JETIR.ORG ISSN: 2349-5162 | ESTD Year : 2014 | Monthly Issue
JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR)
An International Scholarly Open Access, Peer-reviewed, Refereed Journal

LEGAL RECOGNITION OF REPRODUCTIVE HEALTH OF WOMEN IN INDIA

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Abstract of the paper.

Right to health and gender equality are considered as inviolable rights of women in domestic and international laws. Reproductive health is a component of right to health and gender equality. Right to dignity and autonomy requires that women shall be able to take independent decisions about her pregnancy, number of children, spacing of children, method of family planning and her reproductive health care. There shall be protection of confidentiality of data and informed consent in reproductive health-care .In reality, only an elite section of the society do enjoy the reproductive health care. Women from the low income group of society are denied of the maternal care and benefits. Unsafe abortion,maternal and infant mortality ,unscientific birth control methods etc. still prevails among rural population. The male domination in family and traditional cultural norms enhance the gender based crimes like female genital mutilation, sexual assault, child marriage, forced pregnancy involuntary sterilisation, and female foeticide which harms the reproductive health of women .The honourable Supreme court ruled that reproductive autonomy is a part of right to life . This paper analyses legal protection of the reproductive health of women in India .

Key words - Reproductive health,autonomy , dignity,gender equality

In the words of Malala Yousafzai ,the Nobel Peace Prize laureate at the age of 17 years

" *We cannot all succeed when half of us are held back."*

I. Introduction

Motherhood is a precious stage in life of every woman. Unfortunately the impoverished society of women in India are deprived of the entitlements of womanhood. Reproductive health of a woman depends on several factors. Discrimination against women is a pervasive realty in health care also. Traditional and cultural norms place women in subordinate position in her own family and society. Child rearing cannot be considered as the sole responsibility of women.Even some of the legislations perpetrate the gender stereo

type notions and discriminate women. The honouable Supreme Court has struck down various legislations and rules that discriminate women on the ground of her her gender ,marriage, pregnancy, or child birth. Gender discrimination leads to gender based violence.Harmful practices like female genital mutilation, female foeticide ,rape, child marriage, forced pregnancy and involuntary sterilisation are some of the instances of gender based violence which retards the reproductive health of women in India.

II. Reproductive health -a human right

Acoording to World Health Organization (WHO)" Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so."[i]

Article 25 of Universal Declaration of Human Rights (UDHR)1948 states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family .Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)1966,provides that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.

The Committee on the Elimination of Discrimination against Women commented that access to health care, including reproductive health, is a basic right.[ii] Article 12 of the of Convention on the Elimination of all forms of Discrimination against Women (CEDAW)1979 directs the States to eliminate discrimination against women in their access to health-care services throughout the lifecycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period. States have an obligation to respect, protect and fulfil women's rights to health care. There is a duty to ensure access to health-care services, information and health education.

The International Conference on Population and Development (ICPD) held in Cairo in 1994 started a new paradigm in addressing human reproduction and health.The new approach of the International Conference on Population and Development is based on a view that values women intrinsically and is genuinely concerned about their health and well-being. Women's reproductive capacity was transformed from an object of population control to a matter of women's empowerment to exercise personal autonomy in relation to their sexual and reproductive health within their social, economic and political contexts. Women's health in general, and their sexual and reproductive health in particular, are determined not only by their access to health services but by their status in society and pervasive gender discrimination. [iii]

III. Reproductive health and maternal health care

Supreme Court of India expanded the scope of right to life through various judicial pronouncements.In *Suchita Srivastava & Anr* V *Chandigarh Administration,*while dealing with the question of consent of a woman under Medical Termination of Pregnancy Act, the apex court observed that woman's right to make reproductive choices is also a dimension of `personal liberty' under article 21 of the Constitution of India.[iv]

Maternal care and maternal health is guaranteed human right. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) affirms that maternity is a social function and upbringing and development of their children is the common responsibility of men and women. [v] Articles 11 and 12 of CEDAW prohibits dismissal from employment on the grounds of pregnancy,child birth or marital status and provide for adequate nutrition, health care and rest for pregnant women and mother. States shall adopt measures for the reduction of the stillbirth-rate and infant mortality and for the healthy development of the child.

