without the consent of her husband amounts to cruelty. In *Deepak Kumar Arora v. Sampuran Arora*¹⁶ a division bench of Delhi High Court has observed that if a wife undergoes abortion with a view to spite the husband, it may, in certain circumstances be contended that the act of getting herself aborted has resulted into cruelty.

However, judiciary has denied right to abortion of woman if there is no consent of the husband by declaring it as cruelty which is one of the grounds of divorce under personal law. Such a decision discourages woman to exercise her right to take decision to abort child if she is not physically or mentally ready for it. The MPT Act has allowed woman to take decision without the consent of her husband. But such right cannot be exercised by a woman freely if court marked it as matrimonial cruelty. Here, court is required to have wider viewpoint taking into consideration the reproductive right of woman.

1.3.4 Implementation of the Pre-Conception and Pre-Natal Diagnostic Technique Act (PNDT)

The use of sex-determination technology by parents for the purpose of sex-selective abortion has been the prime concern of the country. Internationally, the UN Special Rapporteur on Violence against Women among others has condemned such practices. Similarly, in India, there is enactment and enforcement of the Pre-natal Diagnostic Techniques Act, 1994 to prohibit sex determination or sex-selection of the foetus. The use of these new technologies

¹⁴ Id.

¹⁵ AIR 1983 P&H 252

¹⁶ 1983 1 DMC 182

has resulted into the killing of female fetuses and sex selective abortions.¹⁷

The reproductive right does not include a freedom of the couples to decide on their child's sex if that is for the devaluation of any of the sexes. There has been great number of sex-selective abortions of females in India and China as a sign of devaluation of women. There has been world wide son preference but it is sci grave in South Asia and the Middle East. The obvious reason for son preference in these societies is historically rooted in the patriarchal system. Another reason for such practice is the social and cultural stigma attaches to the daughter or a girl child because of the dowry system where considerable costs of marrying off a daughter have to pay. Also, if the daughter does not marry she will remain dependent upon her family. Thus, pre-natal tests meant to detect the abnormalities of the foetus are being widely used to determine the gender of the child.

The Centre assured the Supreme Court that it will set up a National Inspection and Monitoring Committee for the implementation of the Act. In 2003, the Court was informed that the PNDA Act has been amended in pursuance of the direction of the Supreme Court taking necessary steps to achieve the object of the Act.¹⁸ But the saddest truth is that sex selective abortion is still prevalent in the country.

1.3.5 Changing Outlook towards Abortion Right

There has been the recent observation of a division bench of the Bombay High Court in a case being heard by them concerning a pregnant woman of 25th weeks carrying a foetus in which an anomaly was discovered in the 24th weeks. The foetus was diagnosed with congenital heart block.¹⁹

The MTP Act clearly states that unless it is necessary to save the life of the pregnant woman, a pregnancy can be terminated only up to 20th weeks. In this case, even though, the foetal anomaly was detected only in the 24th weeks, most doctors refused to perform an abortion, as it would be a clear violation of the MTP Act. The gynecologist was also keen on challenging the provisions of the exception with the Mumbai High Court for the basic reasons that a number

¹⁷ MAJA KIRILOVA ERIKSSON, REPRODUCTIVE FREEDOM IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS 268 (1st edition 2000).

¹⁸ ASHOK K. JAIN, THE SAGA OF FEMALE FOETICIDE IN INDIA 147 (1st edition 2006).

¹⁹ ANUBHA RASTOGI "IS ABORTION RIGHT?" JAN-APR COMBAT LAW 100 (2009).

of cases of similar nature were being observed. Since a legal abortion cannot be carry out after 20th weeks of pregnancy so, there is no option left to the couples than turning towards illegal and unsafe abortions.²⁰

The case was than heard on the plea of emergency and was argued for a week. An expert committee of the government doctors formed by the court observed both aspects of an existing anomaly that was likely to result in early death of the child, if born, and in that case the child would have dependent on medical support all its life. Alas, the report finished by saying that there is no specific sign that the child was not likely to survive, if born.

The court passed an order to re-submit the report to the .petitioner. The MTP Act does not cater to the modem technologies that are in existence and therefore does not address an issue like the present one where the anomaly is detectable only after the 24th week of pregnancy and not before. Further, it is a well-established medical stance that due to the technological and scientific advancement, safe abortions can be conducted even after the limit of 20th weeks.²¹

Today, with the quantity and the quality of medical and technological advancement, it is possible and preferred to regularly observe regularly the growth and well-being of the foetus. But the fact remains that even though there are number of phase of foetal growth that can be detected only at the 24th and 26th weeks of pregnancy, it becomes useless as the woman cannot choose for a safe and legal abortion for the reason that it is in violation of law.

Even though, the Mumbai High court denied the pregnant woman liberty to abort the foetus with fatal anomaly at that stage. Many social activists and intellectuals were of the view that the MTP Act should now be amended to accommodate cases like these, while there were others who were offering to take care of the child after it was born and bear the medical expenses.

This case highlighted the harsh truth that women have no say whether she want a child or not. In this case, .notice has been issued to the-State and the petitioner has been asked to produce progressive legislations from other countries.²²

²⁰ Id. at 19

²¹ Id.

²² Id.

1.3.5.1 Abortion and Reproductive Autonomy

In Suchita Srivastava v Chandigarh Administration (2009),²³ 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 integrity.

