CHAPTER V
HEALTH AND SOCIAL SECURITY OF WOMEN

(A) RIGHT TO HEALTH
(B) SOCIAL AND ECONOMIC EMPOWERMENT OF WOMEN
(C) RIGHT TO EMPLOYMENT
(D) WAGE DIFFERENTIALS
(E) MATRIMONIAL HOME

CHAPTER V

HEALTH AND SOCIAL SECURITY OF WOMEN

Social Security is a basic need of all people regardless of the sector of employment in which they work and live. It is an important form of social protection we should begin with birth and should continue till death. In a general sense social security refers to protection extended by the society and state to its members to enable them to overcome various contingencies of life. The main risks or insecurity to which human life is responsible and in relation to which an organized society can afford relief to the helpless individuals are the incidents occurring right from childhood up to old age and death. Which includes many sickness invalidity due to maternity, accident and occupational diseases unemployment, old age etc. Though, we have enacted good number of social security legislations to meet the mandate of our Constitution and provide a sort of protection to the people in case of various providential mishaps, the scope and coverage of these legislations is limited to hardly 39.1% of the total main work force, who are in the so-called organized sector as per 2001 census.[1] But remaining 69.9% of the persons working in unorganized sectors such as the small and marginal farmers, the landless agricultural labour, the rural artisans, the handicrafts men and women, the fisherman and women, the salt workers, the hamals and the building and construction workers etc. are deprived of protection under many social security legislations of the state. Thus majority of the work force in the above said unorganized sector are in an urgent need of a comprehensive social security protection which can be achieved by joint of Governmental and non-governmental organisations.

The Preamble of the Indian Constitution is a sole-repository of social security measures and provide for establishment of Socialist State. According to the Supreme Court of India the Principle aim of socialism is to eliminate inequality of income, status and standard of the life and to provide a decent standard of life to the working people. It is designed to secure social, economic and political justice to all its citizens. Social justice

[1] Govt. of India census report 2001, http//www.censusindia.gov.in

is said to be signature tune of Indian Constitution.[2] Social security is the security that state furnishes against the risks which an individual of small means cannot, today, stand up to by himself even in private combination with his follows.[3]

The quest for social security and freedom from want and distress has been the consistent urge of man through the ages. The urge has assumed several forms according to the needs of the people and their level of social consciousness, the advancement of technology and the peace of economic development.[4] The concept of 'Social Security' is based on ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his countries welfare should be given protection against certain hazardous.[5] Social Security measures are significant from two view points. First they constitute an important step towards the goal of a welfare state. Secondly, they enable workers to become more efficient and thus reduce wastage arising from industrial disputes. Lack of social security impedes production and prevents formation of stable and efficient labour force. Social Security measures are not a burden but a wise investment which yields good dividends.[6]

> *"Social Security" in the words of Lord William Beveridge, is: The Security of an income to take the place of earnings when they are interrupted by unemployment, sickness or accident to provide for retirement, though age-to provide for loss of support by the death of another person and to meet an exceptional expenditure such as those connected with birth, death and marriage.[7] For providing the social security to workers several legislations, both central as well as state have been enacted.[8]*

---

[2] Quoted by Suresh v Nadagoudar, "Social Security for workers in the un-organized sector" XXVIII (4) *IBR* (2001) *see also, Article* 38 of the Constitution states to secure order for promotion of welfare of the people, The State shall strive to promote by securing and protecting as efficiently as it may be a social order in which justice social, economic and political shall in form all the institutions of national life.

[3] Giri V.V., Labour problems in India Industry at 247.

[4] Report of National Commission on Labour, (1969) 162.

[5] I.L.O. Approaches to Social Security (1942) at 80 quoted in report of National Commission of Labour (1969) at 162.

[6] Giri V.V., Labour problems in Indian Industry at 248.

[7] William Bereridge, "Social Insurance and Allied services" at 120.

[8] Acts:

i. The Workmen's Compensation Act, 1923.
ii. The Employees Insurance Act, 1948.
iii. The Employees Provident Fund and Miscellaneous Provisions Act, 1952.

In these legislations a number of social security measures for workers have been provided in the form of compensation for employment injury[9], Pension,[10] Gratuity,[11] and Maternity benefit etc.[12]

(A) RIGHT TO HEALTH

A healthy body is the very foundation for all human activities. "Health is a Wealth" is the adage, though from time immemorial has assumed more significance in contemporary societies across the globe and importantly in third world countries. No Nation could develop and prosper and also defend its integrity unless a society is physically, morally and politico legally sound and healthy.