According to the International Covenant on Economic, Social and Cultural Rights (ICESCR)1966 "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits." [vi]

Articles 24 and 27 of Convention on Rights of Child (CRC) recognises right of the child to the enjoyment of the highest attainable standard of health , facilities for the treatment of illness and rehabilitation of health and the right to adequate standard of living. State has the duty to take measures to diminish infant and child mortality and to develop preventive health care, guidance for parents and family planning education and services.

The directive principles of state policy of Constitution of India casts an obligation on State to provide maternity leave. [vii] The Maternity Benefits Act 1961 protect maternal health of the female workers in the organised sector. National Food Security Act, (2013) gives the right to receive foodgrains at subsidised prices by persons belonging to eligible households under Targeted Public Distribution System. Nutritional support is granted for mother and children to overcome malnutrition. [viii]

In *Sandesh Bansal v. Union of India*, a Public Interest Litigation was filed against the government of Madhya Pradesh over the lack of implementation of maternal health schemes in the State. The High Court of Madhya Pradesh held that the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India. It is the primary duty of the government to ensure that every woman survives pregnancy and child birth. [ix]

Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children. [x] In *Devika Biswas V Union of India* ,the apex court recognized women's autonomy and gender equality as core elements of women's constitutionally-protected reproductive rights.Supreme Court cautioned that sterilization policies that unduly focussed on females violate gender equality norms. [xi]

In *Laxmi Mandal V. Deen Dayal Harinagar Hospital* , the petition highlighted the failure of the Governments in implementing the maternal benefit schemes like Janani Suraksha Yojana (JSY), the Integrated Child Development Scheme (ICDS), the National Maternity Benefit Scheme (NMBS), the Antyodaya Anna Yojana (AAY) and the National Family Benefit Scheme (NFBS) resulting in denial of benefits to mothers below the poverty line (BPL) during their pregnancy and immediately thereafter.Delhi

High Court stated that a woman's right to health, including her right to reproductive health, is a facet of her "inalienable survival rights" under Article 21 of the Constitution.[xii]

Sex education and access to information on reproductive health are very important to maintain reproductive health. In *X V Principal Secretary,Health and Family Welfare Department,Government of N CT of Delhi and Another,* the apex court held that reproductive health implies that women should have access to safe, effective, and affordable methods of family planning and enabling them to undergo safe pregnancy, if they so choose.It was observed that "Absence of sexual health education in the country means that most adolescents are unaware of how the reproductive system functions as well as how contraceptive devices and methods may be deployed to prevent pregnancies .Young girls who have discovered the fact that they are pregnant are hesitant to reveal this to their parents or guardians, who play a crucial role in accessing medical assistance and intervention." [xiii]

States should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their rights to privacy and confidentiality.[xiv]

IV. Reproductive health and Gender-based violence

Gender based violence prejudicially affects physical and mental health of women. Every individual has the right to privacy irrespective of their sex.Gender-based violence against women is negation of right to privacy and other basic human rights.[xv] Committee on the Elimination of Discrimination against Women commented that the traditional notions which consider women as subordinate to men and the stereotyped roles are the reasons for gender based violence such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. [xvi] Girl children and adolescent girls are often vulnerable to sexual abuse by older men and family members and it causes physical and psychological harm and unwanted and early pregnancy.[xvii]

a. Female genital mutilation

Female genital mutilation is a grave violation of human rights. It is practised on various parts of the world. It violates the right to equality, right to health and right to privacy. World Health Organisation(WHO) defines female genital mutilation as "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons".[xviii]

The Committee on Economic and Social Rights observed that female genital mutilation restrict reproductive health and shall be prohibited.[xix] According to the Convention on the Rights of Child (CRC) 1989 female genital mutilation is a specific form of child persecution that requires consideration.[xx] Early marriages and female genital mutilation violate the right to health of a child protected under articles 24 of CRC.[xxi]The practice of genital mutilation violates human rights guaranteed under articles3 and 7 of I CCPR.[xxii]

