

# CHAPTER ONE

# Introduction: Constitutional and Human Rights Framework for Reproductive Justice in India

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Women's<sup>1</sup> life circumstances, their ability to access and exercise their rights, their mental physical and emotional health, and their ability to shape and control their own lives and destiny, rely to a crucial extent on their reproductive freedom and wellbeing. This is why, in the 1994 International Conference on Population and Development Programme of Action, the global community resolved to make reproductive health and rights the cornerstone of policies on population and development,<sup>2</sup> and recognized reproductive rights as the human right to “decide freely and responsibly the number, spacing and timing of [one's] children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes [the] right to make decisions concerning reproduction free of discrimination, coercion and violence...”<sup>3</sup> Reproductive rights are essential to the realization of a wide range of human rights – rights to life, liberty and security, health, non-discrimination and equality, privacy, and freedom from torture and ill treatment, to name a few.<sup>4</sup>

Together, these rights encompass both freedoms and entitlements that must be ensured by states to guarantee women's and girls' autonomy, bodily integrity, and dignity. A recognition of women's reproductive rights in law is insufficient without adequate state and social structures for providing women the material ability to access these rights and exercise this freedom. For example, women who not have the economic ability or decision-making power within the family or society to access contraceptive services may be constrained in their ability to prevent frequent or early pregnancy, which could jeopardize their life and health. For this reason, a focus on women's legal rights in the realm of reproduction has to be supplemented with re-structuring the material circumstances in which reproductive choices can be effectively made. Economic and social justice for women is therefore crucial for securing their reproductive rights just as reproductive rights are crucial for women's economic and social wellbeing. Recognizing the inherent connection between reproductive rights and economic and social justice, women's movements around the world today speak of *reproductive justice*<sup>5</sup> to call for a human rights-based approach to ensuring women's and girls' sexual and reproductive health and autonomy. The human rights framework affirms the link between reproductive rights and women's and girls' enjoyment of the spectrum of civil, political, economic, social, and cultural rights, and recognizes that obligations to respect, protect, and fulfil reproductive rights include both limits on state action (negative measures) as well as positive measures. Such proactive measures include steps to create an enabling environment by ameliorating social conditions such as poverty and unemployment.<sup>6</sup> Further, the human rights framework affirms the role of the judiciary, among other actors, in ensuring access to justice and accountability for reproductive rights.<sup>7</sup>

In India, courts have been at the forefront of recognizing and securing reproductive justice for women. In cases spanning issues such as maternal health, access to contraception, forced and involuntary sterilization, abortion, sexual and reproductive health rights of adolescents, employment discrimination on grounds of pregnancy or childcare, among others, Indian courts have developed robust jurisprudence that not only reflects but also advances global human rights standards. They have also innovated remedies to attempt structural change and ensure that these rights are realized in practice. While court decisions are not uniform, several trailblazing rulings have laid the foundation for Indian courts to continue to play a strong role in preventing and addressing ongoing violations of these rights.

Though issues implicating reproductive justice concerns come up frequently before Indian courts, there has been little sustained effort to study this entire area of adjudication in a holistic manner.<sup>8</sup> In an effort in this direction, this book aims to bring together judgments and orders by the Indian Supreme Court and High Courts across various reproductive justice domains. This holistic overview aims to provide a ready reference for those working on policy, advocacy, adjudication and academic interventions around issues of reproductive justice. To enable such engagement, the book includes judgments

and orders that facilitate securing reproductive justice as well as those that present an obstacle to its realization. The aim is to enable the reader to understand the trajectories of development in the jurisprudence around reproductive justice, and to provide the base material for interrogating this jurisprudence.

Courts in India are continuously engaged in adjudicating cases pertaining to reproductive justice – we ourselves did not realize the extent of this engagement till we began work on this casebook. Our research was carried out in 2017 and is current up to the end of that year. The writing, editing, extracting, reviewing and other work associated with the production of the casebook was carried out in 2018 and the early part of 2019. In this period, courts across the country delivered many more judgements that could have formed part of the book. Some judgments, such as the Supreme Court's decisions in *Navtej Johar v. Union of India*<sup>9</sup> and *Joseph Shine v. Union of India*<sup>10</sup> were of such crucial importance to a range of reproductive justice issues that we felt the need to include these cases despite them being outside the time period of our research. However, the casebook does not claim to comprehensively cover cases decided after 2017. The casebook covers cases that engage substantively with the principles of law around questions of reproductive justice. It therefore excludes cases in which Court orders only direct the State to provide a compliance report (even though seeking such a compliance report is a powerful mechanism for securing implementation of schemes, policies and court orders).

The book is divided into 12 chapters, that detail, sequentially, the Courts' jurisprudence on the following issues:

- Constitutional and Human Rights Framework for Reproductive Justice in India
- Contraceptive Information and Services and Government Population Policies
- Sex Determination
- Surrogacy and Assisted Reproductive Technologies
- Medical Termination of Pregnancy
- Adolescent Reproductive Rights and Criminal Laws
- Disability and Reproductive Rights
- Reproductive Rights of Incarcerated Persons
- Sexuality and Reproductive Decision-Making in Matrimonial Laws
- Maternal Health
- Medical Negligence, Consumer Protection, and Reproductive Health
- Pregnancy, Maternity and Child Care Leave, and Employment

Except for the introduction, which reviews the full body of case law from a constitutional and human rights perspective, each chapter begins with a cover note which lists the issues that have been adjudicated on the topic under discussion. The cover note provides a broad overview of cases that have been adjudicated on the topic, the issues in each case, and the court's broad holding. Since courts often rely on international human rights material to adjudicate reproductive justice cases, each cover note also directs the reader to relevant human rights norms and standards applicable to the issues under discussion in that chapter. This section of each chapter provides reference to human rights sources commonly cited by courts in India on reproductive rights, including United Nations treaties signed and ratified by India, treaty-monitoring bodies' general comments/recommendations and jurisprudence, thematic reports by U.N. human rights experts and expert bodies, and regional human rights jurisprudence.<sup>11</sup>

Following the cover note, each chapter contains extracts from the cases mentioned in the cover note. These extracts are arranged chronologically. They have not been edited for grammatical, spelling or typographical errors. Each extract is preceded by a small headnote to indicate the factual and procedural history of the case and the relevant issue(s) that the case addresses, in order to place the case in its context.

