
**LEGAL FRAMEWORK ON WOMEN'S RIGHT TO REPRODUCTIVE HEALTH:
INDIAN AND INTERNATIONAL SCENARIO**

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Women's health in India has assumed importance only of late, particularly after the International Conference on Population and Development held at Cairo, Egypt in September 1994 and the Fourth World Conference on Women, held in Beijing in September 1995. Both these conferences placed immense importance on women's health, empowerment and reproductive rights. Not discounting the importance of health needs and health status of men, the fact remains that over a lifetime the health of woman is usually worse than that of men. Moreover, certain health problems are more prevalent among women than among men and certain health problems are unique to women/ affect women differently than men. Biologically they bear the burden of reproduction; women alone have to go through all the problems and discomforts related to pregnancy and delivery. Further, society expects them to play a very important role in providing informal health care to all members of the family. It is their responsibility to rear children on healthy times, teach them health habits prepare and feed the family members and care for the young, the sick, the aged and the disabled. At the end of her duties, she will get very little time to spend for herself and to consider about her health needs.

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As far as sexuality and sexual rights/health is concerned, predominantly the sexual health discourse and interventions remain within the larger pretext of reproductive health. In India, even the human rights movements have to a great extent remained out of the sexuality discourse and focused on the civil and political rights, except a few NGO's, civil society organisations and the rights activists who have been engaged with the issues of sexuality. A major barrier to working on sexuality has been India's approach and emphasis to abstinence-only education and messages. The HIV situation played a prominent role in India, it emphasised the need for sexuality education and sexuality rights into the main discourse. However, even within the HIV interventions, the idea of sexual health restricted to 'disease prevention' was contested and rather an approach towards 'access to services' was broadly accepted as critical to sexual rights framework. Hence, now we have activists who address issues of stigma and discrimination against people living with AIDS and sexual minority groups as human rights issues.²

In the worldwide women are facing many injustices and inequalities mainly in terms of protection and promotion of their basic rights. Generally various concerns regarding women are ignored especially their health. This is the high time to provide specific attention on the health issues of women. However, women are more prone to health risk due to their biological structure of reproduction. Any freedom or rights guaranteed to women is meaningless if their reproductive right is not recognized and protected. This can also change their current position in society. Hence, it is essential to determine or re-

¹ N. Ajith Kumar and D.Radha Devi, 'Health of Women in Kerala: Current Status and Emerging Issues' (January 2010) <<http://cseindia.org/admin/modules/cms/docs/publication/24.pdf>>

² B Subha Sri and Bhuvanawari Sunil, 'Sexual and Reproductive Health and Rights as a Key Dimension of Women's Health' <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000456WS/P000858/M019302/ET/1486097337QUAD-1.pdf>

determine women's reproductive right and to understand its impact on their life. It is quite evident that the social, political and cultural structure of society leads to the subordinate status of women in society which has its direct impact on their health, it also prevent them from enjoying different rights guaranteed under the laws of the country such as right to health. The main reasons of maternal mortality is poor nutritional diet, prevalence of high levels of anemia, early and multiple pregnancy, inadequate health care facilities and untrained medical staff. Even the health care for abortion is not available to all the women in India.

There are several policies, schemes and laws governing the major women's health issues such as the National Population Policy, 2000, provides for the right to voluntary and informed choice for the purpose of family planning. In India abortion is illegal if it is not in consonance with the Medical Termination of Pregnancy Act, 1971. Whereas, under Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the determination of sex of the fetus is prohibited. There are various programmes regulating health standards such as National Rural Health Mission, National Family Health Survey, Integrated Child Development Services (1975), Reproductive and Child Health Programme (1996) etc. which has been introduced to spread awareness among the female section of society and provides for different health care measures. However, these programmes fail to consider the main issues of reproductive health of women. Therefore, these programmes need to be re-framed after taking into consideration different issues regarding women's reproductive health in India.

Human rights and public health both aims at promoting and protecting the wellbeing of every individual. Human rights supplement a legal and normative form of guidance and framework for public health actions and thereby increase the accountability of Government health policies. Therefore human rights should be promoted and protected in order to address the underlying determinants of health, including the empowerment of individuals and communities to respond to health challenges and ensuring equitable, effective delivery of services.³

International Framework

Human rights identified and recognised different rights such as right to pollution-free environment, right to know, right to development, right against discrimination and torture, right to education, right to health, and right to life. Similarly, numerous international conventions and treaties have emphasized on right to life. For instance, Article 25 of the Universal Declaration of Human Rights, 1948 has provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. Even the Preamble to the WHO Constitution provides that every individual has a fundamental right to enjoy the highest attainable standard of health. This right also includes the right to the underlying conditions of health as well as medical care.