Female genital mutilation cause a high risk of death and disability and there are chances to contract sexually transmitted diseases like HIV/AIDS.[xxiii] In addition to the mental pain ,the procedure cause many harmful effect on the reproductive health of victims like bleeding, shock, infection and septicaemia ,urine retention, injury to adjacent tissue, menstrual problems , urinary tract infection, formation of cyst, problems at pregnancy and delivery.[xxiv]

The Committee on the Elimination of Discrimination against Women issued certain recommendations like collection and dissemination of basic data about harmful traditional practices, the support of women's organizations, encouragement of different stakeholders like politicians, professionals, religious and community leaders , introduction of appropriate educational and training programmes, introduction of appropriate legal strategies in national health policies etc to curb the practice of female circumcision.[xxv]

In *Sunitha Tiwari* V *Union of India*, [xxvi]a case which is pending before the honourable Supreme court,the petitioner challenged the practice of female circumcision as it violate the right to privacy and right to life and bodily autonomy of women and girls. It is the contention of the petitioner that the practice of female circumcision, or 'khatna', involves the removal of either part or all of a woman's genitalia.

b. Marital rape

Marital rape is a kind of sexual violence against women. Exception 2 of section 375 creates an exception to the offence of rape in cases of forced sexual intercourse by a man with his own wife if she is of 15 years of age or above .In *X V Principal Secretary, Health and Family Welfare Department Government of N CT of Delhi and Another,* Supreme Court observed that meaning of words "sexual assault" or "rape" in Rule 3 (B) (a) of Medical Termination of Pregnancy Act (MTP) 1971 includes marital rape also. A married woman who became pregnant by marital rape can also seek the protection of MT P Act .[xxvii]

Supreme court has made a remarkable change in the law of marital rape in *Independent Thought V Union of India*.Supreme Court held that sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. In the case of a minor girl child good health would mean her right to develop as a healthy woman.Madan B. Lokur, J.,opined that "the differentiation between married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved." [xxviii]Art 19 of CRC states that Government shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child .

c.Child marriage

Child marriages violate the righto reproductive heath of girl child. Early pregnancy and motherhood has adverse effect on her right to education and right to work.United Nations Organisation urges the States to make legislations to prohibit marriage of girl child.[xxix]Marriage must be entered into

with the free consent of the intending spouses.[xxx] The Committee on economic and Social Council reported that practises like early marriage, female genital mutilation, preferential feeding and care of male children etc affects the health of girls.[xxxi]Section 10 of the Prohibition of Child Marriage Act (PCM), 2006 explains the punishment for solemnising a child marriage.

In *Society for Enlightenment and Voluntary Action V Union Of India* ,the petitioner addressed the failure of authorities to prevent child marriages. The apex court observed that "All child marriages are forced marriages. Many parents wish to marry their girl child early to guard against any aspersions on the girl's virtue of virginity and to mitigate the economic costs associated with raising a child, payment of dowry and conducting a wedding. Early marriage in girls, places a burden on them to discharge their duty of giving offspring to the family. Sexual activity within the marital union is unregulated and even encouraged. " [xxxii]

d.Female foeticide and sex selection

The Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act,1994 provides punishment for sex selection. Law is based on article 15 of the Constitution to prevent discrimination against woman. According to Justice Shah, the prevalence of dowry system, lack of education or the traditional preconception of gender specific roles of women are some of the reasons for discrimination against girl child . [xxxiii]

In *Federation of Obstetrics and Gynecological Societies of India V Union of India*[xxxiv]the court observed that "Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 is a social welfare legislation, which was conceived in light of the skewed sex ratio of India .A skewed sex ratio is likely to lead to greater incidences of violence against women and increase in practices of trafficking, bride buying etc. The rigorous implementation of the Act is an edifice on which rests the task of saving the girl child."