Health is a matter of concern in every society. The "Right to health" is central to all human rights, and denial of health right would mean denial of all human rights. Health is central to long term development of individual and society at large. In this context, one

---

iv. The Factory Act, 1948.
v. The Payment Wages Act, 1936.
vi. The Minimum wages Act, 1948.
vii. The Maternity benefit Act, 1948.
viii. The Payments of Bonus Act, 1965.
ix. The Payments of Gratuity Act, 1972.
x. The Contract Labour (Regulation and Abolition Act, 1970.

[9] *Section* 3(1) of Workmen's Compensation Act 1923 provides the liability of the employer to pay compensation for the following four conditions:-
i. Personal injury must have been caused to a workman.
ii. Such injury must have been caused by an accident.
iii. The accident must have been arisen out of and in the course of employment.
iv. The injury must have resulted either in death of the workmen or in his total or partial disablement for a period exceeding three days.

[10] *Section* 6(a) provides Employees Pension Scheme-The Central Govt. may be notification in the official Gazette from a scheme to be called the Employees. Pension Scheme for the purpose of providing for—
a. Superannuation, pension, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this act applies and
b. Widows or widowers pension, children pension of orphan pension payable to the beneficiaries of such employers.

[11] *Section* 11(1) of the payment of Gratuity Act 1972- provided that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, (a) on his superannuation or (b) on his retirement or resignation or (c) on his death or disablement due to accident or disease.

[12] *Section* 5 of the Maternity Benefit Act 1961:- Provides that the maternity benefit to which every women shall entitled and her Employer shall be liable for, is a payment to a worker at the rate of average daily wages for the period of her actual absence immediately proceeding and including the day of her delivery and for sic weeks immediately following that day. In addition the judiciary has played significant role by providing social security to the workers.

has to specifically address female health as it is of the utmost importance, for she is one who carries the future dreams of this earth.

Women's health is inextricably linked to their social status. In many parts of the world, including India, discrimination against women starts before birth and continues till death. The reason for women's ill health often lie within the gender roles they play. Evidence shows that women are biologically more robust than men, and consequently have a natural edge in terms of expected life span. But in our country, this biological advantage is completely cancelled by women's social disadvantage. In most regions of India, women are denied the rights and privileges afforded to their male counter parts, both within and beyond the domestic sphere. Throughout their lives women firmly bear discrimination based on gender, the manifestations of which range from preferential treatment of boys in provision for food and health care to rape, dowry, death and female infanticide. Women are expected to eat last, leave the best food for the men of the family and to ignore their own illness while managing the entire household. In India, majority of women suffer from chronic energy deficit due to insufficient daily calorie in take (500-700 calories less than the recommended daily adult minimum intake of 2,250 calories: UNICEF 1996)[13].

This often results in mal-nutrition and is one of the main reasons behind high rate of morbidity and mortality of women in India. Further, Indian women suffer greatly from a lack of access to health care, based not only on an absolute lack of health facilities-particularly in rural areas but also on the relative inaccessibility of such facilities to them. They often face traditional to boos, based on cultural practice and religious belief against consulting doctors. A survey, in India, for instance, found that the decision for pregnant or post-natal woman to seek medical care is most often made by woman's husband and in some cases by her mother-in-law; the women themselves are very rarely involved in the decision-making.[14]

Health statistics in India clearly indicates the gender discrimination. Majority of women die annually due to pregnancy and birth- related complications. Norms of early marriage continue to predominate, and a large majority of girls become mothers before

---

[13] Mahbub UL Haq. *Health of girls and Women*, Human Development in South Asia (2000), 118.

[14] Source UNFPA, quoted in Ibid at 118.

the age of twenty. In India, the most common diseases for women are diarrhoeal diseases, respiratory infections and perinatal condition (complications or diseases which occur at or after twenty-eight weeks of gestation or within first seven days after child birth.[15]

Women need to access health care services for fertility control or for care during pregnancy. For this reason, in developing countries, like India, women's health issues are generally defined as those relating to their reproductive health to the exclusion of physical and mental heavy domestic work, or the lack of an adequate-diet, water and sanitation. While impact of inadequate kitchen facilities affects the whole family indirectly women and girls are directly affected in terms of work burden, inconvenience, accidents and injuries and exposure to indoor air pollution. Indoor air pollution- a risk linked almost entirely to kitchen activities- is a contributing factor to acute respiratory infection in infants, and is also responsible for the high levels of chronic respiratory and heart disease found in women in India. An average Indian woman spend about 6 hours in the kitchen everyday and hence is the worst affected by the pollution which is caused by unprocessed solid fuels as they release 50 times more toxic pollutants than cooking gas.[16]It was also seen that adverse pregnancy comes out as a result of exposure to this bio mass smoke.