Article 12(1) of the Protocol on Economic, Social and Cultural Rights, States parties have recognised that it is the right of everyone to enjoy the highest attainable standard of physical and mental health. Article 12(2) states that the steps to achieve the full realisation of this right shall include the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child and the creation of conditions, which would assure to all medical service and medical attention in the event of sickness. This Article is supported by Article 24(2) (f) of the Convention on the Rights of the Child,

³ Women's Health And Human Rights: Monitoring the Implementation of Cedaw (WHO publication, 2007) <http://apps.who.int/iris/bitstream/handle/10665/43606/9789241595100_eng.pdf;jsessionid=5C1E448CE7C287EBD5253939DD223BAE?sequence=1>

which requires member nations to develop preventive health care, guidance for parents and family planning education and services⁴.

This right to health is mainly concerned with women because of their biological structure and reproduction capacity and necessity. The International Conference on Population and Development (Cairo) of 1994 and the platform of action adopted at the 1995 Fourth World Conference on Women (Beijing) gave impetus to this movement of right to health of women.

The Beijing Conference of 1995 has also declared that the explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.⁵ The Declaration further provides that the States must also ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms. It also provides that international law, including humanitarian law, must be respected in order to protect women and girls in particular and promote and protect all human rights of women and girls. A very important declaration was also made where it was said that Women's rights are human rights.⁶ Hence the right to health with special reference to women's reproductive health was identified and recognised.

WHO is committed towards making human rights a central concern and advancing the right to health and other health-related rights of women and girls around the world. WHO is also assist in the implementation of the several provisions of Cedaw. Cedaw and WHO both have the common objective to assist Governments in making health care policies for the development and protection women's health. Article 12 also implies an obligation to respect, protect and fulfill human rights related to women's health. Under the convention the State Governments have the responsibility to ensure that legislation; executive action and policy comply with these three obligations. Articles 11, 12 and 14 of the Cedaw have declared in unequivocal terms that government shall take all necessary and appropriate measures to remove discrimination against women and women in terms of equal access to health care facilities and services in order to ensure, including information, education services, counseling services and family planning services.⁷

However, once State parties ratify Cedaw, they are have the mandatory duty to submit periodic reports concerning the legislative, judicial, and administrative or other measures that they have adopted for to protect the women's right to health for the proper implement the convention to the committee established under the convention. The Cedaw committee is formed to look after the situation of women's health and especially their reproductive health. Consequently in 2004, 124 countries established legal mechanism to protect women's right to health. The Committee recommends that the State party should give priority to the situation of the adolescent population and also urges it to adopt measures to strengthen the family planning programme and to guarantee access to sexual and reproductive health services, attending to the information needs of the population, particularly adolescent. It also urges the State party to promote sex education for the entire population, including adolescents, giving special attention to efforts to prevent and combat

⁴ International Covenant on Economic, Social and Cultural Rights, 1976

⁵ Article 17, Beijing Declaration (1995)

⁶ Article 14, Beijing Declaration (1995)

⁷ Convention on Elimination of All Forms of Discrimination against Women, 1979

HIV/AIDS and to improve the dissemination of information about risks and ways of transmission.⁸

As per the definition given by WHO health is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, reproductive health addresses the reproductive processes, functions and system at all stages of life. It implies that people are able to have a responsible, satisfying and safe sex life and that they have the capability to reproduce, spacing and the freedom to decide when and how often to do so. It is implicit in it is that women to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and the right of access to appropriate health care services that will help women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.⁹

Article 25 (a) of the Convention on the Rights of Persons with Disabilities, 2006 has recognised that persons with disabilities have the right to enjoyment of the highest attainable standard of health without discrimination on the basis of disability and right encompasses the right to reproductive health. States have been directed to provide persons with disabilities with the same degree, quality and standard of free or affordable health care including in the area of sexuality and reproductive health. Thus, the right to health as well as women's right to reproductive health has been saddled on firm footing by international declarations mentioned above. It has also been proved beyond doubt that right to health including women's right to reproductive health has also been recognised as a part of human rights. Through ratification all States have directly and indirectly become party to these declarations and now bound to abide by them. As a sequel to it most of the world States have passed various laws relating to health and women's right to reproductive health.¹⁰