A similar observation was made by the Supreme Court in *Voluntary Health Association of Punjab V Union of India,* Court reminded that a society that does not respect its women cannot be treated to be civilized. Dipak Misra J,,observed that " Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified ." [xxxv]

V. Reproductive health and forced pregnancies

Forced pregnancy violates the mental health and dignity of a woman. CEDAW guarantees that women have equal rights with men to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

[xxxvi] According to World Health Organisation ,quality abortion care is a critical part of the universal right to health and essential to protect the health of women and girls .[xxxvii]

In India, abortion is not allowed on demand of the pregnant mother. The law tries to balance the rights of unborn baby, rights of mother, rights of father and interest of State.Medical Termination of Pregnancy Act (MT P) 1971 lays down the conditions for termination of pregnancy .The certificate of a registered medical practitioner is a prerequisite for abortion under the MTP Act. If the doctor certify that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health court shall allow the petition. Where any pregnancy is alleged to have been caused by rape, the anguish caused by the pregnancy is presumed to constitute a grave injury to the mental health of the woman and termination of pregnancy will be allowed. [xxxviii] Section 3 of the Act read with Rule 3B of the MTP Rules provides the conditions and the category of women entitled to apply for the termination of a pregnancy up to twenty-four weeks. Survivors of sexual assault ,or rape, or incest , and minors are included as an eligible category. Where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman and she is eligible for abortion.[xxxix]

Reproductive right of a woman includes her choice to procreate as well as to abstain from procreating. In *Suchitra Srivastava* V *Chandhigarh Administration* [xl] the victim, an orphaned woman of around 19 years, with slight mental retardation, became pregnant as a result of a rape that took place while she was an inmate at a government-run welfare institution. The Supreme Court ruled that consent of the woman is an essential requirement for termination of pregnancy under the MTP Act, when she is major .

The decision of Supreme Court on *X* V *Principal Secretary, Health and Family Welfare Department, Government of N CT of Delhi* is considered as a milestone in the recognition of reproductive autonomy and privacy of a woman. [xli] Court upheld the right of an unmarried woman to get termination of pregnancy under the (MT P) Act 1971.Unmarried women have the same right to autonomy as married women and forcing a woman to continue an unwanted pregnancy will directly violate that autonomy.

VI. Conclusion

Reproductive rights cannot exist in isolation. It is intrinsically connected with other rights like gender equality, protection from discrimination, right to life, right to health, right to privacy, etc. Reproductive health includes the right to access to sex education, health care, access to contraceptives, autonomy in decision making, prevention and treatment of sexual diseases, informed consent in medical procedure, access to menstrual hygiene products, maternal care and menstrual leave etc .The practices like female genital mutilation, marital rape, sexual assault, child marriage, unwanted of forced pregnancy, compulsory sterilisation etc violates the reproductive health.

Gender based violence cause mental harm and adversely affect the development of a woman's personality . Gender-sensitive training shall be given to every public authorities and law enforcement authorities.Stringent punishment shall be given for gender based violence. Education and financial empowerment of women will go a long way in protecting the health and dignity of womanhood. Government shall undertake measures to improve maternal health, neo natal care and post natal care. Free nutritional supplements shall be made available to all women in need. Family planning shall be based on a right based approach of women rather than as a measure of population control .

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[i] https://www.who.int/southeastasia/health-topics/reproductive-health last accessed on12-03-2023.

[ii] Report of the Committee on the Elimination of Discrimination against Women on its twentieth session. .General recommendation 24(twentieth session)Article 12 of the Convention on the Elimination of All Forms of Discrimination against women and health .A/54/38/Rev.1Paragraph 1.

[iii] Dr. Carmel Shalev, Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women available at https://www.un.org/womenwatch/daw/csw/shalev.htm last accessed on15-08-2023.

[iv] *Suchita Srivastava & Anr* V *Chandigarh Administration* (2009) 9 S CC 1 .

[v] Article 5 of The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979).

[vi] Article 10 of International Covenant on Economic, Social and Cultural Rights (ICESCR)1966

[vii] Article 42 Constitution of India.

[viii] Sections 3,4 of the National Food Security Act (2013).

[ix] *Sandesh Bansal V Union of India* W.P.No.9061 of 2008.