(i) Missing Women

India is one of the very few countries of the world, in addition to China and some parts of Arab World, when men outnumber women. In India, there are only 938 women per 1000 men.[17] This unfavourable ratio is primarily a consequence of high levels of mortality among young girls and women in their child-bearing years. Moreover, introduction of prenatal screening methods such as ultra sonography and amniocentesis are also contributing factors to this problem. In those parts of India, where female education and employment opportunities are relatively high, the female-to-male ratio is comparable to that of developed countries. For example, in the *State of Kerala*, there are 104 women for every 100 men in 1999.[18] This proves that a lady, who is educated and

---

[15] Source World Bank 1996, Quoted in Ibid at 119.
[16] Ibid at 119.
[17] *Id.* at 120.
[18] *Id.*

employed, takes much care of her own health, as her economic freedom makes her capable of taking the major decisions of her own life.

The main reason behind the declining male-female ratio in India may be the female infanticide and foeticide. Female infanticide- the practice of killing female children because they are female is taking root in India society. Girl children are got rid of after birth by crude techniques-such as- feeding them poisoned milk, choking them with salt or sand, stuffing coarse gains in their mouths, giving poisonous plant extracts or by suffocating them. This practice of female infanticide is most prevalent in Indian States of Tamil Nadu, Gujarat, Bihar and Rajasthan.[19]

Today girl child can be got rid of before her birth. This has become possible with the help of new scientific innovations of ultra sound and amniocentesis. Originally these medical techniques had been developed to discover the birth defects. But they are now being used to determine the sex of the child before the birth of the child. The process of ending up the pregnancy if the fetus is female have become so popular, that everyone seems to know about them, be it an illiterate maid servant or an educated professional. Hence advancements in modern medical science have helped quicken the pace of death for the girl child: female foeticide is a burning example of what can happen when modern science collides with the forces of traditional society. Today thousand of girls are denied even the right to born. It is very much difficult to get true estimates of female infanticide because such crimes are carried out within the domestic sphere, and at times even closest witness will not testify.[20] Still, the constant decline in the female-to-male ratio over the last century can provide a broad picture of the incidence of this practice. According to the Indian Population Census 1941, the sex ratio of children in the 0-6 years was 1010 females per 1000 male children. This had declined to 945 females per 1000 males in 1991.[21]

We have discussed earlier that biologically female children are more robust during the earlier neo-natal period than male children. But one will be shocked when he comes to know that in India the ratio of female to male oaths is much higher in the first

---

[19] *Id.* at 122.
[20] *Id.*
[21] *Id.*

six days of the child's life. A study in the Madurai district of Tamil Nadu reveals that female mortality rate is 105.3 as against male mortality rate of 47.4.[22]

There is hardly any gender differential in the death rate from almost a month after the birth to the completion of the first year of life. This clearly indicates that there are some specific non-biological processes at work, i.e. the tendency of killing girls as soon as they are born.

Sons are major obsessions throughout India particularly in Bihar, Tamil Nadu, Gujarat, Rajasthan, Maharashtra, Punjab and Haryana. Son preference has penetrated all sections of society- even rising level of education has not helped to raise the status of women significantly. Indian people consider girls a liability for the family as they have to be married off, often with huge dowry. Studies have shown that demands and deaths are one of the main reasons why parents do not desire to have daughters. Sex-determination clinics are doing their business on this fear, advertising these tests with slogans such as "Cheaper alternative to dowry" or "Better pay Rs. 500 now than Rs. 5,00,000 later.[23]

The most surprising and shocking aspect of foeticide is that illiteracy and poverty can not be cited as the reason for such crime. Families who are relatively affluent and who can easily afford dowries also resort to female infanticide or foeticide, the best way to relieve them of an undesirable burden. Actually, it has been seen that most of the families still tolerate the existence of a daughter, but more than one daughter means a crunch on family resources. Many educated women are of the view that sex selective abortion is lesser of two evils, compared to what a women is going to face until the day she dies. They often defended themselves by saying that it is better to be killed in the mother's womb than be burnt at the mother-in-law's.

Sex determination tests do not ensure the birth of a male child, they merely ensure multiple abortions-which can immense harm to the women's health. Repeated abortions deteriorate a woman's health; there are physical consequences including hemorrhage, infection and infertility. Repeated abortions also have an adverse impact on women's mental and emotional health. In India, one woman dies of septic abortion every ten

---

[22] *Ibid.*

[23] Jain Kamla, Sex Determination Factor for the Survival of Female Child, *Legal News and views*, May 1996, 9.

minutes. This refers only to legal abortions, with almost as many deaths for illegal abortions.[24]

