Enforceability of Right to Health: With Special Reference to Women’s Right to Reproductive Health in India— A Human Rights Perspective

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Human rights provide a useful legal and normative framework, vocabulary and form of guidance for public health actions, while enhancing the accountability of Governments. Human rights and public health have the common objective of promoting and protecting the well-being of all individuals. Human rights must 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.1

Since the development of human rights, some newer aspects have been identified and ascertained. Some of them are right to pollution-free environment, right to know, right to development, right to leisure, right against discrimination and torture, right to health and others. These rights are in addition to other basic rights like right to equality, right to freedom, right to religion, cultural and educational rights, etc. Amongst these, right to life has been emphasised time and again. Various international declarations/treaties/conventions/protocols have also reiterated it on various occasions.

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Such as Article 25 of the Universal Declaration of Human Rights, 1948 has stated that: â€œEveryone has the right to a standard of living adequate for the health and well-being of himself and of his familyâ€. Similarly the Preamble to the World Health Organisationâ€™s (WHO) Constitution also declares that it is one of the fundamental rights of every human being to enjoy â€œthe highest attainable standard of healthâ€. This right also includes the right to the underlying conditions of health as well as medical care.2

Article 12(1) of the Protocol on Economic, Social and Cultural Rights, States parties have agreed to â€œrecognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.â€ Article 12(2) provides that the steps to achieve the full realisation of this right shall include those necessary for:

12. (2)(a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
(d) The creation of conditions, which would assure to all medical service and medical attention in the event of sickness. This article is reinforced by Article 24(2)(f) of the Convention on the Rights of the Child, which requires States parties to â€œdevelop preventive health care, guidance for parents and family planning education and servicesâ€.

This right to health carries more importance with reference to women keeping in view their biological structure and child-bearing capacity and necessity. Articles 11, 12 and 14 of the Convention on Elimination of All Forms of Discrimination against Women, 19793 (Cedaw) have declared in unequivocal terms that States shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning and to eliminate discrimination against women in rural areas in order to ensure to such women the right to have access to adequate health care facilities, including information, counselling and services in family planning. The duty of State parties to ensure, on a basis of equality between men and women, access to health care services, information and education implies an obligation to respect, protect and fulfil womenâ€™s rights to health care.

Cedaw contains articles that are directly related to WHOâ€™s objective of assisting Governments in protecting and improving womenâ€™s health. Article 12 specifically directs the States to take all appropriate measures to eliminate discrimination against women in the field of health care, while others have a direct or indirect bearing on the enjoyment of the highest attainable standard of health. It was provided that the States to ensure, on a basis of equality of men and women, access to health care services, information and education. It also implies an obligation to respect, protect and fulfil human rights related to womenâ€™s health. The State Governments have the responsibility to ensure that legislation; executive action and policy comply with these three obligations.

It is also to be noted that once State parties have ratified Cedaw, they are under an obligation to submit periodic reports to the Committee on the legislative, judicial, administrative or other measures that they have adopted to implement the Convention. As a result of which by 2004, 124 countries established legal mechanism to protect womenâ€™s right to health.

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. Cedawâ€™s Committee in 2004 reported that:

482. The Committee is concerned about the situation of womenâ€™s health and particularly their reproductive 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 adolescents. 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 HIV/AIDS and to improve the dissemination of information about risks and ways of transmission.

WHO is committed to 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 helping to implement the various provisions of Cedaw. The Preamble to the World Health Organisation’s (WHO) Constitution also declares that it is one of the fundamental rights of every human being 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.

As per the definition of health by WHO, human health is defined as 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 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.

Article 17 of 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. 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. Thus right to health with special reference to women’s reproductive health was ascertained and recognised.

Recently the Convention on the Rights of Persons with Disabilities of 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 as States have been directed to provide persons with disabilities with the same range, 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 referred 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.

Indian position India has been a participatory and signatory to almost all the major/significant international declarations/conventions on right to health and women’s right to reproductive health. It has ratified these declarations/conventions. Such documents include the Beijing Declaration of 1995 which has expressly recognised women’s right to reproductive health.

