

# Right to health and cultural traditions: typological analysis of emerging fault lines



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***HUMAN RIGHTS UNDER PRESSURE – PROMOTING HUMAN RIGHTS THROUGH CULTURAL TRADITIONS?***

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# Right to health under international law

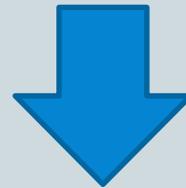


- The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the *highest attainable standard of physical and mental health*.
- The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all **aspects of environmental and industrial hygiene**;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

# Right to health framework



## **Committee on Economic, Social and Cultural Rights**



### **General Comment 14 (2000)**

*Authoritative interpretation of the right to health under Article 12*

# General Comment 14



*Not just the right to be 'healthy'*

## **Freedoms:**

- Bodily integrity
- Autonomy
- Freedom from interference
- ***right to control one's health and body, including sexual and reproductive freedom.***

## **Entitlements:**

- Functioning adequate healthcare system
- Equitable distribution of health services
- Access to **essential medicines**
- Special provisions for vulnerable groups

# General Obligations



## Three types of State obligation

- **Respect:** States must *neither directly nor indirectly violate* the right to health, eg. States must refrain from interfering with the exercise by individuals of their right to SRH. It also requires States to repeal, and refrain from enacting laws and policies that create barriers to access SRH services.
- **Protect:** States must take measures to *prevent third parties* from interfering with the right to health, eg. States must prevent third parties, such as conscientious objectors, from preventing access to lawful abortion services
- **Fulfill:** States are required to adopt *appropriate legislative, judicial and administrative measures and a national plan and strategy* for realizing the right to health, eg. States must provide for a national plan to make available effective sexual and reproductive health services that are accessible and acceptable to the needs of women

# Core obligations vis-à-vis SRH



- To adopt a **national strategy and action plan**, to be reviewed and monitored periodically through a transparent and participatory process;
- Ensuring **privacy, confidentiality and free, informed and autonomous responsible decision-making** (...)
- Take decisions with the **participation** of those effected
- To guarantee **universal, non discriminatory and equitable access to affordable, acceptable and quality goods, services and facilities**, in particular for vulnerable and disadvantaged groups;
- to enact and enforce legal **prohibition of harmful practices** and gender-based violence, including FGM, child and forced marriage, domestic and sexual violence, including marital rape,
- To provide **essential medicines**, equipment and technologies essential to sexual and reproductive health, including those on the WHO Essential Medicines List

## General Comment 14 (CESCR)



**Healthcare facilities, goods, services and programs must be:**

● **Available**

- Adequate number of services for reproductive and sexual health, eg. adequate number of family planning service
- Non-availability of goods and services *due to ideologically* based policies or practices, such as the *refusal to provide services based on conscience*, cannot be a barrier to accessing services; (GC 22)

• **Accessible**

- *Non-discrimination*, for example services that say only vulnerable groups like women and girls need must be accessible
- Services must be *physically* accessible and *financially* accessible, with provision for those on no or low incomes, therefore the State must provide for affordable reproductive health services within the State
- Women must be able to seek, receive and impart *information* about sexual and reproductive health.

# General Comment 14 (CESCR)



## ● Acceptable

- Medical ethics, respectful of requirements of minorities, ***gender-sensitive, culturally*** and respectful of confidentiality
- Gender sensitivity requires health facilities, goods and services to respond to the particular needs of women and respect the capacity of each woman to make-decisions concerning her own reproductive health.
- No denial of health facilities, goods and services goods on cultural differences (**Hijab**)

## • Quality

- Scientifically and medically appropriate, skilled medical staff, safe medicines, equipment and adequate sanitation

***Availability, accessibility, acceptability and good quality are interrelated and essential***

# ICCPR and ICESCR

- **International Treaties : Difference** in application in **civil law** countries (applicable law on signing and ratification) and **common law** countries (have to domesticate the law)
- In some **common law** countries even in the absence of a contrary law the treaty becomes enforceable on signing and ratification (India)
- Traditionally rights under the **ICCPR** (no arrest without furnishing grounds) **are immediately realizable** as against those under the **ICESCR** (providing essential medicines) **which are to be progressively realized** except for core obligations
- This came out from the difference in the perception of erstwhile western countries and the erstwhile soviet states

