CHAPTER-V

INTERNATIONAL STANDARDS RELATING TO REPRODUCTIVE FREEDOM

5.1 Introduction

Mrs E. Roosevelt, the Chairperson of the Committee, entrusted with the drafting of Universal Declaration of Human Rights, observed in 1958 that universal human rights begin “in small places, close to home- so close and so small that they cannot be seen on any maps of the world. Unless these rights have meaning there, they have little meaning elsewhere.”¹ This statement is of much relevance for our study. Violence against women is present everywhere, cutting across boundaries of culture, caste, creed, language, status and age. Even though many societies condemned violence against women but the actual position is that women’s human rights are often violated and this violation is permitted under the garb of cultural practices and norms, or through misinterpretations of religious tenets.²

The concept of international human rights is based on the idea that all people are born free and equal in dignity and rights. The promotion of human rights was identified as the basic purpose of the United Nations in 1945. Then in 1948, the Universal Declaration on Human Rights³ was adopted as a universal or common standard of achievement for all people and all nations. The UDHR along with the UN Charter, ICCPR its optional protocols and ICESCR constitute the “International Bills of Rights” which form the corpus of international human rights agencies. Although the UDHR is not a legally binding document, nations have endowed it with great legitimacy through their actions, including its legal and political invocation at the national and international levels. Principles of the UDHR are cited in numerous national constitutions and governments often refer while accusing other governments

³ Hereinafter to be referred as UDHR.
of violating the human rights.\(^4\)

The International law has set some standards to achieve human rights in general and human rights of the women in specific. Therefore, if we talk about human rights as well as the concern for women’s health, it is the reproductive right which is in fact the greatest need of the human society. Nevertheless, several human rights issues related to women’s rights have recently received renewed interest and have obtained their long-deserved attention and moved to the top of the international human rights agenda. Women’s human rights have become a fundamental concern of the United Nations and regional organisations, which have been established with the aim to promote and protect human rights.\(^5\) The movement towards fostering compliance with reproductive and sexual health rights has been enhanced through the UN\(^6\), national and international non-governmental organizations\(^7\), professional medical associations\(^8\), and academic initiatives. These efforts have been reinforced by, for example, research into women’s perspectives on the exercise of their reproductive rights\(^9\), and research into the challenges of protecting reproductive rights in different regions.\(^10\)

---


5.2 History of Reproductive Rights

In 1945, the UN Charter included the obligation “to promote......universal respect for and observance of, human rights and fundamental freedoms for all without discrimination to race, sex, language, or religion.” However, the Charter did not define these rights. Three years later, the UN adopted the Universal Declaration of Human Rights, the first international legal document to delineate human rights. The Preamble states “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women.” It also did not mention reproductive rights. It was at the UN’s 1968 International Conference on Human Rights that Reproductive Rights were first discussed as a subset of human rights. Hence, the matters relating to procreation and family planning were specifically related to human rights in this Conference. The Article 16 of the Proclamation of Teheran states, “Parents have a basic human right to determine freely and responsibly the number and spacing of their children.” But here the main emphasis in the “basic human right” principle is on population control and not on the reproductive freedom. This right was further expanded and discussed in other international documents since 1968. So, family planning was defined as a human right in Article 14(f) of the concluding document adopted at the World Population Conference in Bucharest in 1974 as follows: “All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.” The Bucharest resolution significantly expanded the concept of reproductive rights to cover all couples and individuals, recognizing that they had to have not only information and education but the means to control their reproduction. Reproductive rights now included two components: the freedom to decide how many children to have and when to have them, and the entitlement of

family planning services.\textsuperscript{12}

Although the International Bill of Human Rights laid down a comprehensive set of rights to which all people, including women are entitled. But the means for protecting the human rights of women were provided by ‘Convention on Elimination of All Forms of Discrimination against Women’ (CEDAW) which is ratified by India also. It is the first human rights treaty that affirms the reproductive rights of the women and targets cultures and traditions as forces conditioning gender roles and family relations.\textsuperscript{13} It is a legally binding treaty in which states parties assume the duty to eliminate discrimination against women in all civil, political, economic, social, and cultural areas, including health care and family planning. CEDAW gave attention to the issue how the women’s health and life is affected by the unsafe abortion. CEDAW prohibits discrimination against women in access to health care during their entire life particularly in the areas of family planning pregnancy and confinement during post-natal period.\textsuperscript{14}

The Declaration of the first International Women's Conference in Mexico City in 1975 firmly grounded its assertion of the right to reproductive choice in the principle of bodily integrity and control. It also began to outline reproductive health principles in reproductive rights:

It should be one of the principal aims of social education to teach respect for physical integrity and its rightful place in human life. The human body, whether that of woman or man, is inviolable and respect for it is a fundamental element of human dignity and freedom.

\textsuperscript{12} See, for example, Paragraph 7 of the World Population Plan of Action, which states: Individual reproductive behaviour and the needs and aspirations of society should be reconciled. In many developing countries, the desire of couples to achieve large families is believed to result in excessive national population growth rates and Governments are explicitly attempting to reduce those rates by implementing specific policy measures. United Nations International Conference on Population, World Population Plan of Action at 11.

\textsuperscript{13} Article 2, 4-16. Despite the wide range of human rights documents incorporating prohibition on the basis of sex, there is no noticeable international document enunciating the right to reproductive choices. So far it is only CEDAW that has referred to this right particularly in Articles 12(1) & 16(1) (e). Moreover in 1993 it adopted the Recommendation No. 21 to the state parties on equality in marriage and in family relations.

Every couple and every individual has the right to decide freely and responsibly whether or not to have children as well as to determine their number and spacing, and to have the information, education and means to do so.\textsuperscript{15}

The significant success of the international women's movement, both at Mexico City in 1975 and in Nairobi in 1985, was a result of shifting the perspective from reproductive rights to women's autonomy from the societal need for fertility decline.\textsuperscript{16} However, the inherent tension between the population control and the women's rights movement on the question of reproductive behaviour is reflected in the right to "decide freely and responsibly" the number and spacing of children, which has formed the basis of every articulation of reproductive rights since Teheran. The "freedom" of the individual to decide is always to be limited by the "responsibility" to make the decision within the framework of population policies imposed for the societal good.\textsuperscript{17}

Faced with this problematic contradiction, women's health advocates have had to redefine reproductive rights from a woman's perspective. A vast body of feminist scholarship has contributed greatly to the still-evolving understanding of women's right to reproductive rights and reproductive health. In essence, advocates and feminist scholars have de-linked reproductive rights from population control to promote the perspective that women have an unencumbered right to reproductive health and choice. They emphasize that this right should be protected from manipulation by individuals, states, or collectives. Women's rights advocates have also called for the recognition of women's right to health, including reproductive health, because it is socially and politically dependent upon the environments in which the women inhabit.\textsuperscript{18}

Along with CEDAW many other global initiatives had been taken to promote women’s rights including reproductive freedom.\textsuperscript{19} International Covenant on Civil and Political Rights establishes the Human Rights Committee (HRC) which provides strong support for women’s right to access abortion. Similarly, the International Covenant on Economic, Social and Cultural Rights establishes the Committee on Economic, Social and Cultural Rights (CESCR), the Convention on the Rights of the Child establishes the Committee on the Rights of the Child (CRC) and the International Convention on the Elimination of All Forms of Racial Discrimination establishes the Committee on the Elimination of Racial Discrimination (CERD). But the promotion of women’s reproductive rights has recently gained momentum, in large part, due to the 1994 United Nations (UN) Conference on Population and Development, held in Cairo, and the 1995 Fourth UN World Conference on Women, held in Beijing.\textsuperscript{20}