Article 30 declares that: Ensures equal access to and equal treatment of women and men in education and health care and enhance 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 the right to health and women’s right to reproductive health. Such laws are the Medical Termination of Pregnancy Act, 1971, Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, the Penal Code, 1860 (Sections 312-318), the Maternity Benefit Act, 1961 and others. But till this time, no comprehensive, consolidated and direct law/act has been passed covering all the aspects of women’s right to reproduction.

The abovementioned laws have indirectly protected the health of women and her right to make choice to bear a child and spacing. Thus these enactments indirectly support women’s right to reproduction, as sexuality and spacing between two children are two aspects of right to reproduction. Thus, it also includes right to abortion. In the abovementioned three Acts women’s right to health has been recognised and she has been armed with the right to give or not to give informed consent for abortion or miscarriage. Paramount consideration has been given to the physical and mental health of mother and child in these enactments.

Maternity benefits in India are mainly provided under the Maternity Benefit Act, 1961. The Act provides various kinds of benefits to women workers during pregnancy and after the birth of child to protect the health of mother. The Supreme Court in MCD v. Female Workers (Muster Roll)10 declared that the maternity benefit is applicable to all casual workers.
and daily wage workers. The Court further observed 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 fulfil international obligations provided under the abovementioned international conventions/declarations.

The Constitution of India and the right to health with special reference to women’s right to reproduction. The Indian Constitution does not have any direct provision on right to health or women’s right to reproductive health. The Supreme Court of India has declared it as a fundamental right within the penumbra of Article 21 of the Constitution. Although Chapter III and Chapter IV relating to fundamental rights and directive principles of State policy respectively, do not provide right to health and health care services within their framework, the Supreme Court has provided them a base to claim and retain them but it has referred international conventions/covenants as their basis. In the following pages we will discuss it.

The directive principles of State policy and the right to health and health care services. Under the directive principles of State policy various provisions have been provided 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. Further, 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. That is why the adage “sarve santu niramaya” still holds well. 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. Rather human health must be top priority by the State. A bare study of these provisions reveals that Articles 41, 42 and 47, which deal with social security, maternity benefits and health, respectively, have been addressed only marginally but not copiously.

A human right approach relating to women’s right to reproductive health. Right to health and reproductive health have been declared by the Supreme Court time and again. They have been declared to be within the penumbra of Article 21 of the Indian Constitution. It has also been opined that right to health is a part of right to livelihood. It was only in 1991, in CESC Ltd. v. Subhash Chandra Bose that the Supreme Court placed reliance on international instruments and declared that the right to health was a fundamental right.

In Consumer Education & Research Centre v. Union of India, the issue before the Supreme Court was in the matter of asbestos industry and the right of such workers to medical aid and service thereafter. The Supreme Court held that in those 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. 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. Enactment of the Medical Termination of Pregnancy Act, 1971 proves that women’s right to reproductive health has been recognised as it confers on women a choice to terminate pregnancy 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. 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 focussed 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.
This Supreme Court ruling is path-breaking as it unequivocally endorses respecting the autonomy of mentally retarded persons in the area of reproductive choice. The Court in Suchita Srivastava case24 observed that: 30. â€” the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy.25 (emphasis supplied)

The Court also quoted with approval the United Nations Declaration on the Rights of Mentally Retarded Persons, 197126 which declares that:

(1) the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
(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.27

The Court also said that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. The decision of the Court amply proves that womenâ€™s right to reproductive health is a part of her human right and part of fundamental rights enshrined in Chapter III of the Constitution.

Conclusion It has rightly been observed:
For a population, which is predominantly at the poverty or subsistence level, expecting people to go to the courts to seek justice for what is constitutionally ordained as a right is unrealistic as well as discriminatory. The mere constitutional provision is not a sufficient condition to guarantee a right, and more so in a situation like health and health care where in provisions in the form of services and commitment of vast resources are necessary to fulfil the right.28

Further it can be said that, it is still important to have health and health care instituted as a right within the Constitution and/or established by a specific Act of Parliament guaranteeing the right to health and health care services.