[x] Report of the Special Rapporteur on Right to Privacy ,Human Rights Council ,Forty-third session 24 February–20 March 2020, A/HRC/43/52 Paragraph 22.

[xi] *Devika Biswas V Union of India* Writ Petition (Civil) No. 95 of 2012.

[xii] *Laxmi Mandal V Deen Dayal Harinagar Hospital* ,W.P.(C) 8853/2008.

[xiii] *X* V. *Principal Secretary, Health and Family Welfare Department, Govt. of N CT of Delhi* Civil Appeal No 5802 of 2022 (Arising out of S LP (C) No 12612 of 2022).

[xiv] Report of the Committee on the Elimination of Discrimination against Women on its twentieth session.General recommendation 24(twentieth session) Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women. A/54/38/Rev.1Paragraph 18.

[xv] Report of the Special Rapporteur on Right to Privacy ,Human Rights Council ,Forty-third session 24 February–20 March 2020, A/HRC/43/52 Paragraph19.

[xvi] Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), reprinted in Compilation

of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003). Paragraph 11.

[xvii] Report of the Committee on the Elimination of Discrimination against Women on its twentieth session.General recommendation 24(twentieth session)Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women .A/54/38/Rev.1Paragraph 12.

[xviii] https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation last accessed on 23-04-2022.

[xix] ICESCR General Comment 16 (Thirty-fourth session, 2005): Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, E/2006/22 (2005) 116 at paragraph 29.

[xx] CRC General Comment 6 (Thirty-ninth session, 2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, A/61/41 (2005) 15 at paragraph 74.

[xxi] CRC General Comment 4 (Thirty-third session, 2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, A/59/41 (2004) 102 at paragraph 10.

[xxii] ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol. I (2000) 133 at paragraph 11.

[xxiii] Report of the Committee on the Elimination of Discrimination against Women on its twentieth session. General recommendation 24(twentieth session)Article 12 of the Convention on the Elimination of All Forms of Discrimination against women and health .A/54/38/Rev.1Paragraphs12 & 18.

[xxiv] Hamid Rushwan,*African Journal of Urology,*Volume ,19,Issue 3,September 2013,p130-133.Female genital mutilation: A tragedy for women's reproductive health. available at https://www.sciencedirect.com/science/article/pii/S1110570413000520 last accessed on 25-04-2022.

[xxv] The Committee on the Elimination of Discrimination against Women General Recommendation No. 14 (ninth session, 1990).

[xxvi] *Sunitha Tiwari* V *Union of India* WP (C) 286/2017.

[xxvii] *X V Principal Secretary, Health and Family Welfare Department Government of N CT of Delhi and Another,* Special Leave Petition (Civil)No. 12612 of 2022.

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[xxx] Article 10 of International Covenant on Economic,Social and Cultural and Rights 1966

[xxxi] I CESCR General Comment 14 (Twenty-second session, 2000): Article 12: The Right to the Highest Attainable Standard of Health, E/2001/22 (2000) 128 at paragraph 22 .

[xxxii] *Society for Enlightenment and Voluntary Action V Union of India* Writ Petition No (C)1234of 2017 .

[xxxiii] *Centre for Enquiry into Health and Allied Themes V Union of India* AIR 2003 SUPREME COURT 3309.

[xxxiv] *Federation of Obstetrics and Gynecological Societies of India V union of Indi*a AIR 2019 SUPREME COURT 2214.

[xxxv] *Voluntary Health Association of Punjab V Union Of India* AIR 2013 SUPREME COURT 1571,

[xxxvi] Article 16 (1)(e) of CEDAW

[xxxvii] https://www.who.int/southeastasia/health-topics/reproductive-health last accessed on12-03-2023.

[xxxviii] Explanation 2, Section 3 of Medical Termination of Pregnancy Act (MT P) 1971.

[xxxix] Explanation 1 ,Section3of Medical Termination of Pregnancy Act (MT P) 1971.

[xl] *Suchitra Srivastava* V *Chandhigarh Administration* (2009) 9 SCC 1 .

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