The “keystone” of the Cairo Conference, according to Ms Nafis Sadik, the Secretary-General of the 1994 Population Conference, “is gender equality, equity and empowerment of women. Women are half the world’s population, half the population of every country. Because women are the only ones who become pregnant and bear children, population policy must be dealt with by them…..The subject of control is what concerns religious leaders. Throughout history anthropological, cultural, social and religious norms have supported fertility control. That has been used to subjugate women..........Our plan of action is only saying that the needs of women should be addressed in consultation with them, not as a prescription to them and imposed on them.”\textsuperscript{21}

\textsuperscript{19} Even Article 2(1) of the UN Convention on the Rights of the Child contains principles of non-discrimination on the basis of sex. The UN observed 1975 as International Women’s Year and 1975-85 as a Decade for Women. In 1975 the First World Conference on Women was held in Mexico City. Subsequently two other UN Conferences on Women were held in 1980 and 1985 respectively at Copenhagen and Nairobi. At Nairobi the Forward Looking Strategies for the Advancement of Women to the Year 2000 were adopted by consensus, as a blueprint for women betterment. The epoch making Fourth World Conference on Women was held in 1995 in Beijing that adopted the Beijing Declaration and Platform of Action. The World Summit for Social Development held in Copenhagen in 1995 focussed on the issues related to improvement of the status of women. Women issues retained their priority even in the Beijing +5 year review and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001. All these Conferences proved that equality in human rights of the men and women is main agenda of United Nations.


\textsuperscript{21} Rakshat Puri, “Population Curbs: Key is Gender Equality” \textit{The Hindustan Times}, Sep 7, 1994 at 7.
This holistic approach to reproductive rights is reflected at the 1994 Cairo conference on population and development, where a Programme of Action encompassing a broad spectrum of reproductive and sexual health needs was developed. The Cairo Programme of Action is noteworthy not only for making reproductive health the centrepiece of family planning programs and policies, but also for its articulation of a comprehensive concept of reproductive health.

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 therefore 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. Implicit in this last condition are the rights 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

---


Reproductive health care in the context of primary health care should, inter alia, include: family-planning counselling, information, education, communication and services; education and services for prenatal care, safe delivery and post-natal care, especially breast-feeding and infant and women’s health care; prevention and appropriate treatment of infertility; abortion as specified in para 8.25, including prevention of abortion and the management of the consequences of abortion; treatment of reproductive tract infections; sexually transmitted diseases and other reproductive health conditions; and information, education and counselling, as appropriate, on human sexuality, reproductive health and responsible parenthood ....

23 This is also the definition of Health in the World Health Organization, “suggesting broader social rather than purely medical parameters for health”. Constitution of the World Health Organization (1946), reprinted in World Health Organization, Basic Documents 1 (40th ed. 1994).
diseases.\textsuperscript{24}

Abortion right received a serious setback at Cairo Conference when the crucial abortion debate was deferred without reaching any common consensus. The Fourth World Conference on Women which was held in 1995 in China, the land which proudly proclaims “women hold up half of heaven” also failed to adopt any concrete resolution on women’s sexual and reproductive rights. Although both the conferences have failed to adopt any draft resolution on abortion right, the women issues are now openly on the international agenda. ICPD in Cairo in 1994 was recognized by many Eastern and European women’s groups as their first real opportunity to be involved in the international conference arena. Beijing provided a second opportunity to seek support and solidarity, to discuss priorities and to seek solution to the continuing struggle that women face in Eastern and European countries.\textsuperscript{25} The reproductive health goals formatted in Cairo were reaffirmed at the 1995 Beijing Women's Conference, which placed reproductive rights squarely within “human rights already recognized in national laws, international human rights documents and other consensus documents.”\textsuperscript{26} The Beijing Platform for Action was also the first non-treaty document to recognize gender bias and inequality and gender stereotypes as significant barriers to the attainment of women's health.\textsuperscript{27}

These two Conferences led to the recognition that the protection of reproductive and sexual health is a matter of social justice, and that the realization of such health can be addressed through the improved application of human rights contained in existing national constitutions and regional and

\textsuperscript{24} Supra note 22 at 43.
\textsuperscript{25} See a Keynote on Fourth World Conference on Women, IPPF, Annual Report 1995-96 at 25.
\textsuperscript{26} United Nations, Report of the Fourth World Conference on Women at 39, U.N. Doc. A/CONF.177/20 (1969). Paragraph 96 goes further than the Cairo Programme of Action in its recognition that “[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”
\textsuperscript{27} Paragraph 89 of the Beijing Platform for Action states: “A major barrier for women to the achievement of the highest attainable standard of health is inequality, both between men and women and among women in different geographical regions, social classes and indigenous and ethnic groups.” Id. at 37. Paragraph 90 states: “Women's health is also affected by gender bias in the health system and by the provision of inadequate and inappropriate medical services to women.” Id. at 37.
international human rights treatise. The Programme of Action\textsuperscript{28} resulting from the 1994 Cairo Conference, and the Declaration and Platform for Action\textsuperscript{29} resulting from the 1995 Beijing Conference was strengthened in subsequent five-year reviews in 1999\textsuperscript{30} and 2000\textsuperscript{31} respectively.\textsuperscript{32}

The declarations and statements from these Conferences have established the human right of couples and individuals to reproductive choice and freedom. Taken together, they constitute a vast body of “soft law” which, although lacking the binding nature of treaty law, has undeniable value in advancing reproductive health goals. First, these declarations and statements add to the practice of customary law. Although UN Conference documents are not legally binding, they are politically enforceable since they represent a consensus among all member nations. Second, they shape domestic law by giving advocates the language to make legal demands, foster a rights debate and ensure informal obligations on the part of state and non-state actors. The impact of conference statements and declarations on customary and domestic law is critical given the scant international and domestic jurisprudence on women’s health and the absence of case law. The scope and vision of the Cairo and Beijing documents, in particular, with the public commitments made by signatory governments, make them potentially effective bargaining tools in the hands of women’s health and human rights advocates.\textsuperscript{33}

These treaty-monitoring bodies’ interpretations and jurisprudence have played a large role in advancing women’s reproductive rights.\textsuperscript{34} The UN


\textsuperscript{29} UN, Department of Public Information, Platform for Action and Beijing Declaration. Fourth World Conference on Women, Beijing, China, 4-15 September 1995 (UN, New York, 1995).


\textsuperscript{32} Supra note 20 at 149.


treaty monitoring system acts to ensure state compliance with international treaty obligations. Each of the major international human rights treaties establishes a Committee to monitor compliance with it. The Committees issue ‘General Comments’ or ‘General Recommendations’ which describe what State Parties must do in order to observe rights protected by conventions. They may set standards to establish the minimum conduct that States must undertake to comply with legal obligations and advance the realization of rights. These standards, or indicators, equip States to discharge reporting responsibilities under the various international human rights treaties, inform treaty-based committees of the types of data they may request and receive, and serve as advance notice to reporting States of the criteria by which compliance may be monitored.