Indian Framework

India has ratified and signed almost all the various significant international conventions and declarations concerning the right to health especially the women's right to reproductive health. Such as the Beijing Declaration of 1995 which has expressly recognised women's right to reproductive health. Article 30 provides that women and men should get equal access and equal treatment in education and health care and it also provides for the development of women's sexual and reproductive health as well as education. Therefore, Indian Parliament has also passed many Acts and the Government has come out with various schemes to protect and preserve right to health and women's right to reproductive health such as the Medical Termination of Pregnancy Act, 1971, Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, the Penal Code, 1860, the Maternity Benefit Act, 1961¹¹, etc. However, still India has no comprehensive, consolidated and direct law or act concerning all the aspects of women's right to reproduction. The abovementioned enactments indirectly protect and promote the health of women and her right to reproduction. However, it also includes right to abortion. In this way women's right to health has been recognised by the Indian government and she

⁸ Sonia Jain, 'Enforceability of Right to Health: With Special Reference to Women's Right to Reproductive Health in India- A Human Rights Perspective' (2012) < <http://www.supremecourtcases.com> >

⁹ *ibid*

¹⁰ *ibid*

¹¹ See, Section 3 of the Medical Termination of Pregnancy Act, 1971; Sections 4(2), (3) and 5 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; Sections 312 and 313 of the Indian Penal Code, 1860.

has been armed with the right to give or not to give informed consent for abortion or miscarriage. Special attention has been provided on the physical and mental health of mother and child in these enactments.

Maternity benefits in India are guaranteed under the Maternity Benefit Act, 1961. The Act provides different benefits to women workers during the time pregnancy and after the birth of child to protect the health of mother. The Supreme Court in *MCD v. Female Workers*¹² (Muster Roll) declared that the maternity benefit is applicable to all casual workers and daily wage workers. The Court further opined that there is nothing in the Maternity Benefit Act, 1961 which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis. Thus the women's right to reproductive health has been duly established and recognised in India under these enactments. It must not be forgotten that these laws have been passed to fulfill international obligations as mentioned under the abovementioned international conventions/declarations.

The Indian Constitution does not have any express provision regarding the right to health or women's right to reproductive health. However, the Supreme Court of India has declared these two rights are fundamental rights which flow from Article 21 of the Constitution in its different judgments.¹³ Chapter III and Chapter IV of the Indian constitution relating to fundamental rights and directive principles of State policy, expressly do not provide right to health and health care services, but the Supreme Court has opined in various cases them and other international conventions and declarations as a basis on which on which women's right to reproductive health. Chapter IV provides various provisions to protect human health. Article 38 of the Constitution imposes liability on the State that States will secure a social order for the promotion of welfare of the people. Article 39(e) related with workers to protect their health. Article 41 imposed duty on the State to public assistance basically for those who are sick and disabled. Article 42 makes provision to protect the health of infant and mother by maternity benefit. Article 47 also directs that it is the primary duty of the State to improve public health, securing of justice, human condition of workers, extension of sickness, old age, disablement and maternity benefits are also contemplated. Moreover, the State shall regard the raising of the level of nutrition and standard of living of its people and improvement of public health as among its primary duties. It has also been found that public interest petition for maintenance of approved standards for drugs in general and for the banning of import, manufacturing, sale and distribution of injurious drugs is maintainable. A healthy body is the very foundation of all human activities. In a welfare State, it is the obligation of the State and its instrumentalities to assure the creation and sustaining of conditions congenial to good health.¹⁴ Hence, human health must be a matter of primary importance of the State. Abovementioned provisions provides for social security, maternity benefits and health, respectively in a very limited sense.

In the case of *CESC Ltd. v. Subhash Chandra Bose*¹⁵ the Supreme Court emphasized on international conventions and sources and held that the right to health was a fundamental right. It has also been opined that right to health is a part of right to livelihood. In

¹² (2000) 3 SCC 224

¹³ Article 21, Protection of life and personal liberty, No person shall be deprived of his life or personal liberty except according to procedure established by law, Constitution of India, 1950