To set the context for the discussions in each of these chapters, the remainder of this introduction describes judicial interventions that address constitutional norms implicated in securing reproductive justice in India.

# 1. Constitutional and Human Rights Foundations of Reproductive Justice in India

The Constitution of India guarantees the right to life with dignity,<sup>12</sup> the rights to health,<sup>13</sup> to personal liberty (including sexual, reproductive and decisional autonomy),<sup>14</sup> the right to privacy,<sup>15</sup> the right against torture or cruel, inhuman and degrading treatment,<sup>16</sup> the right to equality - specifically the right to non-discrimination on grounds of sex,<sup>17</sup> and the right to equality of opportunity in public employment,<sup>18</sup> amongst other rights. The Constitution also empowers the Supreme Court and High Courts to provide remedies for violation of fundamental rights.<sup>19</sup> All these rights are implicated in securing reproductive justice for women and Courts in India have referenced these rights in adjudicating reproductive justice cases. Courts have also relied heavily on international human rights norms in determining the contours and contents of rights under the Indian Constitution, and correspondingly, the State's obligation to secure reproductive justice.<sup>20</sup>

Each chapter of this book highlights the constitutional issues raised in cases on the topic under discussion. In this chapter, we discuss the broader constitutional themes that have emerged from such cases and present the related human rights framework.<sup>21</sup>

The Chapter lists cases that discuss:

1. The Right to Privacy and to Sexual and Reproductive Autonomy
2. The Right to Life and Health, including Reproductive Health
3. The Right to Equality and Non-Discrimination

## 1.1 The Right to Privacy and to Sexual and Reproductive Autonomy

### 1.1.1 CONSTITUTIONAL NORMS

In *K.S. Puttaswamy v. Union of India*,<sup>22</sup> a nine-judge bench of the Supreme Court affirmed that the Indian Constitution guarantees the right to privacy as a fundamental right. The Court held that the right to privacy protects the ability of individuals to exercise control over vital aspects of their lives, including in matters relating to contraception and procreation. Various concurring opinions in this judgment addressed the impact of the right to privacy on aspects of a woman's reproductive capacity. In their respective opinions, Nariman and Chelameswar JJ. recognized that a woman's decision to procreate or to abort a pregnancy falls within the realm of her right to privacy. Chelameswar J. also affirmed that the right to make an informed choice regarding sterilization is also included within the right to privacy.<sup>23</sup> The Court further affirmed its ruling in *Suchita Srivastava v. Chandigarh Administration*,<sup>24</sup> that a woman's right to reproductive autonomy emanates from her right to privacy, dignity and bodily integrity under Article 21. In *Suchita Srivastava*, the Court had recognized women's right to make reproductive choices as part of the right to "personal liberty" under Article 21 of the Indian Constitution. This includes the right to refuse participation in a sexual activity; insist on use of contraceptive methods; adopt birth control measures; carry a pregnancy to its full term and raise children or seek abortion.

Following *Suchita Srivastava*, the Supreme Court has repeatedly stressed that the bodily integrity, personal autonomy and sovereignty of a woman over her body must be respected in relation to abortion.<sup>25</sup> In *Z v. State of Bihar*,<sup>26</sup> the Supreme Court relied on *Suchita Srivastava's* articulation of reproductive autonomy and linked it to the prohibition against torture. Finding that denial of termination of an unwanted pregnancy when a woman was otherwise entitled to such termination under the law causes "grave mental torture" and that such torture affects her dignity and corrodes her self-respect, the Court held that the denial of her statutory rights, would in these circumstances, entitle the woman to damages for the violation of her fundamental rights under Article 21. In *Z*, the Court also emphasized that for adult women who are not suffering from mental illness, the Medical Termination of Pregnancy Act, 1971 (MTP Act), which governs induced abortion, only requires the woman's consent for abortion. It is interesting to note that prior to *Suchita Srivastava*, the Supreme Court had held, in the context of divorce petitions, that not seeking spousal consent for abortion amounted to "cruelty" against the husband.<sup>27</sup> However, in more recent cases such as *Anil Kumar Sharma v. Dr. Mangla Dogra*,<sup>28</sup> the Supreme Court refused to interfere in a decision of the Punjab and Haryana High Court<sup>29</sup> which had held that a husband is not entitled to damages from his wife or her doctor on account of the wife's decision to terminate a pregnancy without his consent. In reaching its decision, the Court held that a husband cannot compel his wife to conceive or give birth to a child against her will. This more recent line of cases, rooted in the recognition of a woman's reproductive autonomy, therefore calls into question the basis of the previous dictum that termination of pregnancy without spousal consent amounts to cruelty within a marriage.

Along these lines, the Bombay High Court, in *High Court on its Own Motion v. State of Maharashtra*,<sup>30</sup> has recognized that forcing a woman to continue with an unwanted pregnancy violates her right to bodily integrity and is deleterious to her mental health. The Court held that a woman's decision to procreate or abstain from procreating flows from her human right to live with dignity as a human being in the society and is protected as a fundamental right under Article 21 of the Indian Constitution. The Court recognized that a foetus is not a rights-bearing entity, and its interests cannot be put on a higher pedestal than the right of a living woman. Thus, according to the Court, the fundamental right under Article 21 of the Indian Constitution protects life and personal liberty which covers a woman's decision to terminate an unwanted pregnancy.

In its recent decisions,<sup>31</sup> the Supreme Court has emphasized women's sexual autonomy as a facet of their fundamental rights under the Indian Constitution. In his concurring opinion rendered in *Joseph Shine v. Union of India*,<sup>32</sup> Chandrachud J. recognized that sexual autonomy of a woman forms part of her "inviolable core" and is a manifestation of her fundamental right to privacy, dignity and liberty under Article 21 and right to equality under Article 14. In this case, Section 497 of the Indian Penal Code, 1860 that criminalised adultery was declared unconstitutional, *inter alia*, on the grounds that it curtailed the sexual agency of women.

Without reproductive autonomy, a woman can never have complete sexual autonomy. The Supreme Court recognized the interrelatedness of sexual and reproductive autonomy in *Independent Thought v. Union of India*.<sup>33</sup> In striking down an exemption from criminal liability for rape within marriage where the victim was between 15-18 years of age, the Court held that depriving a girl the right to deny sexual intercourse to her husband violates the bodily integrity of the girl child and her right to reproductive choice.