The Committees also facilitate a ‘country reporting’ process. This process requires states to report periodically on their efforts to respect, protect and fulfil the human rights enshrined in a particular treaty. Following dialogues with government representatives, Committee members issue Concluding Observations to the reporting government. Concluding Observations provide a mechanism through which Committees apply the overall human rights standards developed in General Comments and General Recommendations. Although Committees are not judicial bodies and their Concluding Observations are not legally binding, the increasingly comprehensive quality of the Concluding Observations on the subject of reproductive rights has enormous potential to influence national laws and policies. When taken together and analysed, the Committees’ General Comments and Concluding Observations may be considered a type of jurisprudence or collective work guiding the development and application of human rights both at the national level and at the international level. Some Committees also have a mandate to examine individual complaints of human

rights violations and issue written decisions in such a case.\textsuperscript{38}

5.3 **Key Conventions and Conferences and their Role in Developing International Law**

Reproductive rights are essential for the realization of fundamental rights. There are certain Conventions which provide the legal foundation for reproductive rights including the rights relating to safe pregnancy and childbirth are as follows:

**5.3.1 Convention on the Elimination of All Forms of Discrimination against Women**

The Convention on the Elimination of All Forms of Discrimination against Women (1979) \{CEDAW\} which has been ratified by India is considered as the Magna Carta for the rights of women. This Convention provides the basis to undertake effective measures to equalize men and women in every walk of life by giving equal opportunities in economic, political and public life. By abolishing all discriminatory laws, all forms of traffic in women and exploitation of women, this Convention affirms the reproductive rights of women and targets, culture and tradition as influential forces, which shape gender roles and family relations. This is a significant international treaty that protects the right of women to make their own decisions about their fertility and sexuality. Under the CEDAW, governments are obliged to take appropriate measures to eliminate all forms of discrimination against women, including those forms that result from the lack of reproductive health services and education. The Convention stresses that policy makers, governments and service providers have to see fertility regulation and reproductive health services as a way to empower women, and not as a means to limit population growth, save the environment or speed economic development.\textsuperscript{39}

5.3.2 Declaration on the Elimination of Violence against Women 1993

The Preamble to Declaration on Elimination of Violence against Women 1993 (herein after referred as DEVAW)\(^\text{40}\) states that this Declaration is the first international human rights instrument to exclusively deal with the issue of violence against women. It affirms that violence against women violates, impairs or nullifies women’s human rights and exercise of their fundamental freedoms. DEVAW gives a broad definition to the word violence and includes psychological harm inflicted on women. Violence against women, would encompass but not limited to physical, sexual and psychological violence occurring in the family including battery, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation, physical, sexual and psychological violence occurring within the general community including rape, sexual abuse, sexual harassment and intimidation at work in educational institutions and elsewhere, trafficking in women and forced prostitution, physical, sexual, and psychological violence perpetrated or condemned by the State, wherever it occurs.\(^\text{41}\)

5.3.3 Vienna Declaration of 1993

For the first time ever, violations of human rights were specifically recognized by the UN at its World Conference held in Vienna in June 1993.\(^\text{42}\) The Vienna Declaration specifically condemned gender based violence and all forms of sexual harassment and exploitation. The Conference concluded that:

“Human rights of women and of the girl child are inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.” The Conference urged upon governments,


\(^{41}\) Pratima Sharma, “Development and Emergence of International Norms and Standards for Arresting Domestic Violence against Women: A study” XL (1) IBR 74-75 (2013).

institutions, inter-governmental and non-governmental organizations to intensify their efforts for protection and promotion of human rights of women, and the girl child.\textsuperscript{43}

In the Vienna Declaration the issue of violence against women was first discussed in terms of acts of overt physical and sexual violence, for example, female foeticide, female infanticide, incest, wife beating, marital rape in private sphere and sexual harassment and rape in the public domain. In recent years, the definition of the term ‘gender based violence’ of this Declaration has been expanded to include more structural forms of gender-based violence. Certain cultural practices, like son-preference, dowry customs and virginity tests, for example, are highlighted as denigrating or objectifying women. Thus Vienna Declaration specifically condemns gender based violence, all forms of sexual harassment and exploitation and calls upon the General Assembly, to adopt a draft declaration on Violence against Women.\textsuperscript{44}

\textbf{5.3.4 International Conference on Population and Development\textsuperscript{45}}

For the first time, in 1994 International Conference on Population and Development, organized by United Nations in Cairo, all governments recognized the need to advocate the reproductive rights for all men and women to be informed and to have an access to safe, effective, affordable, legal and acceptable methods of family planning of their choice. International Conference on Population and Development defined the concept of safe motherhood as, “Services based on the concept of informed choice, should include education in safe motherhood, prenatal care, maternal nutrition, adequate delivery assistance, referral services for pregnancy, child birth and abortions complications, post-natal care and family planning. All births should be assisted by trained persons.” ICPD major pronouncement was the recognition of women’s individual rights and responsibilities in reproductive decision making, acclaimed as a key to advancing economic development.

\textsuperscript{43} Vijay Lakshmi, “Women’s Rights are Human Rights” 96 \textit{AIR} 23(Feb. 2009).
\textsuperscript{44} \textit{Supra} note 41 at 73.
\textsuperscript{45} Awadesh Kumar Singh and Jayanta Choudhury, \textit{Violence against Women and Children: Issues and Concerns} 114 (Serials Publications, New Delhi, 2012).
5.3.5 Millennium Development Goals

The Millennium Development Goals (MDGs), which derive from the Millennium Declaration (2000) ushered a new approach to development and focused on basic needs and outcomes. It included important commitments in the area of sexual and reproductive health, such as: addressing safe motherhood and child survival, prevention of HIV/AIDS, and promoting gender equality and empowering women. The Goals also encompass a commitment to develop a global partnership for development. Targets to meet this Goal include commitment in the fields of development cooperation, trade, market access, debt sustainability and access to medicines. Progress towards meeting the Goals is slow and uneven: the targets for maternal health are particularly off-track. The original MDG Indicators were found inadequate as out of 8 goals only 3 goals are related with sexual and reproductive health and more so maternal health is not specifically referred in Millennium Declaration. Therefore, revised MDG were developed by Inter Agency and Expert Group in 2005 which included an additional goal of Universal Access to Reproductive Health and it was finally accepted in 2007. Therefore it is clear that reproductive rights are essential to the attainment of a number of the MDGs including Goal 3 (promoting gender equality and empowering women); Goal 4 (reducing the child mortality rate) and Goal 5 (reducing maternal mortality).

5.3.6 Millennium Review Summit

The 2005 World Summit emphasized the centrality of the MDGs to international development. However, it also highlighted the importance of a broader development dialogue for poverty elimination, and identified issues, including reproductive health, which have an important role to play in this respect.

5.4 Human Rights Framework and Reproductive Rights

The international human rights framework is robust and authoritative...

---


47 Ibid.
as it stands for the proposition that rights cannot be given or taken away by government, but they exist innately for all human beings. They are part of customary international law as evidenced by the world embracing the principles of UDHR as well as of the two major International Covenants: the ICESCR and ICCPR. These documents contain a wide range of rights and fundamental freedoms like right to life, liberty, non-discrimination, health, work, education etc. and have been ratified by governments globally. Additional human rights conventions and guidelines govern the rights of women, children, religious and ethnic minorities, refugees, people living with HIV/AIDS etc. This synergistic relationship between international human rights framework and the well-being of individuals form the bedrock of human dignity and worth. The obligation of states to protect women’s right to life in the context of pregnancy and childbirth has explicitly been recognized by international and regional bodies.  

5.4.1 Rights relating to Life, Survival, Security of Person

Rights relating to life, survival, security and sexuality are increasingly applied to require a state to eliminate barriers to the basic services necessary for the reproductive and sexual health of its residents. These rights include the right to life and survival, the right to liberty and security of the person, and the right to be free from torture and from inhuman and degrading treatment. Notions of health are illuminating the content and meaning of these rights at the national level, particularly in national courts, and at the regional and international levels. Article 6(1) of the ICCPR states that: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ For example, the Human Rights Committee (HRC), the ICCPR’s interpretive body, emphasises in General Comment No. 6 that state parties should take positive measures to ensure the right to life, particularly measures to increase life expectancy. Additionally, the HRC’s General Comment No. 28 on equality of rights between men and women.

49 Supra note 20 at 159.
50 HRC, General Comment No. 6, Article 6 (Right to life), in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.7 (2004) (Compilation of General Comments) at 129, para.5, see infra note 52.
women, asks states parties, when reporting on the right to life protected by Article 6, to 'give information on any measures taken by the state to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.' Further the Committee on the Elimination of Discrimination against Women (CEDAW Committee), and the African Commission on Human and People’s Rights have all characterized preventable maternal mortality as a violation of women’s right to life. These bodies have established the link between unsafe and illegal abortion and high rates of maternal mortality, and have asked states to ensure that women are not forced to undergo clandestine abortions that endanger their lives.