# ICCPR and ICESCR



- There is no **intrinsic difference between ICCPR and ICESCR**
- They are interrelated and inextricably linked
- The apparent difference is because of requirement of resources
- They have turned out to be so because of **historical accident of the existence of resources**
- **Right to due process** in arrest, conviction requires as much if not more resources than **treating a patient in hospital**
- Both are now enforceable in the UN under the **Optional Protocols**
- Both based on **inherent dignity of human beings** (See US Supreme Court in *Munn v Illinois* and Indian Supreme Court in *Francis Coralie Mullin*)

# Religion, culture and health



- **Religion, culture and customs** are legally distinct concepts but they are deeply intertwined, with religion often having a significant bearing on cultural practices and traditions
- In many societies, **religion, culture and custom constitutes a significant part of individual identity, informs decisions about health** as well as provides coping mechanisms, social support, existential meaning, a sense of purpose, a coherent belief system and a clear moral code.

# Religion, culture and health



- **Custom** what exists as local practices from time immemorial (30 years); Can be **overridden by statute**
- **Culture** International law and some Constitutions provide for the right to conserve culture and in particular language of a community (Article 29 of the Indian Constitution)
- In **indigenous communities the relationship** of the people, the land, the rivers, the animals and their ancestor is very important and nay sacred (e.g. **Dakota access pipeline** and the **Sioux nation**)
- **Development paradigm** today of making all natural resources and the habitat, both flora and fauna subservient to human beings is contrary to many cultures

# Understanding religion as a Human right

- **Religion** (a) in the west assumes the “existence” of a superior being : God (See *Nikulnikoff v. Archbishop, etc., of Russian Orthodox Greek Catholic Church*, 142 Misc. 894, 255 N.Y.S. 653, 663.; Amongst **Hindus it is a way of life** with existence of the divine being; Amongst **Buddhists there is no divine being** but the spiritual relationship with one self and others
- **Right to practice, profess and propagate religion is a** recognized human right internationally and constitutional rights in many countries
- However courts tend to protect the **core of religious practices** and not every aspect of it
- Ritual **sacrifices of animals** is not a core of Hindu sects but the way animals are slaughtered amongst Muslims is protected

# Freedom of religion international law



- **Article 19** of the Universal Declaration of Human Rights (UDHR) establishes the freedom of opinion and expression stating: *“everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*
- **Article 18** of the International Covenant on Civil and Political Rights (ICCPR)  
*“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice....”*
- **Art. 18 (3):** *“Freedom to manifest one's religion or beliefs may **be subject only** to such limitations as are prescribed by law and are necessary to protect **public safety, order, health, or morals or the fundamental rights and freedoms of others.**”*

# Freedom of religion under the Indian Constitution

- Freedom of religion in India is a fundamental right guaranteed by Article 15 and Article 25 of the Constitution of India.
- Freedom of conscience and free profession, practice and propagation of religion
  - (1) Subject to **public order, morality and health** and to the **other provisions of this Part** (Part III-**fundamental rights**), all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (Similar to Article 18(3) of the ICCPR)

# Freedom of religion is subject to other human rights



- **General Comment 22** of the Human Rights Council (HRC) to Article 18 discusses the limitation on the right to religion—Should be established by law, directly related and proportional to the goal of public health and non-discriminatory.
- Convention on the Elimination of All Forms of Discrimination against Women, *and the* Protocol to the African Charter of Human and Peoples’ Rights on the Rights of Women in Africa—*call for discriminatory customary and traditional practices that violate human rights be removed.*
- Where there is **conflict**, international law and constitutional law has **expressly preferred protection of the right to health by restricting the right to practice religion in order to further public health goals.**

## Fallout with religion: negative impact on the right to sexual and reproductive health

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- Women and girls are often burdened with upholding religious, cultural or customary norms, values and practices. Religious and cultural tradition is often used to justify discrimination and crackdowns on rights—especially those of women.
  - Religious/cultural preferences for male offspring-perpetuates the practice of female infanticide in countries like India.
  - Female Genital Mutilation is widespread Egypt and some sects of the Islamic faith.
  - Restrictions and criminalization on the use of birth control and abortion particularly in Ireland, Poland, Portugal and the Philippines.