This recent line of cases on sexual and reproductive autonomy call into question the reasoning and dictum of the courts in cases such as *Javed v. State of Haryana*,<sup>34</sup> where the Supreme Court refused to recognize the right to decide the number of children one has, as a facet of reproductive autonomy protected by Article 21 of the Indian Constitution. Instead, the Court emphasized the goals of population control and socio-economic welfare, which according to the Court justified a law that disqualified persons with more than two children from being elected to certain local government posts.

Courts have engaged with privacy and the right to life with dignity in cases on menstruation and women's rights. In *Neera Mathur v. Life Insurance Corporation of India*,<sup>35</sup> the Court directed the Life Insurance Corporation to delete the "embarrassing if not humiliating" questions in their employee declaration form regarding menstruation, pregnancy, abortion and childbirth. The Court termed seeking such information a denial of an employee's modesty and self-respect and an unwarranted intrusion into personal issues of the employee.

More recently, in *Indian Young Lawyers Association v. State of Kerala*,<sup>36</sup> Chandrachud J. expressly acknowledged that the menstrual status of a woman is an attribute of her privacy, and that enforcing any segregation or exclusion on this basis violates her right to life with dignity. In his concurring opinion, he stated that the practice of prohibiting entry to women of menstruating age (between 10 to 50 years) violates the prohibition of untouchability contained in Article 17 of the Indian Constitution. Justice Chandrachud held that such social exclusion of women legitimized the notions of "purity and pollution" associated with menstruation and was a manifestation of the practice of untouchability that is forbidden under Article 17.

### 1.1.2 HUMAN RIGHTS NORMS

Autonomy is a core component of the rights to life, privacy and liberty, among others, and includes individuals' rights to make informed decisions about their bodies, including their reproductive and sexual lives. In human rights law, the right to reproductive autonomy is rooted in the right to privacy and the right to determine the number and spacing of one's children. The right to privacy is enshrined in Article 17 of the International Covenant of Civil and Political Rights (ICCPR).<sup>37</sup> The Human Rights Committee has repeatedly recognized the state obligation to ensure reproductive autonomy arises from the right to privacy.<sup>38</sup>

The right to determine the number and spacing of children is articulated in Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>39</sup> The CEDAW Committee has stated that "the right to autonomy [for women] requires measures to guarantee the right to decide freely and responsibly on the number and spacing of their children."<sup>40</sup> It has also expressed concern where countries fail to ensure the reproductive rights of women, which include "the right of women to autonomous decision-making about their health."<sup>41</sup>

Full exercise of autonomy requires that choices are meaningful, not limited by discrimination or lack of opportunities. Women are unable to exercise their reproductive autonomy where laws, policies, and practices restrict this autonomy, imposing arbitrary or unlawful restrictions on their right to access sexual and reproductive health services. Impermissible barriers to reproductive autonomy include third party authorization requirements—such as those required from spouses, parents, guardians, judges or health authorities—for reproductive health services.<sup>42</sup> The Human Rights Committee has found that the failure to act in conformity with a woman’s decision to undergo a legal abortion is a violation of the right to privacy, including when the judiciary interferes with such a decision.<sup>43</sup>

Further, women also experience violations of the right to reproductive autonomy when they are subjected to violence or coercion. This may include forced reproductive health procedures such as forced or coerced sterilization, gender-based violence, and harmful traditional practices such as forced marriage that limit women’s opportunities for decision-making, particularly around reproduction and sexuality.<sup>44</sup> Treaty monitoring bodies have also recognized that states must guarantee women the right to be free from violence when seeking maternal health services.<sup>45</sup>

In certain cases, human rights law recognizes that denial of reproductive autonomy as a result of violence or coercion may constitute a violation of the right to freedom from torture and cruel, inhuman and degrading treatment (ill treatment).<sup>46</sup> The right to freedom from torture and ill treatment is the subject of the Convention against Torture and other forms of Cruel, Inhumane and Degrading Treatment (CAT) and also enshrined in Article 7 of the ICCPR. While India has only signed but not ratified CAT, it is still obligated as a signatory to refrain from acts that are contrary to CAT.<sup>47</sup> The Committee against Torture, which monitors CAT, has confirmed that women are vulnerable to torture and ill treatment in the context of “deprivation of liberty [and] medical treatment, particularly involving reproductive decisions....”<sup>48</sup> The Human Rights Committee has also found that, in certain circumstances, denial of access to abortion services can lead to physical or mental suffering that amounts to ill-treatment.<sup>49</sup> Treaty monitoring bodies have also found that coerced and forced sterilization and, in some cases, the disrespect and abuse women face in health facilities can amount to ill treatment within the meaning of this Convention.<sup>50</sup>

## 1.2 Rights to Life and Health, Including Reproductive Health

### 1.2.1 CONSTITUTIONAL NORMS

Denial of reproductive rights, including specifically access to reproductive health care, has been found by courts to violate the protection of the right to life under Article 21 of the Constitution of India. Courts have established that the right to life includes the duty to preserve life<sup>51</sup> and to protect dignity.<sup>52</sup> In *Sandesh Bansal v. Union of India*, the High Court of Madhya Pradesh found that “shortage not only of the infrastructure but of the manpower” to implement maternal health schemes<sup>53</sup> led to the “inability of women to survive pregnancy and child birth [which] violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India.”<sup>54</sup>

The Supreme Court of India has recognized the right to health as an aspect of the right to life with dignity.<sup>55</sup> Extending this to the realm of reproduction, the Court has recognized women’s right to reproductive health as also being a facet of their Article 21 rights. In *Devika Biswas v. Union of India*,<sup>56</sup> the Supreme Court adopted international human rights norms with respect to reproductive health and stated that the right to reproductive health is “the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour.”<sup>57</sup> The Court also affirmed the international human rights norm that “[t]he right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health.”<sup>58</sup> Reiterating its ruling in *Suchita Srivastava* that reproductive autonomy is a facet of a woman’s personal liberty guaranteed under Article 21, the Court held that reproductive rights include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion.