¹⁴ Vincent Panikurlangara v. Union of India, (1987) 2 SCC 165

¹⁵ (1992) 1 SCC 441

*Consumer Education & Research Centre v. Union of India*¹⁶, the issue before the Supreme Court was regarding the matter of asbestos industry and the right of such workers to medical aid and service thereafter. The Supreme Court held that in the cases where workers were found to be suffering occupational health hazards, their right to health and medical aid is a fundamental right. The Court relied upon the Preamble to the Constitution, the directive principles of State policy and the Universal Declaration of Human Rights of 1948. This right also extends to provide adequate medical facilities and medical care services.¹⁷ The Supreme Court has held that doctors are obliged to treat medico-legal patients without insisting on prior paper work in both private and public sector. Looking to the judicial pronouncements made by the Supreme Court it can be said that it is now a settled law that right to health is integral to right to life and the Government has a constitutional obligation to provide health facilities.¹⁸ The Medical Termination of Pregnancy Act, 1971 specifies that women's right to reproductive health has been recognised as it confers on women a choice to terminate or not to terminate pregnancy. Further, her informed consent is essential to terminate pregnancy. The Delhi High Court has in unequivocal terms declared that right to reproductive health is basic human right of women.¹⁹ The Hon'ble High Court of Delhi stated that no pregnant women be denied access to medical treatment regardless of her social economic status. The Court found that the petitions focused on two inalienable survival rights that form part of the right to life: the right to health and in particular the reproductive rights of the mother and the other is the right to food. The Court gave a ground-breaking decision that establishes the right to maternal health care, particularly the reproductive rights of the mother as a constitutionally protected right under Article 21 in June 2010.²⁰ The Supreme Court has declared that Reproductive health and reproductive rights stand in relation to one another. It is only when reproductive health is in a good state that one can appropriately enjoy their reproductive rights. Similarly, it is only when one has reproductive rights that their reproductive health can be fully protected.²¹ Hence it has been regarded as one of the fundamental rights.

Right to Reproduction of Mentally Retarded Woman

The Supreme Court has clarified that the MTP Act clearly provides that even a mentally retarded persons who has attained the age of majority has the full freedom to take reproductive decisions. In various cases court has observed that a woman's right to reproductive choice-making flows from the fundamental right to liberty under Article 21 of the Indian Constitution. This Supreme Court decisions are path braking as it protects the right of mentally retarded women in the field of reproductive choice making.

In Suchita Srivastava case a mentally retarded woman became pregnant as she was raped. She was found to be a mentally retarded woman. She also expressed her willingness to bear the child. The Court decided that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her best interests. Court observed that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy.²² In situations where the express

¹⁶ (1995) 3 SCC 42

¹⁷ Paschim Banga Khet Mazdoor Samity v. State of W.B., (1996) 4 SCC 37

¹⁸ State of Punjab v. Mohinder Singh, (1997) 2 SCC 83 : 1997 SCC (L&S) 294

¹⁹ Laxmi Mandal v. Deen Dayal Harinagar Hospital, (2010) 172 DLT 9

²⁰ Prakash Mani Sharma v. Govt. of Nepal, Writ No. 064 of 2008

²¹ Lakshmi Dhikta v. Govt. of Nepal, Writ No. 0757 of 2011

²² Suchita Srivastava & Anr v. Chandigarh Administration (2009) 9 SCC 1

consent of the woman is in question it not a necessary condition for continuing the pregnancy, the MTP Act clearly states that it is mandatory to obtain the consent of the pregnant woman for the purpose of termination of a pregnancy. The Court also referred the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 which declares that:

- 1) The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.²³
- 2) The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.²⁴

The Court further observed that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents.²⁵ Thus the decision of the Court proves that women's right to reproductive health is a human right and covered under fundamental rights guaranteed under the Constitution.

Conclusion

There are a lot of government policies and schemes to help women in India to protect and promote their reproductive right. Still a way forward towards the reproductive rights in reality is very difficult and slow in India. There is need of adequate implementation of the existing schemes and policies. Indian laws also provides for adoption of a child under certain restrictions. The whole process of adoption is very long and time taking and complicated. It is a human nature that everyone wants a child of its own. The freedom to make reproductive choices has been recognised as an inherent part of fundamental right under Article 21 of Indian Constitution in various judicial decisions. However the practice of surrogacy is highly criticized in India on different grounds such as it is violation of human rights, public policy and etc. but from the view point of a surrogate mother it can be the best way for her to overcome from the poverty and through which she can also fulfill the basic demands of its family member and thus it can also help in development of women empowerment. Therefore the government needs to take appropriate, to strengthen the women's right to have reproductive choices and the right to access to resources of livelihood by promoting the practice of surrogacy as a legitimate method to solve the problem of infertility. The government should start awareness programmes to educate and remove the misconception among the masses.

²³ OHCHR, Declaration on the Rights of Mentally Retarded Persons, General Assembly resolution 2856 (20 December 1971)

²⁴ *ibid*

²⁵ *ibid*