5.4.2 The Right to Health, Reproductive Health, and Family Planning

The fundamental right to the highest attainable standard of health is

51 HRC, General Comment No. 28, Article 3 (Equality of Rights between Men and Women), in Compilation of General Comments ibid at 179, para.10, see infra note 52.
53 See, e.g., HRC: Mali, para.14, U.N. Doc. CCPR/CO/77/MLI (2003) (expressing concern about the high maternal mortality rate due in part to the practice of clandestine abortions, and asking the State party to ensure that women are not forced to undergo clandestine abortions so as to guarantee the right to life); Guatemala, para.19, U.N. Doc. CCPR/CO/72/GTM (2001) (finding the criminalization of all abortion, in light of the impact on maternal mortality of clandestine abortions, to be problematic, and that the “State party has the duty to adopt the necessary measures to guarantee the right to life (Article 6) of pregnant women who decide to interrupt their pregnancy”); CEDAW Committee, Belize, para.56, U.N. Doc.A/54/38 (1999) (noting that “the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens”); Dominican Republic, para.337, U.N. Doc. A/53/38 (1998) (stating that “the Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life…”); see also, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003, Article 14.2(c) [hereinafter Maputo Protocol].
recognized in various international and regional human rights treaties, and encompasses the right to sexual and reproductive health. The Committee on Economic, Social and Cultural Rights (CESCR Committee) has explained that the right to health consists of both freedoms and entitlements: “freedoms include the right to control one’s health and body, including sexual and reproductive freedom,” and “entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.” The CESCR Committee has further stated that an essential component of the right to health is the availability, accessibility, and quality of health facilities, goods and services.

International and regional human rights instruments and bodies have established States’ obligations regarding the provision of the quality health care services women need for safe pregnancy and childbirth. For example, Article 10(2) the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees special protection for women during a reasonable period before and after childbirth, and Article 15(1) (b) guarantees to all the right to enjoy the benefits of scientific progress and its


56 Id.

57 Id., at para.12 (stating that accessibility consists of non-discrimination, physical accessibility, affordability, and access to information). The U.N. Special Rapporteur on the right to health has affirmed these necessary components of the right to health. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, para.68, 71, U.N. Doc. A/HRC/4/28 (Jan. 17, 2007).

58 CESCR, supra note 54 at Article 10(2).
applications.\textsuperscript{59} The CESCR Committee has established that to improve maternal health, states must take measures to provide access to family planning, pre- and post-natal care, and emergency obstetric care (EmOC).\textsuperscript{60} The CEDAW Committee, the Committee on the Rights of the Child, and the CESCR Committee have all emphasized that women and girls also have the right to information on family planning services,\textsuperscript{61} and the Committee against Torture has also established that they have the right to access post-abortion care.\textsuperscript{62} Article 12(2) of CEDAW requires states to “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal-period, granting free services where necessary,”\textsuperscript{63} and the CEDAW Committee has emphasized that states must “ensure women's right to safe motherhood and emergency obstetric services.”\textsuperscript{64} The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) also requires states to: provide adequate, affordable, and accessible health services to women; establish and strengthen ante-natal, delivery, and post-natal health and nutrition services for women during pregnancy; and to authorize abortion in enumerated cases, which include when the pregnancy endangers the mental and physical health of the pregnant woman.\textsuperscript{65}

5.4.3 The Right to Decide the Number and Spacing of one’s Children

Women’s right to reproductive self-determination finds legal support

\textsuperscript{59} CESCR, \textit{supra} note 54 at Article 15(1)(b); Additionally, the Human Rights Council has recognized that preventable maternal mortality requires effective promotion and protection of the rights of women and girls to enjoy the benefits of scientific progress, among other rights. \textit{See} Human Rights Council, 11\textsuperscript{th} Sess., \textit{Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development: Preventable Maternal Mortality and Morbidity and Human Rights}, A/HRC/11/L.16/Rev.1 (June 16, 2009).

\textsuperscript{60} CESCR, \textit{General Comment No. 14, supra} note 55 at para.14.


\textsuperscript{63} CEDAW, \textit{supra} note 53 at Article 12(2).

\textsuperscript{64} CEDAW Committee, \textit{General Recommendation 24: Women and Health} (Article 12), para.27, 20\textsuperscript{th} Sess. (1999) [hereinafter CEDAW, \textit{General Recommendation 24}].

\textsuperscript{65} \textit{Supra} note 53 at Article 14(2).
in international guarantees of the right to determine the number and spacing of children\textsuperscript{66} and the rights to liberty, personal integrity and privacy.\textsuperscript{67} The right to determine the number and spacing of children is based on recognition of the overall impact of childbearing and rearing on women’s physical and mental health, as well as women’s access to education, employment, and other activities related to their personal development.\textsuperscript{68} Government failure to provide reproductive health services in connection with pregnancy and childbirth violates women’s rights to reproductive self-determination because it denies them the freedom and ability to safely control their family life, in particular the number and spacing of children. Moreover, women without the means to control their fertility are more likely to experience unwanted pregnancies and have multiple births at shorter intervals, making them more vulnerable to the risks of maternal mortality and morbidity.\textsuperscript{69}

The respect for woman’s right to plan her family requires governments to give good sex education, as also provide contraceptives and make abortion services when considered legal, safe and accessible to woman. Especially if a woman becomes pregnant through non-consensual sex she should not by any means be forced to bear the child and bring the pregnancy to term if she does not desires to do so.\textsuperscript{70}

\textbf{5.4.4 The Right to Consent to Marriage and to Equality in Marriage}

The right to marry and to found a family encompasses the right of “a man and a woman of full age, without any limitation due to race, nationality or religion,… to marry and to found a family”, to be “entitled to equal rights as to marriage, during marriage and at its dissolution” and to protection by


\textsuperscript{67}See ICCPR, Article 9 (“Everyone has the right to liberty and security of the person…”), Article 17.1 (“No one shall be subject to arbitrary or unlawful interference with his privacy...”); CCPR, General Comment 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, para.2, U.N. Doc. HRI/GEN/1/Rev.7 (1992) (stating that the aim of ICCPR Article 7 is “to protect both the dignity and the physical and mental integrity of the individual”).

\textsuperscript{68}CEDAW Committee, General Recommendation 21: Equality in Marriage and Family Relations, paras.21, 13\textsuperscript{th} Sess. (1994) [hereinafter CEDAW, General Recommendation 21].

\textsuperscript{69}Centre for Reproductive Rights available at: www2.ohchr.org/English/issues/women/docs/responses/CRR.doc.

\textsuperscript{70}“Chapter Two: International Legal Standards and Conventions on Reproductive rights” available at: catarina.udlap.mx/u_dl_a/tales/documentos/lri/escalante_b_ap/capitulo2.pdf (visited on August 16, 2013).
society and the state of the family as “the natural and fundamental group unit of society.” 

Article 23(2) of the International Covenant on Civil and Political Rights states that the right of man and woman of marriageable age to marry and to found a family shall be recognized. Article 10(1) of the International Covenant on Economic, Social and Cultural Rights reiterates Article 23(3) of the Covenant on Civil Rights, whereby “...marriage must be entered into with the free consent of the intending spouses.” Wording similar to that of Article 23(1) of the Political Covenant is found in Article 18 of the African Charter, requiring protection of the family. Similar protection of ‘right to family’ and equality in marriage is provided under Article 17(1) of the American Convention. Article 23(2) is slightly amended and made part of Article 17(2) of the American Convention. It states, “The right of men and women of marriageable age to marry and to raise a family shall be recognized.”