Similarly, in *Laxmi Mandal v. Deen Dayal Harinagar Hospital*,<sup>59</sup> the Delhi High Court stated that a woman’s right to health, including her right to reproductive health, is a facet of her “inalienable survival rights” under Article 21 of the Constitution.<sup>60</sup> Relying on a range of international human rights instruments, the Court emphasized the interrelatedness of civil and political and socio-economic rights to state that the proper implementation of schemes designed to give effect to these rights was essential for meeting the state’s obligations arising from these rights. Similarly, in *Kali Bai v. Union of India*,<sup>61</sup> the Chhattisgarh High Court held that the right to health includes the right to access public health facilities and

the right to a minimum standard of treatment and care through such facilities. Noting that such right to health and the reproductive rights of women are inalienable components of Article 21, the Court emphasized that the identification of high-risk pregnancies, and the prompt referral of cases needing specialist care to institutions equipped to provide the same, were “indefensible components of access to protection and enforcement of reproductive rights.”<sup>62</sup>

The denial of reproductive rights also risks a woman’s broader physical, mental, and social well-being. The MTP Act itself recognizes and presumes that carrying certain unwanted pregnancies constitutes “a grave injury to the mental health” of the pregnant woman.<sup>63</sup> The Bombay High Court, in *High Court on its Own Motion v. State of Maharashtra*,<sup>64</sup> recognized that forcing a woman to continue with *any* unwanted pregnancy is deleterious to her mental health. The Bombay High Court also clarified that the right to life accrues only post-birth, stating: “a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights.”<sup>65</sup> In cases such as *Meera Santosh Pal v. Union of India*,<sup>66</sup> *Sarmishtha Chakraborty v. Union of India*,<sup>67</sup> and *Mrs. X v. Union of India*,<sup>68</sup> the Supreme Court has emphasized that a pregnant woman has the right to preserve her life and protect herself against grave risk to her physical or mental health, and as such, cannot be mandated to continue with a pregnancy that may endanger her life, or her physical or mental health.

## 1.2.2 HUMAN RIGHTS NORMS

Under human rights law, the right to life is enshrined in the ICCPR,<sup>69</sup> and the right to health is protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>70</sup> CEDAW<sup>71</sup> offers legal protection against discrimination in the enjoyment of women’s right to health, including non-discrimination in access to healthcare.<sup>72</sup>

The right to life obligates governments to ensure women are not at risk of preventable deaths due to legal restrictions or other barriers to reproductive health care. The Human Rights Committee, the body which monitors the implementation of ICCPR, has stated in General Comment 6 that the right to life obligates states to take measures to safeguard individuals from arbitrary and preventable losses of life<sup>73</sup> and should not be narrowly interpreted.<sup>74</sup> This includes taking steps to protect women against the unnecessary loss of life related to pregnancy and childbirth<sup>75</sup> by ensuring that reproductive health services such as abortion, maternal health care, and contraceptive information and services are accessible.<sup>76</sup> In General Comment 36 on the right to life, the Human Rights Committee has recognized that states must ensure that any restrictions on abortion do not violate the right to life of the pregnant woman or girl, including by imposing criminal sanctions against women and girls for undergoing abortion or medical providers for assisting them.<sup>77</sup> International human rights law recognizes the right to life as accruing only at birth. Under human rights law, any state prenatal protections must be consistent with and cannot violate women’s human rights, including their right to life.<sup>78</sup>

The right to life is closely linked to the right to the highest attainable standard of health, which includes sexual and reproductive health. The Committee on Economic, Social and Cultural Rights (ESCR Committee), the body which monitors implementation of the ICESCR, has stated that the right to sexual and reproductive health includes freedoms and entitlements. The freedoms include “the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health.”<sup>79</sup> The entitlements include “unhindered access to a whole range of health facilities, goods, services and information.”<sup>80</sup> States must ensure both the underlying determinants of health, such as nutrition and education, as well as the social determinants of health, which include social inequalities as manifested in laws, institutional arrangements and social practices that prevent individuals from effectively enjoying in practice their sexual and reproductive health.

The human rights framework requires that all health facilities, goods, and services—including sexual and reproductive health-related facilities, goods, and services—must be available, accessible, acceptable, and of good quality.<sup>81</sup> This framework requires states to fulfil the following principles within the right to health, including the right to sexual and reproductive health:

- **Availability:** States must ensure adequate training of health care providers, a sufficient number of health facilities throughout the country, adequate sanitation and infrastructure for sexual and reproductive health services, including in rural areas, and essential drugs, as defined by the World Health Organization (WHO) Model List of Essential Medicines.<sup>82</sup>
- **Accessibility:** States must ensure that sexual and reproductive health information and services are accessible by guaranteeing physical, economic, and information accessibility.<sup>83</sup>
- **Acceptability:** States must provide sexual and reproductive health care in a way that respects the rights to confidentiality and informed consent and is sensitive to gender and life-cycle needs. Such care must be respectful of the culture of individuals, including minorities; this requirement cannot be used to justify the refusal of tailored care to specific groups. Acceptability requires that provision of sexual and reproductive health care respects women’s dignity and is sensitive to their needs and perspectives.<sup>84</sup>

- **Quality:** Health services must be scientifically and medically appropriate, which requires skilled medical personnel, scientifically approved and unexpired drugs, sufficient hospital equipment, safe and potable water, and adequate sanitation.<sup>85</sup>

The ESCR Committee has recognized states' obligations "to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health."<sup>86</sup> Although the right to health is considered a right of progressive realization, there are minimum core obligations related to the provision of reproductive health services, which states must fulfil regardless of resource constraints. These core obligations include eliminating discrimination in access to health services, avoiding retrogressive measures, and providing essential medicines in accordance with the WHO Model List of Essential Medicines.<sup>87</sup>

## 1.3 Equality and Non-Discrimination

### 1.3.1 CONSTITUTIONAL NORMS

Discrimination against women on the basis of their reproductive capacity, pregnancy, childbirth or child care responsibilities, in the context of employment and educational opportunities has been held to violate women's right to equality and non-discrimination on the basis of sex protected under Articles 14, 15 and 16 of the Constitution. In so holding, courts have also invoked the State's obligations to promote the directive principles of state policy to provide just and humane conditions of work and maternity relief (Article 42) and make effective provisions to secure right to work and education (Article 41), as well as international human rights norms governing the field.

