REPRODUCTIVE HEALTH matters

The role of litigation in ensuring women's reproductive rights: an analysis of the Shanti Devi judgement in India

Jameen Kaur

Project Manager, Human Rights Law Network (when this article was researched), New Delhi, India.
Correspondence: jameeny@hotmail.com

Dedicated to the memory of Shanti Devi and the courage of the Mandal family

Abstract: *The struggle for reproductive self-determination has specific significance for women and girls in India, where a maternal death occurs every five minutes. This paper analyses the role litigation played in seeking redress for violations of the reproductive rights of Shanti Devi, who died in childbirth in 2010 in Haryana state, and some of the socio-economic, cultural, political and legal factors involved. It provides a brief overview of India's national and international obligations with regard to maternal health, and through the lens of the litigation in Shanti Devi's case, it examines how the government failed to protect, respect and fulfill her right to life and health. Litigation can be used to ensure accountability in further cases by building on case law, informing communities about these decisions and their rights, and holding government accountable at local, state and central level. Litigation also has limits, most importantly due to people's lack of awareness of their rights and entitlements, the lack of government outreach programmes informing them of these, and the lack of accountability mechanisms within health programmes when they are not transparent or functioning effectively. Thus, although constitutional justice is an important tool for democratic progress and social change, social justice will only be achieved through broader social struggle.*

Keywords: maternal mortality, law and policy, litigation, reproductive rights, human rights, India

The complete realization of a woman's reproductive rights is an "integral part of a modern woman's struggle to assert her dignity and worth as a human being".[1] Feminist scholars have argued that "how reproduction is managed and controlled is inseparable from how women are managed and controlled".[2] The struggle for reproductive self-determination has specific significance for women and girls in India, where a maternal death occurs every five minutes. According to government figures for 2007–2009, the maternal mortality ratio in India has dropped to 212 deaths per 100,000 live births from 254.[3] Even so, this figure is still shockingly high in comparison to other middle-income countries. For example, the maternal mortality ratio is 45 in China, 56 in Sri Lanka, 16 in Chile, 45 in Cuba, 110 in Brazil, and 130 in Egypt.[4] Factors that heighten women's and girls' risks of maternal death lie deeply rooted in the discrimination and inequality they suffer, which have a negative impact on their reproductive health and decision-making, and security and sexuality, which when combined deny them their right to reproductive self-determination.[1]

The three main clinical causes of maternal deaths in India are haemorrhage (38%), sepsis (11%) and complications of abortion (8%). According to the Indian Planning Commission maternal deaths are largely attributed to the absence of skilled birth attendants at delivery, poor access to emergency obstetric care in case of complications, and no reliable referral system for women who experience complications.[5] Unjustly, many more women and girls will suffer preventable injuries, infections and disabilities, often serious and lasting a lifetime, due to failures in maternal care.[6] The disparities in who is at risk within India reflect the additional obstacles women and girls face due to their caste, religion, income, education levels and where they live. The report of the UN Special Rapporteur on

the right to health's most recent mission (2010) to investigate maternal mortality in India observed:

"For a middle-income country of its stature and level of development, the rate of maternal deaths in India is shocking.... Although the problem is not simply a matter of funding, public spending on health remains among the lowest in the world. There is a yawning gulf between India's commendable maternal mortality policies and their urgent, focused, sustained, systematic and effective implementation. For the most part, maternal mortality reduction is still not a priority in India."[4]

This paper analyses the role litigation played in seeking redress for the violation of the reproductive rights of Shanti Devi, who died in childbirth, and some of the socio-economic, cultural, political and legal factors that influence the power dynamics involved, from the level of the family to that of national and international institutions.

India's obligations to respect, protect and fulfill women's reproductive rights

International treaty obligations

India's legal obligations to fulfill women's reproductive rights are included in the following international treaties, which the country has ratified:

- International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 12, which addresses access to health care, including family planning, and appropriate services (free where necessary) in relation to pregnancy, confinement and the post-partum period; Article 14, which acknowledges the additional burden faced by rural women; and Article 16, which ensures the equal right of women to decide freely and responsibly the number and spacing of their children and have access to information, education and the means to exercise these rights;
- International Covenant on Civil and Political Rights (ICCPR) Articles 3 and 26, which guarantee men and women equality before the law and require the law to protect against discrimination; and
- International Convention on Economic, Social and Cultural Rights (ICESCR) Article 12, which recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Committee on Economic, Social and Cultural Rights (the monitoring body for ICESCR) in General Comment No. 14 (2000), says that States must:

"...improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information."[7]

National legal obligations

The Indian government has largely made health care services the responsibility of state-level governments; however, the health policy and planning framework has been provided by central government.[8] The Constitution contains Fundamental Rights and Directive Principles of State Policy. Fundamental Rights ensure the protection of individual rights, including the right to life, which the Supreme Court of India has also interpreted to encompass the right to health; freedom from cruel, inhuman and degrading treatment; and the right to live with human dignity, equality and freedom from discrimination. The Directive Principles detail how the State should implement these rights and require that the Executive, Legislative and Judicial apparatus of the State are in compliance with the Directive Principles, especially when acting on and devising laws for the State and its governance. Article 47 of the Directive Principles sets the State's duties to raise and improve public health, nutrition and the standard of living;[5] however, Directive Principles, unlike Fundamental Rights, are not enforceable in court.

National case law

Indian case law established the right to life, which encompasses the right to health and human dignity, in the landmark judgment in *Paschim Banga Khet Samity v. State of West Bengal*, in which the Supreme Court of India for the first time considered the right to emergency medical care as a fundamental right and directed that:

"...the primary duty of the Government is to secure the welfare of the people. ...The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person... Failure on the part of a Government hospital to provide timely