# Impact of criminal laws on women's right to reproductive and sexual health



- **UN Special Rapporteur on the Right to Health – Report on criminalization of sexual and reproductive health (2010)**
- **Discriminatory in nature and effect**
- Legal restrictions are founded upon, and perpetuate, wrongful gender ***stereotypes, discrimination and marginalization of women and girls***
- **Negates empowerment of women**
- Criminal regulation of health services that only women need, is **antithetical to the empowerment of women**, instead isolating women and discouraging them from taking steps to protect their health due to fear of prosecution and stigmatization.
- Women almost ***exclusively bear the health burdens*** caused by restrictions on reproductive and sexual autonomy
- This generates disproportionately ***poor health outcomes*** for women compared to men

# Impact of criminal laws on women's right to reproductive and sexual health

## Women have to resort to unsafe or expensive health services

- Other means of accessing reproductive health facilities, goods and services can be prohibitively expensive, thereby compounding discrimination for women from disadvantaged socio-economic backgrounds.
- Criminalization leads women to resort to unsafe abortions
- States should “ensure that measures are taken to **prevent coercion** in regard to fertility and reproduction, and to ensure that women are **not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control**”

*(CEDAW Committee General Recommendation 19 (1992) on violence against women)*

# Impact of criminal laws on women's right to reproductive and sexual health



## Criminal laws and public morals

- Public morality is *not a legitimate justification* for enacting or enforcing laws intended to regulate conduct or decision-making on sexual and reproductive health matters
- Laws based on public morality are not *evidence-based*
- 'Morals' tend to reflect a dominant social or cultural patterns, in which *stereotyped roles for men and women* typically prevail. CEDAW Committee requires States to modify such patterns (Article 5)

# International jurisprudence on abortion

## **KL v Peru (2005; UN Human Rights Committee):**

- the right to privacy includes protection of women from “*interference in decisions which affect their bodies and lives, and offers them the opportunity to exercise their right to make **independent decisions on their reproductive lives.***”
- Human Rights Committee found a violation of the freedom from torture and cruel, inhuman and degrading treatment due to the significant psychological injury caused to KL in giving birth to a child with a fatal foetal abnormality.

# International jurisprudence on abortion

## ***LC v Peru (2011: CEDAW Committee)***

- The decision of medical staff to delay spinal surgery after discovering LC was pregnant (as a result of rape) was based on the prescriptive sex-role stereotype that women should be mothers. ***Reliance on this stereotype had the effect of prioritising protection of the foetus over the life, health and dignity of the pregnant girl in this case***
- Consistent with jurisprudence relating to the right to privacy, the right to health under Article 12 of CEDAW requires effective and accessible procedures to establish entitlement to the medical services required

# European Court of Human Rights



## **Procedural obligations under Article 3 and Article 8**

- *RR v Poland, Tysiac v Poland* and *A, B & C v Ireland* all hold that if abortion is permitted, the right to privacy requires ***effective and accessible procedures*** to allow a pregnant woman to determine if she is entitled to an abortion and to resolve disputes between a **doctor and pregnant woman as to whether an abortion is permitted**.
- This is particularly important in the context of criminal laws that have a chilling effect on access to lawful abortion.
- Denial of access to lawful abortion may be tantamount to ***cruel, inhuman and degrading treatment*** depending on the impact on the pregnant women's health.

# European Court of Human Rights

***The ECHR refuses to recognise a substantive right to abortion, including on health or wellbeing grounds because:***

- Whilst a consensus does exist amongst European states to allow abortion for health and wellbeing grounds, there is *no consensus on when life begins*
- The **ECHR defers** to the moral values of a State concerning the question of when life begins, **therefore giving a State a wide margin of appreciation for determining when to protect the life of the foetus.**
- As the rights of a pregnant woman are inextricably linked to the right to life of the foetus, that margin of appreciation is considered to extend to determining how to balance the rights of a pregnant woman against the right to life of a foetus (and when to allow abortion)

# European Court of Human Rights



**Partly dissenting opinion of 6 Judges in A,B & C v Ireland disagreed with denial of abortion for health and wellbeing grounds:**

- The relevant consensus was that relating to the **balancing of a pregnant woman's rights against the rights of the foetus (not the question of when life begins)**
- *There is a clear consensus in Europe that the right to life and health of a pregnant woman should prevail over the right to life of the foetus*
- Right to abortion for health and wellbeing reasons therefore should have been found by the majority of the ECHR

# European consensus?



## **A, B & C v Ireland**

- **ECHR noted that abortion is available:**
  - on request (subject to certain criteria, such as gestational limits) in some 30 Contracting States
  - for health grounds in some 40 Contracting States
  - on well-being grounds in some 35 Contracting States

*Abortion is absolutely prohibited in only 3 Contracting States*