In *Air India v. Nergesh Meerza*,<sup>88</sup> the Supreme Court held that employment regulations requiring airhostesses to retire on their first pregnancy violated their right to equality under Article 14 of the Constitution. However, the Court justified the prohibition on marriage of airhostesses up to four years of service and termination of employment on third pregnancy on grounds of the overall health of airhostesses, goals under the family planning programmes, as well as in the interest of good upbringing of children.

Recently, in *Navtej Singh Johar v. Union of India*,<sup>89</sup> Chandrachud J. questioned the reasoning of the Court in *Nergesh Meerza*. *Inter alia*, he criticized the Court's approach in placing the entire burden of family planning and upbringing of children on women as a violation of their constitutional guarantee against non-discrimination on grounds of sex under Article 15 since it reinforces stereotypical gender norms. Reflecting this gender equality dimension of policies relating to reproduction, in *Devika Biswas*, the Supreme Court cautioned that sterilization policies that unduly emphasize and incentivize female sterilization would violate gender equality norms. The Court also highlighted the state's obligation to promote substantive equality and to ensure that socio-economic vulnerabilities are not exacerbated by its policies, or that reproductive freedom is not effectively denied because of socio-economic contexts which leave vulnerable groups with little meaningful choice. This recognition that policies operate differently based on social realities and hierarchies was noticeably missing in *Javed*, where the Court dismissed the argument that a provision disqualifying persons with more than two children from being elected to certain government officers would have a disproportionate impact on Indian women who often lack the autonomy to make reproductive choices in households controlled by men.<sup>90</sup>

Along similar lines, the Kerala High Court in *Neetu Bala v. Union of India*,<sup>91</sup> held that denial of employment to women solely on grounds of pregnancy was arbitrary and illegal and thus violative of Articles 14, 16 and 42 of the Indian Constitution. It further stated that such discrimination would amount to negation of India's obligations under the CEDAW, International Labour Organization's Maternity Protection Convention, and the Universal Declaration of Human Rights (UDHR)<sup>92</sup>.

Courts have also located maternity benefits including maternity leave as a facet of the guarantee of equality and non-discrimination. The Delhi High Court in *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*,<sup>93</sup> stated that although the directive principles of state policy are unenforceable, Article 42 can be used to determine the legal validity of the petitioners' claim to maternity benefits. The Court found that the Maternity Benefit Act, 1961 aims at achieving a just social order by providing all the facilities to women employees that they are entitled to in order to deal with the state of motherhood in a dignified and peaceful manner, without fearing penalties for forced absence during the pre-natal or post-natal period. The Court added the principles under Article 11 of CEDAW on the right to non-discrimination on grounds of marital status, pregnancy, child birth, or family care obligations, should be read into the employees' contract of service.



Similarly, the Delhi High Court in *Seema Gupta v. Guru Nanak Institute Management*,<sup>94</sup> held that provisions providing for maternity benefits under the employment and service regulations should be construed in the light of Articles 15, 41 and 42 of the Constitution and the obligations under UDHR and CEDAW. It stated that the case of an employee seeking extension of her maternity leave in line with employment regulations is not to be construed as a traditional case of enforcement of contract of service but an exercise of her fundamental rights.

The Delhi High Court in *Inspector (Mahila) Ravina v. Union of India*,<sup>95</sup> and Kerala High Court in *Mini K.T. v. Life Insurance Corporation of India*,<sup>96</sup> have held that forcing a female employee to choose between motherhood and employment violates her fundamental rights under Articles 14, 15 (1), 16(2) and 21 of the Constitution. The Delhi High Court held the right to reproduction and child rearing form an essential facet of the right to life under Article 21 and the directive principle under Article 42 reflects the constitutional commitment to provide all circumstances conducive for exercise of this right. Along similar lines, the Kerala High Court stated that motherhood forms an integral part of the dignity, status and self-respect of women. It further held that pleas of financial implications or organisational interest cannot be raised by employers to deny equality of opportunity or to penalise women employees who are unable to attend work due to “compelling family responsibilities” of child care.

Likewise, in the context of educational opportunities, the Karnataka High Court in *Jennifer A. v. ESIC College of Nursing and Ors.*,<sup>97</sup> and Delhi High Court in *Vandana Kandari v. University of Delhi*,<sup>98</sup> held that students who were unable to meet the minimum attendance requirement because of their pregnancy were entitled to concessions in attendance requirements in view of the directive principles under Articles 41 and 42. Both Courts held that denial of such relaxation to pregnant students would amount to making “motherhood a crime” and negate the constitutional guarantee of gender equality.<sup>99</sup> On the contrary, the Kerala High Court in *Jasmine V.G. v. Kannur University*,<sup>100</sup> opined that pregnancy is not a medical condition that arises unexpectedly and therefore, preferential treatment cannot be given to students who opt to become pregnant in the face of their educational commitments.

### 1.3.2 HUMAN RIGHTS NORMS

The right to equality and non-discrimination is found in every major international human rights treaty, including the ICCPR, ICESCR, and CEDAW.<sup>101</sup> The human rights framework recognizes that ensuring equality means addressing both formal and substantive inequality.<sup>102</sup> Human rights bodies have recognized the insufficiency of formal approaches to equality which only require ensuring that laws and policies treat all persons alike.<sup>103</sup> CEDAW and other human rights bodies have clarified that states are obligated to ensure substantive equality—that is, to address discriminatory power structures to address inequalities, recognize difference in how men and women experience rights violations due to discriminatory social and cultural norms, and ensure the equality of results and outcomes.<sup>104</sup> To ensure substantive equality, the CEDAW Committee, as well as other treaty monitoring bodies, urge states to “make more use of temporary special measures such as positive action, preferential treatment or quota systems.”<sup>105</sup> Further, states must eliminate 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.”<sup>106</sup>

The right to non-discrimination obligates governments to ensure that women are able to equally enjoy their human rights.<sup>107</sup> Recognizing that women’s role in procreation exposes them to discrimination, CEDAW calls on states specifically to introduce special measures to protect women during pregnancy.<sup>108</sup> This requires taking measures to prevent discrimination against women in the field of work, including those arising on the grounds of marriage or maternity.<sup>109</sup> Such measures include prohibiting dismissal on the grounds of pregnancy or of maternity leave; prohibiting discrimination in dismissals on the basis of marital status; introducing maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances; and encouraging provision of necessary social services to enable parents to combine family obligations with work responsibilities and participation in public life.<sup>110</sup>