The European Convention on Human Rights (ECHR) sets out a list of fundamental rights and freedoms which are believed to be common to all people. Article 12 defines an individuals’ right to marry. The ECHR states that all men and women, who have reached the age at which they can legally marry, have the right to get married and to start a family. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) stresses the importance of equal rights within the family. Article 16 provides:

State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during

71 See Article 16 of the Universal Declaration of Human Rights.
72 Yuval Merin, “The Right to family Life and Civil marriage under International Law and its implementation in the State of Israel” available at: http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1077...iclr (visited on April 6, 2014).
73 See Article 12 of the European Convention on Human Rights
marriage and at its dissolution...\(^74\)

### 5.4.5 The Right to Privacy

The right to privacy is very much recognized as a fundamental human right and is given a lot of importance at the international level. Article 12 of the Universal Declaration of Human Rights proclaims: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”\(^75\) Article 17 of the International Covenant on Civil and Political Rights provides that “No one shall be subjected to arbitrary or the unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour or reputation.”\(^76\) Article 8 of the European Convention on Human Rights states that “Everyone has the right to respect for his private and family life, his home and his correspondence.”\(^77\)

The individual’s interest in his/her privacy is particularly compelling in reproductive matters; firstly an intrusion on privacy threatens the liberty of an individual and secondly, by reason of the physical and psychological impact on an individual, if there is interference by others in reproductive autonomy. The community has an interest in maintaining privacy so that people feel safe and comfortable in using public health measures, such as reproductive and sexual health clinics, because patients will feel unusually exposed and vulnerable to observation by strangers. If privacy is not ensured, patients may not return for care important to their own reproductive health and to the health of others, and potential patients may deter from going to them.\(^78\)

### 5.4.6 The Right to be Free from Discrimination

The right to equality and non-discrimination, regardless of gender, race, or other status, is protected under international and regional human

\(^{74}\) Supra note 20 at 179-180.  
\(^{75}\) Article 12, UDHR.  
\(^{76}\) Article 17, ICCPR.  
\(^{77}\) Article 8 of ECHR.  
\(^{78}\) Supra note 20 at 120.
Every woman has the right to non-discrimination, no one should be discriminated because of gender. The Convention on the Political Rights of Women addresses this right and many other international instruments as well, such as Article 2 of the International Declaration on Human Rights and Para 24 of the Fourth World Conference on Women, Beijing Declaration. Because only women require health care services for pregnancy and childbirth, systematic government failure to provide such services reflects the devaluation of women in society and constitutes discrimination on the basis of gender. Indeed, CEDAW explicitly prohibits discrimination against women in all fields, including health care, and the CEDAW Committee has found that it is discriminatory for states to criminalize or refuse to legally provide certain reproductive health services for women.

Furthermore, governments are obliged under international law to ensure that women do not face discrimination on the basis of age, income, race, ethnicity, HIV status or any other condition when accessing health care services. The CESCR Committee has stated that strategies for promoting women’s health are needed to eliminate discrimination against women, and should include high quality and affordable sexual and reproductive health services and have the goal of reducing maternal mortality.

5.4.7 The Right to be free from Torture and Ill-Treatment

Women are abused and raped as sexual objects. They are raped in front
of their husbands, fathers, brothers and other family members for purpose of humiliation and torture. They are also raped as a form of ethnic “cleansing” to make them unmarriageable in the communities in which they live as members of ethnic groups. Women are exposed to these violations of dignity and integrity primarily because of their sexual vulnerability. Reproductive choice is further imperilled where abortion following rape is legally denied, practically obstructed, or unacceptable to victims themselves on religious or cultural grounds. Women in these circumstances suffer the double cruelty of victimization by ethnic hatred, and then rejection by their families and communities, which value them only as reproductive vehicles. Ill treatment by enemies is motivated by knowledge of women’s liability to consequent ill-treatment by their own families and communities. Armed conflict serves to cast light on women’s low status in their communities in peacetime. This low status compels women to conform to social rules that would, for instance, punish marriage and childbearing across ethnic, racial, or religious divisions.

Private conduct does not directly incur the responsibility of States under international law. States have been held responsible, however, for violations of human rights that suffer at the hands of other individuals when states have failed to take appropriate prevention action, including punitive measures against such violations. Some countries have taken measures to prevent violations of the human right not to be subject to inhuman and degrading treatment or torture. Canada, for instance, has granted refugee status to a Somali woman fleeing her country because of a well-founded fear of persecution, in that her daughter would be circumcised.

5.4.8 The Right to be free from Practices that harm Women and Girls

Article 2(f) of the CEDAW provides that the state parties should take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Similarly, Article 24.3 of the Vienna Programme of Action

86 Supra note 36 at 997.
provides that the state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of the children. Similarly, Paragraph 38 of the Vienna Programme of Action also directs the importance of working towards the eradication of any conflicts of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. Paragraph 22.4 of the Beijing Platform of Action also provides that any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated. Similarly, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that the term "torture" means any act which may cause severe pain or suffering, whether physical or mental, is intentionally inflicted on person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public officials or other persons acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.88

5.4.9 The Right to Education and Information

Article 26 of the Universal Declaration of Human Rights states in part that “Everyone has the right to education. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship..... ‘The right to information is also protected under international and regional human rights law and is a necessary part of women’s ability to make choices with respect to their sexual and reproductive lives and to access health services needed to ensure healthy pregnancy and delivery. CEDAW establishes that states must provide ‘access to the information, education, and means” to enable women to decide freely and

88 Supra note 48.
responsibly on the number and spacing of their children." The Child Rights Committee has emphasized that states “should provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs).” None the less, in a number of countries it remains a criminal offence, sometimes described as a crime against morality, to spread information about contraceptive methods or to publicize where women can receive pregnancy termination services. There is a strong relation between girls' access to education and literacy, and their capacity to protect and improve their reproductive and sexual health. Key factors in reducing maternal death in a number of countries, including Sri Lanka, Kerala State in India, Cuba, and China have been the combined effects of education and empowerment strategies for girls, and improved access to necessary health services.

5.4.10 The Right to Enjoy Scientific Progress and Consent to Experimentation

Article 27(1) of Universal Declaration states that: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Further Article 7 of the Civil and Political Rights Covenant states that “No one shall be subjected without his [sic] free consent to medical or scientific

---


“Economic, Social, and Cultural Rights Covenant also states in Article 15(1) (b) that “The states parties to the present Covenant recognize the right of everyone . . . to enjoy the benefits of scientific progress and its applications.” This Convention reinforces reproductive health care as a component of general healthcare. Scientific research on physical and mental health, health service delivery systems, and preventive health care, undertaken through biological, pharmaceutical, and related medical sciences, but also through psychological, sociological, and, for instance, economic and information sciences, all contribute to reproductive health protection. The human right underpinning this entitlement is not simply that of patients and potential patients but also of researchers in relevant sciences.93

The right to enjoy the benefits of scientific progress and its applications is important in the context where the women because of political or religious reasons are denied access to drugs that pharmaceutical science has made effective for emergency contraception or for non-surgical abortion. The same right may be invoked, although probably with more difficulty, where reproductive and sexual health services are not financially or geographically accessible to individuals who are at high risk of reproductive or sexual ill-health.94

5.4.11 The Right to be Free from Sexual Violence

Article 5(a) of the CEDAW provides that the state parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.95 Article 19.1 of the Children Rights Convention provides that the state parties 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

93 Supra note 36 at 1002-03.
94 Supra note 20 at 194.
95 Article 5(a), Convention on the Elimination of All Forms of Discrimination against Women.
parent(s), legal guardian(s) or any other person who has the care of the child.\textsuperscript{96} Similarly Paragraph 18 of the Vienna Declaration provides that the Gender- based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with dignity and worth of the human person, and must be eliminated.\textsuperscript{97} Principle 4 of ICPD Programme of Action provides gender equality and equity and empowerment of women and elimination of all kinds of violence against women, and ensuring women’s ability to control their own fertility, are cornerstones of population and development related programmes.\textsuperscript{98}

5.5 Regional Human rights Treatise

Similar to the UN system there were certain other regional standards which have been adopted by different countries with regard to the reproductive rights. These regional human rights systems monitor states’ compliance with regional human rights treaties.