The Suchita Srivastava case arose in the context of the Medical Termination of Pregnancy Act, 1971 (MTP Act), which governs abortions in India. Enacted two years before the landmark judgment of the US Supreme Court in *Roe v Wade* (1973),²⁴ the MTP Act allows for legal abortions only if certain conditions are met. Under Section 3 of the act, only registered medical practitioners can terminate a woman's pregnancy if they believe in good faith that continuing the pregnancy would involve a risk to the woman's life or gravely injure her physical or mental health; or that the child would be seriously handicapped by physical or mental abnormalities. If the woman has been pregnant for under 12 weeks, the permission of one medical practitioner is required, and if the pregnancy is between 12 and 20 weeks, the authorisation of two medical practitioners is mandatory. Beyond 20 weeks, Section 5 of the act applies, which permits abortion only in situations where the medical practitioner believes that abortion is immediately necessary to save the woman's life.

1.3.6 Right to Privacy

The proponents of right to privacy said that it is the right of the individual married or single, to be free from unwarranted governmental intrusion, in the matters fundamentally affecting a person such as whether to bear or beget children. It is argued that human being is a sociological concept before becoming a biological concept. A pregnant woman should not be bound by the embryo which has no sociological meaning when she has not accepted it. Thus, she should be able to choose whether or not to have children.²⁵

1.3.6.1 Privacy and Reproductive Rights

*In the context of the privacy judgment (Justice K S Puttaswamy v Union of India*²⁶, we examine two reproductive rights issues that have featured prominently in recent public discourse:

²³ 2009 SCC,SC,9,p 1

²⁴ 1973 410 US 113

²⁵ C.L. ANAND "A CRITICAL EXAMINATION OF LAWS RELATING TO ABORTION AND ACCESS TO ALL FORMS OF CONTRACEPTION" 24 CIVIL AND MILITARY LAW JOURNAL 253 (1988).

²⁶ WRIT PETITION (CIVIL) NO 494 OF 2012

abortion and surrogacy. In this piece, we outline how the privacy judgment provides a much-needed impetus to the legislature to resolve potential constitutional challenges to laws on these two issues.

On 24 August, 2017, a nine-judge bench of the Supreme Court of India (hereafter SC or Court) unanimously affirmed privacy as a fundamental right under the Constitution (*Justice K S Puttaswamy v Union of India 2012*). The bench recognised privacy as an inalienable right, grounded in values such as dignity which underlie all our fundamental rights, and it categorically located privacy in the individual. While judges phrased their conceptions of privacy differently, the bench commonly held privacy to cover personal autonomy relating to the body, mind, and to making choices, as well as informational privacy.

A key aspect of this personal autonomy are reproductive rights, which entail rights to make sexual and reproductive decisions, as recognised by the 1994 United Nations International Conference on Population and Development (UNPIN 1994). These rights have been elaborated to include access to contraception, the right to a legal and safe abortion, the right to make decisions concerning reproduction free of discrimination, coercion and violence, the right to not be subject to harmful practices such as the coerced bearing of children (including with their spouse); and equal entitlement of LGBTQ persons to the same sexual and reproductive health services as all other groups (UNFPA, OHCHR, and DIHR 2014).

1.3.7 The Judicial Activism in the Surrogate Motherhood

Surrogate motherhood is one of the many old reproductive techniques that have enabled infertile couples to have children. A surrogate mother is a woman who agrees to be artificially inseminated generally with the sperm of a man whose own wife is incapable of fertilizing his wife's egg and/or where the wife is incapable of conceiving or carrying a child to term. A surrogate mother will enter into a formal contract relationship with the infertile couple to provide for her medical and living expenses in addition to a fee.

The surrogate motherhood becomes the burning issue when the news of Nirmala case was known. A 30 year old woman called Nirmala from Chandigarh intends to bear a child of an infertile couple for the sum of Rs 50,000 in order to pay for her invalid husband's medical bills. A total ban on surrogate parenting would be unwise restraint on choices that childless couples and willing surrogates should be permitted to make. It is an unreasonable interference with

personal autonomy

1.4 CONCLUSION

The concept of reproductive health is gaining importance slowly but steadily motivating a shift from demographic to meeting the needs of individuals for access to reproductive services. In this environment, a new approach by the judiciary while dealing with such issues is the need of the hour. It is through the judiciary the gaps in legal framework have to be filled.

There are very few occasions where the issue of reproductive rights has been raised. However, there is a need to frame health care policies and rules in the light of the present challenges of reproductive rights. As there is no visible law on the issue, most of the cases has gone unregistered and therefore, there are very few case lying before the judiciary. The issue itself is very sensitive and thus requires wider perspective of the legal guardian i.e. - Court.

Thus, when appearing before the judiciary in the trial court, the judges must have sympathetic attitudes towards women. The Indian women particularly, less privileges women look at judiciary in despair and suspension. It is the duty of the judges to assure such women fairness and justice.

The Naz Foundation case is the expansion of the idea of privacy in India by the judiciary as it did in establishing the right of women to terminate their pregnancy in Roe v. Wade. This case emerged at a time when many feminists and women's rights activists were encouraging State legislature to liberalise their abortion laws. After success in the arena of legal reform, the next step was to shift the battle to the court. The main feature of cases like Wade is the use of the judiciary and innovative interpretations of the Constitution to settle a controversial area and establish rights for unpopular minorities or to establish a ruling against public morality as defined by the majority. Thus, Naz Foundation is rightly called as welcome arrival of the Roe v. Wade of India for new beginning.

Last but not the least, acknowledging that women occupy subordinate position in the society because of which she has been the victim of age old discrimination is the first stepping stone for the foundation of empowerment of women. Another step is to provide education to all women of all levels. This will help raising awareness among women about their human rights

and also help enhancing self-esteem and self confidence among them. Finally, there is a need for regulation of reproductive process through proper legal framework for the protection and promotion of women's rights.

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