International law recognizes that the deprivation of reproductive rights discriminatorily violates women’s ability to enjoy their other human rights, including their rights to life, health, and privacy. Human rights bodies have recognized that women’s right to non-discrimination in enjoyment of the right to life is violated, for example, where governments fail to protect women from arbitrary and preventable losses of life related to pregnancy and childbirth, which are risks only women face.<sup>111</sup> Similarly, states discriminatorily violate women’s right to health where “a health-care system lacks services to prevent, detect and treat illnesses specific to women.”<sup>112</sup> Women also experience discrimination in enjoyment of the right to privacy where governments “fail to respect women’s privacy with regards to the reproductive functions.” Human rights law recognizes that states must take action to prevent violations of women’s right to privacy by private actors, such as employers who conduct mandatory pregnancy tests prior to hiring women.<sup>113</sup>

States have an obligation to eliminate gender-based violence under the right to non-discrimination, including arising from denials of reproductive rights.<sup>114</sup> This obligation requires ensuring that women are not forced to seek unsafe abortion because of lack of access to appropriate reproductive health services, do not experience coerced sterilization, or face disrespect and abuse in maternal health care.<sup>115</sup> Further, states must ensure that women and girls who suffer sexual violence have access to necessary reproductive health care, including legal abortion, emergency contraception,<sup>116</sup> and post-exposure prophylaxis to protect against HIV infection.<sup>117</sup>

The right to non-discrimination also requires that states take measures to eliminate multiple discrimination.<sup>118</sup> Treaty monitoring bodies have established that states should make extra efforts to ensure that women from marginalized groups have access to sexual and reproductive health information and contraceptives, including adolescents; rural women; women from certain castes or tribes; refugees, internally displaced people, and migrants; and women with disabilities.<sup>119</sup>

## Endnotes

- 1 While the terms “woman” or “women” are used in this casebook, it does not exclude other persons who may also become pregnant and want or need access to abortion.
- 2 See *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995) [hereinafter *ICPD Programme of Action*].
- 3 *ICPD Programme of Action*, *supra* note 2, para. 7.3.
- 4 See discussion below.
- 5 The best known definition of reproductive justice comes from the Asian Communities for Reproductive Justice which defines reproductive justice as “the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, and will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.” Asian Communities for Reproductive Justice, *A New Vision for Advancing our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice*, available at <https://forwardtogether.org/tools/a-new-vision/>. See also Robin West, *From Choice to Reproductive Justice: DeConstitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1425 (2009) (“Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early childcare for infants and toddlers, income support for parents who stay home to care for young babies, and high quality public education for school age children”).
- 6 UNFPA, A GUIDE IN SUPPORT OF NATIONAL HUMAN RIGHTS INSTITUTIONS: COUNTRY ASSESSMENTS AND NATIONAL INQUIRIES ON HUMAN RIGHTS IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH AND WELL-BEING (2019).
- 7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) [hereinafter CAT], arts. 2(1), 12, 14; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No.16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR], art. 2(2); Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, (44<sup>th</sup> Sess., 1992), at 200, para. 8, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 20*]; Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (80<sup>th</sup> Sess., 2004), at 244-245, paras. 7-8, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 31*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties’ obligations (Art. 2, para. 1)*, (5<sup>th</sup> Sess., 1990), at 7-8, paras. 3-5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, *Gen. Comment No. 3*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, (22<sup>nd</sup> Sess., 2000), at 90-92, paras. 51, 53, 56, 59, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, *Gen. Comment No. 14*]; Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 193, U.N. Doc. A/24/46, U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW], arts. 2(a)-(c), (e)-(f).
- 8 An excellent exception is HUMAN RIGHTS LAW NETWORK, CLAIMING DIGNITY (1<sup>st</sup> edition 2009; 2<sup>nd</sup> edition 2013).
- 9 (2018) 10 SCC 1.
- 10 2018 SCC OnLine SC 1676.
- 11 While not included in this casebook for brevity, reference to country-specific concluding observations and special procedures’ reports would also be useful in considering reproductive rights cases. The Office of the High Commissioner on Human Rights’ Universal Human Rights Index is a helpful web-based tool in reviewing concluding observations, available at <https://uhri.ohchr.org/en>. The Center for Reproductive Rights’ Breaking Ground 2018: Treaty Monitoring Bodies on Reproductive Rights also includes summaries of concluding observations on reproductive rights, available at <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2018.pdf>.
- 12 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746 (interpreting Article 21, Constitution of India).
- 13 Pt. Parmanand Katara v. Union of India, (1989) 4 SCC 286; Paschim Banga Khet Majoor Samiti v. State of West Bengal, (1996) 4 SCC 37 (interpreting Article 21, Constitution of India).
- 14 See e.g., Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1, Navtej Johar v. Union of India, (2018) 10 SCC 1.
- 15 Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1.
- 16 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746 (interpreting Article 21, Constitution of India).
- 17 Articles 14 and 15, Constitution of India.
- 18 Article 16, Constitution of India.
- 19 Articles 32 and 226, Constitution of India, respectively.
- 20 In Vishaka v. State of Rajasthan, AIR 1997 SC 3011 in a Public Interest Litigation filed in the Supreme Court regarding the state’s failure to provide effective redressal for sexual harassment in the workplace, the Court held that, “[i]n the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.” This ruling was based on an interpretation of Article 51 (c) of the Constitution which mandates the state to endeavour to “foster respect for international law.”
- 21 The human rights sub-sections draw on a survey of human rights norms developed by the Center for Reproductive Rights. See Center for Reproductive Rights, Breaking Ground (2018): Treaty Monitoring Bodies on Reproductive Rights (2018), available at <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2018.pdf>.
- 22 (2017) 10 SCC 1.
- 23 (2016) 10 SCC 726 / 733.
- 24 (2009) 9 SCC 1.
- 25 See e.g., Meera Santosh Pal v. Union of India, (2017) 3 SCC 462; Sarmishtha Chakraborty v. Union of India, (2018) 13 SCC 339; Mrs. X v. Union of India, (2017) 3 SCC 458.
- 26 (2018) 11 SCC 572.
- 27 See e.g., Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.
- 28 Civil Appeal No. 4704/2013. Decided on: October 27, 2017 by a bench comprising of Chief Justice Dipak Misra, Justice A.M. Khanwilkar and Dr. Justice D.Y. Chandrachud.
- 29 Dr. Mangla Dogra v. Anil Kumar Sharma, ILR (2012) 2 P&H 446.
- 30 2017 Cri.L.J. 218 (Bom).
- 31 See Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1, Navtej Johar v. Union of India, (2018) 10 SCC 1.
- 32 2018 SCC OnLine SC 1676.
- 33 (2017) 10 SCC 800.
- 34 (2003) 8 SCC 369.
- 35 (1992) 1 SCC 286.
- 36 2018 SCC OnLine SC 1690.
- 37 ICCPR, *supra* note 7, art. 17, paras. 1-2.
- 38 K.L. v. Peru, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 39 CEDAW, *supra* note 7, art. 16, para. 1(e).