5.5.1 Inter-American Commission

Similarly, the Inter-American Commission on Human Rights (Inter-American Commission) was created in 1959 to be the primary human rights organ of the Organization of American States.\textsuperscript{99} With the adoption of the American Convention on Human Rights (American Convention) in 1969, the Inter-American Commission was granted the legal authority to issue recommendations regarding alleged American Convention violations.\textsuperscript{100} The Inter-American system had become a major source of jurisprudence on women’s reproductive rights. While reproductive rights are not explicitly guaranteed by any of the regional treaties in Latin America, lawyers have strategically used specific provisions of the American Convention and the

\textsuperscript{96} Article 19.1, Convention of the Rights of the Child.
\textsuperscript{97} Paragraph 18 of the Vienna Declaration.
\textsuperscript{98} Principle 4 of ICPD Programme of Action.
\textsuperscript{99} Declaration of Santiago, Final Act of the Fifth meeting of Consultation of Foreign Minister, Res. VI, OEA/SER.C/11.5 (1959) at 10–11.
Convention of Belem do Para (Violence against Women) to challenge violations of reproductive rights which have been recognized by the Inter-American Commission as a valid basis for establishing state accountability. Key provisions used to bring reproductive rights claim include, among others, the obligation to respect rights established by the American Convention which has been interpreted by the IACHR as requiring the state to exercise due diligence to prevent such violations and the prohibitions on violence against women established by the Convention of Belem do Para which obligates in any such practice. The American Convention also created the Inter-American Court on Human Rights (Inter-American Court), to interpret the Convention and hear individual cases following their consideration by the Inter-American Commission and give legally binding judgments in those cases.  

5.5.2 The African Commission on Human and Peoples’ Rights (ACHPR)  

Finally, the African Commission on Human and Peoples’ Rights (ACHPR) was established under the African Charter on Human and Peoples’ Rights (African Charter), which was adopted in 1981, by the Organisation of African Unity (now the African Union). The ACHPR ensures the protection and promotion of human rights throughout Africa. Under the African Charter, States Parties are called upon to submit, on a biennial basis, a report on the measures they have taken to give effect to the rights and freedoms recognised and guaranteed by Charter. The ACHPR then issues corresponding reports evaluating the Member States’ compliance with the African Charter. The African Charter also created a ‘communication procedure,’ through which the Commission can be petitioned to assess alleged violations. Article 14 of the African Charter on Women’s Rights addresses health and reproductive rights, making the case that State Parties shall ensure that the right to health of women, including sexual and

---

101 Ibid at 150.
103 Article 62, African Charter.
104 African Commission – Information Sheet, supra n. 24. A communication can also be made by a State Party that reasonably believes that another State Party has violated any of the Charter's provisions.
reproductive health, is respected and promoted.\textsuperscript{105}

The rights include:

a) The right to control their fertility;

b) The right to decide whether to have children, the number of children and the spacing of children;

c) The right to choose any method of contraception;

d) The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e) The right to be informed on one’s health status and on the health status of one’s partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with international recognized standards and best practices;

f) The right to have family planning education.\textsuperscript{106}

\textbf{5.5.3 African Protocol on Women Rights}

On November 25, 2005\textsuperscript{107} the protocol on the rights for women in Africa came into force. This treaty was adopted to supplement the African Charter on Human and Peoples’ Rights. The treaty affirms reproductive choice and autonomy as key human rights. However, it lacked legal authority to enforce remedies. However, the African Court has been established to issue legally enforceable decisions in response to the complaints from individuals. The African Court on Human and Peoples’ Rights was created to complement the ACHPR by interpreting and applying the African Charter and to give legally binding judgments in individual cases, which will, bolster women's rights under the African Charter and its Women's Protocol.\textsuperscript{108}

\textbf{5.5.4 Asia}

At present, there is not a regional human rights monitoring system in

\textsuperscript{105} Article 14, African Charter on Women’s Rights.


\textsuperscript{107} Treaty was adopted to supplement the African Charter on Human and People Rights.

Asia. But a human rights charter was declared in South Korea on May 17, 1998 which evolved from series of national consultation coordinated by Asian Human Rights Commission. This declaration was adopted on the 50th anniversary of the Universal Declaration of Human Rights.\(^{109}\)

### 5.6. Reproductive Freedom and Judicial Approach

Judicial mechanisms enable rights-holders to bring claims before a third-party arbiter at the national, regional or international level to determine whether violations of rights have occurred.\(^{110}\) Through judicial review, courts can determine whether a state failed to meet its constitutional and international human rights obligations related to safe pregnancy and childbirth, compel state action to correct systemic policy failures or order remedies for victims.\(^ {111}\)

#### 5.6.1 National Courts

In India, advocates in domestic courts have successfully drawn on constitutional and human rights law to argue that the state is not fulfilling its legal obligations to prevent maternal mortality and morbidity.\(^ {112}\) In the 2010 decision of *Laxmi Mandal v. Deen Dayal Hari Nager Hospital & Ors*, the Delhi High Court recognized a constitutionally-protected right to maternal healthcare and ordered compensation for rights’ violations experienced by two impoverished women who died during childbirth. The High Court recognized the state’s failure to implement various programmes to reduce maternal and infant mortality.\(^ {113}\) It ordered the state to financially compensate

---


\(^{111}\) *Id.* at 18; see also *International Commission of Jurists, Courts and the Legal enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justifiability* 6 (2008).


\(^{113}\) For a description of the relevant government programs, see *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors* (2010) 8853/2008 H.C. Del. paras.3-9, 12-18 (Jun. 4, 2010).
the women’s families\textsuperscript{114} and specifically directed the State to correct the deficiencies in the system and improve monitoring of public health programmes.\textsuperscript{115}

\textbf{5.6.2 Regional Human Rights Courts}

Regional human rights courts, such as the African Court on Human and Peoples’ Rights, the Inter-American Court of Human Rights and the European Court of Human Rights, are other forums for addressing pregnancy-related rights violations. These mechanisms are empowered to issue legally-binding rulings and advisory opinions on the interpretation of relevant treaties.\textsuperscript{116} For example, in the 2009 case of \textit{Xákmok Kásek Indigenous Community v. Paraguay}, the Inter-American Court of Human Rights found human rights violations where the absence of special measures to protect pregnant women contributed to the pregnancy-related deaths of indigenous women.\textsuperscript{117} The court rebuked Paraguay’s failure to implement policies to train skilled birth attendants, provide pregnancy-related care, and document cases of maternal mortality.\textsuperscript{118} It ordered the state to establish immediate measures to provide healthcare for pregnant women\textsuperscript{119} and directed it to conduct a study with the participation of community members and experts, to identify means for adapting maternal care to community needs.\textsuperscript{120} In crafting this remedy, the court mandated broad stakeholder participation in developing policies to combat maternal death. In another case of Maria Mamerita Mestanza\textsuperscript{121}, a Peruvian 33 year old woman who suffered forced sterilization by public health authorities under Fujimori’s regime, the petitioners alleged that the

\textsuperscript{114}Id. paras. 51-61.
\textsuperscript{115}Id. paras. 62, 64-70.
\textsuperscript{118}Id. para. 233.
\textsuperscript{119}Id. para. 301.
\textsuperscript{120}Id. para. 303-06.
Peruvian State had violated Mrs. Mestanza’s right to life, personal integrity, and equality based on Articles 4, 5, 1 and 24 of the American Convention, as well as violations of Articles 3, 4, 7, 8 and 9 of the Convention of Bel’em do Par’a, Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and Articles 12 and 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Peruvian State recognized its international responsibility in a friendly agreement and offered economic compensation to Mrs. Mestanza’s family as reparation. It also promised to make a thorough investigation of the facts and apply legal sanctions to any person determined to have participated, and modify national legislation and public policies on reproductive health and family planning to eliminate discrimination and respect women’s autonomy.\footnote{Id.}