Mere statement of national policy alone is not sufficient to assure entitlement to health care; but the right must be developed and established through specific statutes, programmes and services which we lack in India. Instead of piecemeal legislation, some specific and comprehensive legislation covering all the aspects of health and health care services must be passed. While passing such a statute judicial pronouncements made by the Supreme Court and the State High Courts must be taken into consideration.

Social security legislation like Employee State Insurance Scheme, Central Government Health Scheme Maternity Benefit Scheme and various other schemes for mine workers, plantation workers, beedi workers, cinema workers, seamen, armed forces, railway employees, etc., or through employer provided health services or reimbursements. This population estimated to be about 12% of the countryâ€™s population might be said to have right to health care, at least during the working life of the main earner in the family. A very few have adopted mediclaim services but most of the people have no such cover or protection. Such provisions must also be available to other persons also.

Provisions in the Constitution will also serve to inform the people that protection of their health is official policy and duty of the Government and is reflected in the basic law of the land, the Constitution of India.

By adopting the above suggestions we will be able to achieve our basic target i.e. health for all including womenâ€™s right to reproduction in its true and proper sense.

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- Womenâ€™s Health And Human Rights: Monitoring the Implementation of CEDAW (WHO publication, 2007) 1.
- Franklin D. Roosevelt also advocated for a right to medical care in 1944. See, Franklin D. Roosevelt, â€œThe Economic Bill of Rightsâ€• â€œExcerpt from 11-1-1944 message to Congress on the State of the Union.
- It is a legally binding document.
- Franklin D. Roosevelt also advocated for a right to medical care in 1944. See, Franklin D. Roosevelt, â€œThe Economic Bill of Rightsâ€• â€œExcerpt from 11-1-1944 message to Congress on the State of the Union.
- Para 94 of the â€œPlatform for actionâ€• explains that: â€” Reproductive health therefore implies that people are able to have satisfying and safer sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations and not merely counselling and care related to reproduction and sexually transmitted diseases. (emphasis supplied)
- The Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (icesscr) ratified on 10-4-1979; the International Covenant on Civil and Political Rights (iccpr) ratified on 10-4-1979; the International Convention on Elimination of all Forms of Racial Discrimination ratified on 3-12-1968; the Convention on Rights of the Child acceded on 11-12-1992; the Convention on Elimination of all Forms of Discrimination Against Women signed on 30-7-1981; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment signed on 8-10-1997; the Convention on the Political Rights of the Women ratified on 1-11-1961; the International Convention on the Rights of Persons with Disability, 2006 ratified on 1-10-2007. 
- 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 Penal Code, 1860.
- âœ21. Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law.âœ•
- Laxmi Mandal v. Deen Dayal Haringar Hospital, (2010) 172 DLT 9 sub nom Jaitun v. MCD. (The Court ordered Municipal Corporation of Delhi to pay compensation of Rs 50,000 to the mother for the violation of her fundamental rights by being compelled to give birth to her daughter under a tree.); Laxmi Mandal v. Deen Dayal Haringar Hospital, (2010) 172 DLT 9 (One Shanti Devi living in poverty, died as the result of being refused adequate maternal health care despite the fact that she qualified for the free services under the existing State-sponsored schemes.)
- In some countries this right has been given due place in their Constitutions; like Article 20 of the Constitution of Nepal (2007) provides: âœ20. (2) Every woman shall have the right to reproductive healthâœ•. The Supreme Court of Nepal in Prakash Mani Sharma v. Govt. of Nepal, Writ No. 064 of 2008 and in Lakshmi Dhikta v. Govt. of Nepal, Writ No. 0757 of 2011 have declared that:
- Reproductive health and reproductive rights stand in relation to one another. It is only when oneâ€™s 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.
- Thus it has been declared as one of the fundamental rights.
- Suchita Srivastava v. Chandigarh Admin., (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570. In this case a mentally retarded woman became pregnant as she was raped. She was found to be a âœmildly retardedâœ• woman. She also expressed her willingness to bear the child. The Court decided that: âœthe victimâ€™s pregnancy cannot be terminated without her consent and proceeding with the same would not have served her âœbest interestsâœ•.
- (2009) 9 SCC 1, 17, para 30.
- India has ratified this Convention on 1-10-2007.
- (2009) 9 SCC 1, 21, para 50.