- 40 Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Decision 57/II Statement by the Committee on the Elimination of Discrimination against Women on sexual and reproductive health: beyond the 2014 review of the International Conference on Population and Development*, U.N. Doc. A/69/38 (2014).
- 41 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 42 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20<sup>th</sup> Sess., 1999), paras. 11, 21, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, paras. 11-12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].
- 43 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 44 CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 42, para. 22; Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 1: Article 12: Equal recognition before the law*, (11<sup>th</sup> Sess., 2014), para. 35, U.N. Doc. CRPD/C/GC/1 (2014) [hereinafter CRPD Committee, *Gen. Comment No. 1*]; CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19* (2017), para. 31, U.N. Doc. CEDAW/C/GC/20 (2017) [hereinafter CEDAW Committee, *Gen. Recommendation No. 35*]; CEDAW Committee & Committee on the Rights of the Child (CRC Committee), *Joint General Recommendation No. 31 & General Comment No. 18: On harmful practices* (2014), paras. 20-22, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014) [hereinafter CEDAW Committee & CRC Committee, *Joint Gen. Recommendation No. 31 & Gen. Comment No. 18*].
- 45 See e.g., CEDAW Committee, *Concluding Observations: Portugal*, paras. 36-37, UN Doc. CEDAW/C/PRT/CO/8-9 (2015).
- 46 Committee against Torture (CAT Committee), *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013); *Concluding Observations: United States of America*, para. 21, U.N. Doc. CAT/C/USA/CO/3-5 (2014).
- 47 Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, arts. 10, 18, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).
- 48 Committee against Torture, *General Comment No.2: Implementation of article 2 by States parties*, (39<sup>th</sup> Sess., 2007), at 377, para. 22, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).
- 49 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, paras. 6.3-6.6, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para. 9.2, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); *Mellet v. Ireland*, Human Rights Committee, Commc'n No. 2324/2013, paras. 7.6-7.8, U.N. Doc. CCPR/C/116/2324/2013 (2016); *Whelan v. Ireland*, Human Rights Committee, Commc'n No. 2425/2014, paras. 7.7-7.9, 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).
- 50 See e.g., CAT Committee, *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013).
- 51 *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37, para. 16.
- 52 *Chameli Singh v. State of Uttar Pradesh*, (1995) 6 SCR 827, paras. 5 & 8.
- 53 *Sandesh Bansal v. Union of India*, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh).
- 54 *Sandesh Bansal v. Union of India*, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh)
- 55 *Pt. Parmanand Katara v. Union of India*, (1989) 4 SCC 286; *Paschim Banga Khet Majoor Samity v. State of West Bengal*, (1996) 4 SCC 37.
- 56 (2016) 10 SCC 726.
- 57 *Id.*
- 58 *Id.*
- 59 (2010) 172 DLT 9 / 2010 SCC OnLine Del 2234.
- 60 See also *Sandesh Bansal v. Union of India*, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh).
- 61 2017 SCC OnLine Chh 1081.
- 62 *Id.*
- 63 See Explanation I and II to Section 3, *Medical Termination of Pregnancy Act*, 1971.
- 64 2017 Cri.L.J. 218 (Bom).
- 65 *Id.*
- 66 (2017) 3 SCC 462.
- 67 (2018) 13 SCC 339.
- 68 (2017) 3 SCC 458.
- 69 ICCPR, *supra* note 7, art. 6.
- 70 International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 12, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].
- 71 CEDAW, *supra* note 7, art. 12.
- 72 *Id.* art. 2(c) & 12(1).
- 73 Human Rights Committee, *General Comment No. 6: Right to life (Art. 6)*, (16<sup>th</sup> Sess., 1982), at 177, paras. 3 and 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 6*].
- 74 Human Rights Committee, *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, (124<sup>th</sup> Sess. 2018), para. 8, U.N. Doc. CCPR/C/GC/36 (2018) [hereinafter Human Rights Committee, *Gen. Comment No. 36*].
- 75 Human Rights Committee, *General Comment No. 28: Article 3 (The equality of rights between men and women)*, (68<sup>th</sup> Sess., 2000), at 229, para. 10, U.N. Doc. HRI/ GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 28*].
- 76 Human Rights Committee, *Concluding Observations: Mali*, para. 14, U.N. Doc. CCPR/CO/77/MLI (2003).
- 77 Human Rights Committee, *Gen. Comment No. 36*, *supra* note 74, para. 8..
- 78 See K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); see also CENTER FOR REPRODUCTIVE RIGHTS, *International and Regional Standards on the Right to Life, in WHOSE RIGHT TO LIFE? WOMEN'S RIGHT TO PRENATAL PROTECTION UNDER HUMAN RIGHTS AND COMPARATIVE LAW* (2012), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL\\_3\\_14\\_12.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3_14_12.pdf) [hereinafter CENTER FOR REPRODUCTIVE RIGHTS, *International and Regional Standards on the Right to Life*].
- 79 ESCR Committee, *Gen. Comment 14*, *supra* note 7, paras. 90-92.
- 80 *Id.*
- 81 ECSR Committee, *Gen. Comment No. 14*, *supra* note 7, para. 12; ESCR Committee, *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights)*, para. 39, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter ESCR Committee, *Gen. Comment No. 22*].
- 82 ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, paras. 12 and 36; ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 49 (g).
- 83 ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, para. 12(b); ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, paras. 14-19.
- 84 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 20.
- 85 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 20; ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, para. 12.
- 86 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 45.
- 87 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 49 (g); ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, paras. 12(a), 43 (d); CRC Committee, *General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health*, (2013), para. 37, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter CRC Committee, *Gen. Comment No. 15*].