5.7. Reproductive Freedom and Approach of Quasi-Judicial Bodies

5.7.1 National Human Rights Institutions (NHRIS)

Quasi-judicial bodies, including NHRIs, health tribunals and U.N. Treaty Monitoring Bodies (TMBs), are also important accountability mechanisms.\footnote{Supra note 110.} NHRIs are independent governmental bodies that advance and defend human rights.\footnote{Id. at 18.} Therefore, they have an important role in ensuring government accountability for maternal health. NHRIs often have the authority to conduct inquiries into human rights violations, issue reports and make recommendations to the government.\footnote{Id.} For example, in 2010, the Kenya National Commission on Human Rights initiated a public inquiry on Pumwani Maternity Hospital, Kenya’s largest referral maternity hospital, which notoriously detains women unable to pay medical fees in inhumane conditions.\footnote{See Federation of Women Lawyers-Kenya & Centre for Reproductive Rights, “Failure to Deliver: Violations of Women’s Human Rights in Kenyan Health Facilities” 40 (2007) available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_failuretodeliver.pdf (visited on May 6, 2014).}

\footnote{Id.} \footnote{Supra note 110.} \footnote{Id. at 18.} \footnote{Id.} \footnote{See Federation of Women Lawyers-Kenya & Centre for Reproductive Rights, “Failure to Deliver: Violations of Women’s Human Rights in Kenyan Health Facilities” 40 (2007) available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_failuretodeliver.pdf (visited on May 6, 2014).}
has analysed several petitions regarding reproductive rights and had issued two thematic reports on reproductive rights issues: Access to Maternal Health Services from a Human Rights Perspective (2010) and Access to Information on Reproductive Health from a Human Rights Perspective (2011).¹²⁷

Significantly, NHRIIs must have the authority to enforce their recommendations to effectively realize change and remedy health violations without relying on the volition of politicians with ulterior interests.¹²⁸ Furthermore, by creating an alternative channel to lodge complaints, NHRIIs may alleviate economic and geographic barriers that prevent the utilization of judicial mechanisms.¹²⁹

5.7.2 Reproductive Freedom: Health Councils / Tribunals

Likewise, Health Councils, Patient’s Rights Tribunals and Healthcare Commissions are autonomous quasi-judicial accountability bodies, which are generally established pursuant to legislation and can incorporate civil society input in policy creation and implementation.¹³⁰ Health Councils may function as independent, democratically-elected bodies with the authority to approve health plan budgets and/or act as a complaint mechanism.¹³¹ Specifically, the creation of an independent Maternal Health Ombudsperson can provide oversight of the maternal health system and a mechanism to facilitate dialogue among different actors involved in maternal healthcare. The Ombudsperson can also promote access to the judicial system as a method of increasing accountability, among other functions.¹³²

Patient’s Rights Tribunals or Healthcare Commissions handle complaints about the healthcare system, services or employees.¹³³ These quasi-judicial mechanisms may also issue binding resolutions that compel

¹²⁸ supra note 110 at 18.
¹³⁰ supra note 110 at 19, 22.
¹³¹ ibid at 22.
¹³² supra note 129 at 131.
¹³³ supra note 110 at 19.
changes within the health sector, conduct investigations into particular facets of the health system and formulate recommendations for implementation by policymakers.\textsuperscript{134} In the United Kingdom, following a national review of maternity services conducted by the Healthcare Commission, which revealed troubling variations in the quality of care throughout the country, in 2008, the Healthcare Commission collaborated with stakeholders, such as women and clinicians, to establish performance benchmarks for providing maternity services.\textsuperscript{135}

5.8 Reproductive Freedom and Non-Governmental Organizations

NGO’s plays a pivotal role in placing important issues on the international human rights agenda. The issue of violence against women and the recognition that ‘women’s rights are human rights’ was placed on the agenda of the World Conference on Human Rights (Vienna, 1993) as a result of a sustained campaign by women’s rights organizations from around the world. Until that time, the former issue was largely ignored on the grounds that it occurred in the ‘private’ domain (that is, it was a family matter) and was not appropriate for ‘public’ regulation, while women’s rights were treated as something apart from the mainstream of human rights concerns. Now there is a United Nations Declaration on the Elimination of Violence against Women (1993) and a Special Rapporteur on Violence against Women- Its Causes and Consequences. Similarly, women’s rights groups have managed to get rape recognized as a war crime by the Ad Hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda, and they have made election of women judges for the International Criminal Court a major agenda items.\textsuperscript{136}

Therefore, NGOs provide an invaluable service for the protection of human rights. They pressurize international bodies as well as national governments to address human rights issues and also formulate human rights standards. Because of the vital role NGOs play, it is important that they are

\textsuperscript{134} Id.
\textsuperscript{135} Id. at 20.
protected from government repression that inhibits their worthwhile activities. The UN Declaration on Human rights Defenders is an example of the standards needed to protect NGOs and to ensure the effectiveness of their human rights work.\textsuperscript{137}

\textbf{5.9 Reproductive Freedom and Non-State Actors}

The adoption of the Universal Declaration of Human Rights (UDHR), in 1948, recognized the relevance of human rights law to non-state actors. The UDHR calls itself:\textsuperscript{138}

\begin{quote}
A common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.\textsuperscript{139}
\end{quote}

While the UDHR principally focuses on the obligations of states, the quoted paragraph from the preamble mentions the responsibilities of individuals and ‘every organ of society’, which would include non-state actors. Pursuant to the widely ratified International Covenant on Civil and Political Rights (ICCPR) each state party ‘undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant’\textsuperscript{140} Accordingly, if a corporation endangers the rights of an individual, the state has a duty to ensure respect for human rights and to take preventive action. For instance if any individual i.e. medical practitioner or the corporations which are involved in the research process violates any human right in regard to reproductive freedom, then the state can take action against them. Similarly, Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women requires the 180 states parties to ‘take all appropriate measures to eliminate


\textsuperscript{138} Preamble of UDHR.

\textsuperscript{139} Ibid.

\textsuperscript{140} ICCPR, Article 2(1), As of 26 August 2012, 167 states are party to the ICCPR.
discrimination against women by any person, organization or enterprise.’ The Committee on the Elimination of Discrimination Against Women has interpreted that provision as including the states’ responsibility ‘for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.’

5.10 Factors Responsible for Violation of Reproductive Freedom

5.10.1 Poverty: Poverty contributes to maternal mortality in a number of ways. First, the high cost of reproductive health services discourages women with limited economic resources from accessing family planning, antenatal care or skilled delivery. Even government waiver systems, introduced in many countries to provide free family planning or maternal health care services, are often ineffective because they are not consistently implemented and women continue to be charged informal user fees.

Second, women often face discrimination and other human rights violations at health facilities based on their socio-economic status. In Kenya, for example, the Centre has documented cases where women who were unable to pay for services received partial or no care, were abused by staff during the provision of care, or were forcibly detained in the health facility after receiving care until payment was made. These practices are not unique to Kenya. They take place around the world and violate a woman’s rights to


143 Id. at 41-44. See also Federation of Women Lawyers- Kenya (FIDA- Kenya) and the Centre for Reproductive Rights, “Failure to Deliver: Violations of Human Rights in Kenyan Health Facilities available at: at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_failuretodeliver.pdf. (visited on August 6, 2014).

144 Ibid.
dignity and not to be subjected to cruel, degrading and inhuman treatment.\footnote{145}{Supra note 142 and Supra note 143, Women Advocates Resource and Documentation Centre (WARDC) and the Center for Reproductive Rights, “Broken Promises: Human Rights, Accountability and Maternal Deaths in Nigeria available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_nigeria2.pdf (visited on August 6, 2014).}

5.10.2 Discrimination Based on Social or Ethnic group: Women from certain social classes or ethnic groups often face discrimination in accessing health and other social services on the basis of their social status. In India, for example, studies show that while certain disadvantaged castes make up 16% of India’s population, they represent at least 25% of all maternal deaths.\footnote{146}{See The Centre for Reproductive Rights, Maternal Mortality in India: Using International and Constitutional Law to promote Accountability and Change available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_br_maternal_mortality_in_india_2009.pdf.} In Brazil, Afro-descendant populations also have less access to contraceptives, more pregnancies and higher rates of maternal death than non-Afro-descendant women.\footnote{147}{See Latin American and Caribbean Committee for the Defence of Women’s Rights (CLADEM), Monitoring Alternative Report on the Situation of Maternal Mortality in Brazil to the International Covenant on Economic, Social and Cultural Rights, available at: http://www.cladem.org/english/regional/monitoreo_convenios/descMMbrasili.asp.} Women from disadvantaged or stigmatized groups generally have limited access to resources, education, routine preventive health care, nutrition and decent living conditions, which increases their vulnerability to maternal mortality and morbidity.\footnote{148}{Supra note 146 at 108.}

5.10.3 Inadequate Access to Family Planning Information and Services and Access to Safe Abortion: UNFPA estimates that one in three deaths related to pregnancy and childbirth could be avoided if all women had access to contraceptive services.\footnote{149}{UNFPA, Reducing Risks by Offering Contraceptive Services, available at: http://www.unfpa.org/mothers/contraceptive.htm; World Bank, Public Health at a Glance: Maternal Mortality (2006), at http://web.worldbank.org/website/external/topics/exthealthnutritionandpopulation/extphaag/0,,contentMDK:20944136~menuPK:2656916~pagePK:64229817~piPK:64229743~theSitePK:672263,00.html.} Women lack access to family planning services for a number of reasons, including high cost of services;\footnote{150}{Supra note 143 at 16-17; see also Centre for Reproductive Rights, International Standards on Subsidizing Contraceptives, available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_slovak1_international%20standards_9%202008_WEB.pdf (September 2, 2014).} decisions by health care staff not to provide comprehensive information and services to patients;\footnote{151}{See Supra note 143 at 20-21.} and discrimination against women who try to access...
services.\textsuperscript{152} Government policies often work to limit or deny access to contraceptives as well. In the Philippines, for example, the Centre found that a ban on modern contraceptives in Manila City’s public health facilities has effectively blocked access to contraceptives for the majority of the city’s population, particularly low-income women.\textsuperscript{153}

5.10.4 Lack of Comprehensive Policies and Implementation: High rates of maternal mortality are often exacerbated by government failures to either enact comprehensive sexual and reproductive health laws and policies or for the failure to adequately implement these policies. Moreover in many cases, oversight mechanisms for maternal health care are services are not in place or are inadequately implemented. In Nigeria, for example, there are no policies or laws that require the compulsory and confidential reporting and documentation of maternal deaths, data that is essential to tracking patterns of maternal mortality and formulating effective policy interventions.\textsuperscript{154}

5.10.5 Resource Allocation and Corruption: Systematic under-funding of public maternal health services plays an important role in maternal mortality and morbidity as it often results in a lack of adequate health facilities, trained staff, and equipment and supplies necessary to provide Emergency Obstetric care (EmOC) services. Funding shortages also undermine fee waiver systems as health care providers will be more likely to charge informal fees to cover short falls in equipment, supplies and salaries.\textsuperscript{155}

Lack of proper resource allocation is often connected to systemic corruption within health care systems. This corruption originates from both public and private actors and takes many forms, including the diversion of public funds for private use by high-level government officials, marketing of fake drugs by pharmaceutical companies, and demands for informal payments by health care providers.\textsuperscript{156} Lack of transparency and restricted freedom of

\textsuperscript{152} Supra note 142 at 36.
\textsuperscript{154} Supra note 142 at 22; see also supra note 143 at 63-65; supra note 146 at 22-23.
\textsuperscript{155} See Supra note 142 at 22.
\textsuperscript{156} See id. at 20; see also supra note 146 at 20-26.
information can also prevent the public from holding states parties accountable for how public funds are spent – including their failure to adequately fund maternal health services.\(^{157}\)

### 5.10.6 Financial, Infrastructural and Institutional Barriers to Quality Care

Women face financial, infrastructural and institutional barriers that delay or prevent access to quality maternal health care services. These barriers start at the community level, as women often live long distances from health care facilities and lack access to reliable and affordable transportation.\(^{158}\) Human rights and public health standards obligate states parties to improve the accessibility of maternal health services, including by ensuring that there are a sufficient number of well-distributed health centres that provide basic and Emergency Obstetric Care (EmOC) services.\(^{159}\) The CESCR Committee, for example, has interpreted accessibility of health care to require governments to ensure that medical services “are within safe, physical reach, including in rural areas.”\(^{160}\)

### 5.11 India and International Standards regarding Reproductive Freedom

Under international law, India is under an obligation to uphold and protect women’s dignity and basic human rights. But the continuing occurrence of maternal deaths indicates the government’s failure to protect women’s reproductive rights and thereby complying with international norms. The United Nations (UN) General Assembly’s millennium declaration, and subsequently the Millennium Development Goals (MDGs), committed India, along with other signatories, to a 75% reduction in maternal mortality between 1990 and 2015 (UN General Assembly 2001) The most recent estimates available are for 2010 and show a national maternal mortality ratio of 200 maternal deaths per 1,00,000 live births, which, while an improvement

---

\(^{157}\) Supra note 142 at 20-26.

\(^{158}\) Ibid.


on previous levels (of 600 in 1990 and 390 in 2000), is three to five times higher than those of the other BRIC countries—Brazil (56), Russia (34) and China (37). The current rate of progress suggests that India is unlikely to achieve its MDG target by 2015.\(^{161}\) Therefore, the need of the hour is to take necessary steps to reduce maternal mortality by implementing effectively the national policies on reproductive health and holding those accountable who are responsible for the failure of the policies.

5.12 Conclusion

No doubt there are various provisions incorporated in the international law relating to human rights which specifically recognizes reproductive rights. Various treaties and Conventions have also been signed and ratified by the by the states. But the main drawback of International law is that it does not form part of domestic law and the States cannot be held accountable for the violation of International norms unless and until it is expressly incorporated by legislation. Therefore, it is suggested that norms in international human rights conventions and treaties that have been ratified should be made a part of domestic law and it should be properly implemented.

Certain anti-abortionist countries are also forced to amend their laws because of international pressure. As we have seen that certain Catholic countries which do not permit abortion in any circumstances are also coming forward to legalise abortion not in all circumstances but only in life-threatening cases. As it is only because of the efforts of Amnesty International after the death of 31-year-old Savita Halappanavar, who died from septicaemia following a miscarriage and European Court of Human Rights which ruled in 2011 that Ireland’s inaction forced women to face unnecessary medical dangers which pressurized the Irish government to introduce The Protection of Life During Pregnancy Bill which passed its first hurdle clearing up decades of confusion over the right of women to have abortions in extreme circumstances.\(^{162}\) So we can say that little is done and much is needed to be done by International human rights provisions as

---


\(^{162}\) “Bill to Legalize Abortion in Ireland passes first hurdle” The Tribune, July 4, 2013 at 13.
women’s right to access abortion is always at risk. Thus, reproductive rights advocates should also promote reproductive rights of all especially safeguarding women and respect their right to self-determination, right to have control over her body and right to abortion and international and human rights law can be a strong basis for doing so.