- 88 (1981) 4 SCC 335.
- 89 (2018) 10 SCC 1.
- 90 Javed v. State of Haryana, (2003) 8 SCC 369, 395.
- 91 2016 SCC OnLine P&H 602.
- 92 Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR].
- 93 (2000) 3 SCC 224.
- 94 2006 SCC OnLine Del 1421.
- 95 MANU/DE/3946/2015.
- 96 2017 SCC OnLine Ker 41588.
- 97 2016 SCC OnLine Kar 8362.
- 98 2010 SCC OnLine Del 2341.
- 99 On facts, in *Jennifer* the Court determined that the petitioner had not intimated the College in time about her absence and had therefore precluded the possibility of extra classes or other remedial measures being taken by the College to make up for her absence. In this factual scenario, the Court denied relief to the petitioner, but also directed that the College should amend its Rules to provide specifically for the contingency of pregnancy.
- 100 2016 SCC OnLine Ker 3221.
- 101 UDHR, *supra* note 92; ICCPR, *supra* note 7; ICESCR, *supra* note 70; Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter CERD]; CEDAW, *supra* note 7; CAT, *supra* note 7; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, annex, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990) [hereinafter CRC].
- 102 See CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)*, (13<sup>th</sup> Sess., 2004), at 366-367, paras. 7-10, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 25*]; ESCR Committee, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)*, (34<sup>th</sup> Sess., 2005), at 114-115, para. 7, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, *Gen. Comment No. 16*].
- 103 CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, paras. 7-8.
- 104 CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, paras. 7-8; CEDAW Committee, *General Recommendation No. 28: The core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, (47<sup>th</sup> Sess., 2010), para. 9, U.N. Doc. CEDAW/C/GC/28 (2010) [hereinafter CEDAW Committee, *Gen. Recommendation No. 28*]; ESCR Committee, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, paras. 8, 9 & 39, U.N. Doc. E/C.12/GC/20 (2009) [hereinafter ESCR Committee, *Gen. Comment No. 20*]; CRC Committee, *Gen. Comment No. 15, supra* note 87, para. 9; Human Rights Committee, *Gen. Comment No. 28, supra* note 75, para. 30.
- 105 CEDAW Committee, *General Recommendation No. 5: Temporary Special Measures*, (7<sup>th</sup> Sess., 1998), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 320, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008); see also, Human Rights Committee, *General Comment No. 18: Non-discrimination*, (37<sup>th</sup> Sess., 1989), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 196, para. 10, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008); CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, para. 14; ESCR Committee, *Gen. Comment No. 16, supra* note 102, para. 15.
- 106 CEDAW, *supra* note 7, art. 5(a). India has a declaration to article 5(a) stating that “it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.”
- 107 ICESCR, *supra* note 70, art. 2(2); ESCR Committee, *Gen. Comment No. 16, supra* note 102 para. 19; ICCPR, *supra* note 7, art. 3.
- 108 CEDAW, *supra* note 7, Preamble, art. 11(2).
- 109 *Id.* art. 11(2).
- 110 *Id.*
- 111 Human Rights Committee, *Gen. Comment No. 28, supra* note 75, para. 19.
- 112 CEDAW Committee, *Gen. Recommendation No. 24, supra* note 42, para. 11.
- 113 *Id.*; see also Human Rights Committee, *Gen. Comment No. 28, supra* note 75, para. 20.
- 114 CEDAW Committee, *General Recommendation No. 19: Violence against women*, (11<sup>th</sup> Sess., 1992), at 331, para. 24(m), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [herein after CEDAW Committee, *Gen. Recommendation No. 19*].
- 115 CEDAW Committee, *General Recommendation No. 19; see also* MANDATES OF THE WORKING GROUP ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE; THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH; THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; AND THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES 5-7 (2015); CAT Committee, *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013); CAT Committee, *Concluding Observations: United States of America*, para. 21, U.N. Doc. CAT/C/USA/CO/3-5 (2014); CEDAW Committee, *Concluding Observations: Portugal*, paras. 36, 37, UN Doc. CEDAW/C/PRT/CO/8-9.
- 116 See e.g., CEDAW Committee, *Concluding Observations: Egypt*, para. 40, U.N. Doc. CEDAW/C/EGY/CO/7 (2010); Committee on the Rights of the Child (CRC Committee), *Concluding Observations: Costa Rica*, para. 64, U.N. Doc. CRC/C/CRI/CO/4 (2011); ESCR Committee, *Concluding Observations: Chile*, para. 53, U.N. Doc. E/C.12/1/Add.105 (2004); ESCR Committee, *Concluding Observations: Kuwait*, para. 43, U.N. Doc. E/C.12/1/Add.98 (2005); ESCR Committee, *Concluding Observations: Malta*, para. 41, U.N. Doc. E/C.12/1/Add.101 (2004); ESCR Committee, *Concluding Observations: Nepal*, para. 55, U.N. Doc. E/C.12/1/Add.66 (2001).
- 117 Special Rapporteur on violence against women, its causes and consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, Intersections of Violence against Women and HIV/AIDS, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk*, at 23, U.N. Doc. E/CN.4/2005/72 (Jan. 15, 2005).
- 118 CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, para. 12.; ESCR Committee, *Gen. Comment No. 22, supra* note 81, paras. 30 & 31.
- 119 CRC Committee, *General Comment No. 20: Implementation of the rights of the child during adolescence* (33<sup>rd</sup> Sess., 2003), paras. 39 & 60, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008); CEDAW Committee, *General Recommendation No. 34: on the rights of rural women* (63<sup>rd</sup> Sess., 2016), para. 37, U.N. Doc. CEDAW/C/GC/34 (2016); CEDAW Committee, *Concluding Observations: Switzerland*, paras. 38-39, U.N. Doc. CEDAW/C/CHE/CO/4-5 (2016); CRPD Committee, *General Comment No. 3: Women with Disabilities (Art. 6)*, (9<sup>th</sup> Sess., 2016), U.N. Doc. CRPD/C/GC/3 (2016).