However, while Indian law permits abortions only under certain conditions,[25] it prohibits strictly and absolutely the determination of the sex of a fetus.[26] Not only that, any publicity or advertisement regarding the facility of the pre-natal determination of sex is punishable with imprisonment and fine.[27] The spread of female foeticide has led to a controversy surrounding the ethics of and right to opt for abortion. Though Indian law permits abortion only under certain conditions, but these can be broadly interpreted and abortion can be carried out on demand before the twentieth week of pregnancy.[28] The question arises that if abortion is legal, why should be democratic state interfere in a couple's decision to abort a female fetus? It has been suggested by some analysis that in India abortion or "medical termination of pregnancy" is encouraged by the medical establishment as a form of birth and population control. In a society where families are willing to have child after child until they get a desired number of sons, female foeticide seems to be answer both to keeping family size small and to ensuring the birth of a son.[29]

(ii) Nutritional Challenges

The majority of Indian women are chronically ill as a result of under and mal-nutrition, lack of adequate health care and frequent child-bearing. About 60 percent of women in their child-bearing years in India are under-weighted, stunted by inadequate nutrition during their own childhood.[30] Both the quantity and quality of food intake

---

[24] Source: Kapur 1993, Quoted in 'Mahbub UL Haq, Health of Girls and Women, *Human Development in South Asia 2000*, 123.

[25] *Section* 3 of the Medial Termination of Pregnancy Act, 1971 provides that a pregnancy may be terminated only when any of the following conditions is fulfilled:

(i) if the continuance of pregnancy bears the risk of endangering the women's physical or mental health or involves a risk to the life of the pregnant woman; or

(ii) the birth of the child involves the risk of birth of an abnormal child whether mentally or physically.

[26] *Section* 6 of the "Pre-Natal Diagnostic Techniques (Regulation and prevention of Misuse) Act, 1994 absolutely prohibits the determination of the sex of a foetus.

[27] *Section* 22 of the "Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 provides that no person, organization or Genetic center should-advertise or give any publicity in any form regarding the facility of the pre-natal determination of sex available at such center or laboratory.

[28] *Id.* at 123.

[29] *Id.*

[30] Source: UNFPA, Quoted in *Ibid* at 124.

determine nutritional status of an individual. In India, there is widespread evidence of inequitable feeding practices for boys and girls starting at infancy. Boys are breast fed more frequently and for longer periods than girls and girls usually receive less food than boys after breast feeding.[31] The male bias in feeding practices continues into adulthood and results in chronic under-nutrition in girls and women. A study conducted in the largest cities of India reveals that in the 6-14 age group, 66.7 percent females in Hyderabad, 95.3 percent in Calcutta and 73.3 percent in New Delhi suffered from anemia.[32]

Poverty is a major contributing factor to the ill health and malnutrition of women, because in the traditional societies of India, poverty affects women disproportionately. Whatever food is available within the household tends to be distributed in such a way that women get a smaller share. In India, the tradition of sequential feeding is practiced, i.e. male adults eat first followed by male children, then female adults and finally female children. Such a condition takes a heavy toll on the health of young girls. Even in families that eat together, adult women often allocate the portions of food and these allocations are illustrative of gender bias.

In households where there is enough food to eat, women are still the most disadvantaged in terms of food consumption. There are traditional notions that prohibit women from consuming certain foods that may be essential for them. For instance, young girls often are not given certain foods because it is thought that they should not grow fast or too much.[33] Hence high protein foods like milk, eggs and meat and foods with greater fat content are considered to be the privilege of male children, while girls are given cereals. A study in Indian Punjab found that although most pregnant women realise the need for a more nutritious diet during pregnancy and lactation, they are not provided with a special diet and their inferior status in the household makes it difficult for them to demand it.[34]

Children under 5 years of age are most susceptible to six deadly diseases- polio, diphtheria, whooping cough, tetanus, measles and tuberculosis. Throughout the world,

---

[31] *Id.* at 125.
[32] Source: World Bank 1996, Quoted in, *Id.* at 124.
[33] *Id.* at 125.
[34] Source: World Bank 1996, Quoted in *Id.*

campaigns and programmes have been developed to immunize children against these deadly diseases. There is some evidence of discrimination against female in terms of immunization. In India, for instance more boys than girls were vaccinated in 1993-94.[35] A study of one rural area reported that over a one week period roughly three times as many boys as girls were brought to the primary health center for treatment.[36]

Oppression of girls in India tends to increase during their adolescence. Once a girl reaches puberty, families often will invoke social and cultural taboos to restrict her to the household. Although pregnancy is a serious health risk for women under 18 years of age, the tradition of marrying off daughters once they reach Puberty is still prevalent in certain communities of India, A study of 20-24 year women showed that 60 percent were married by the age of 18, burdening girls-who are often not physically or mentally prepared-with child bearing, child care and sexual responsibilities. These girls are at increased risk of sexually transmitted diseases, including HIV/AIDS.

(iii) Medical Negligence and Women

Right to life is guaranteed under Article 21 of the Indian Constitution. This right has been couched in the negative form and when read literally, it empowers the state to interfere with the enjoyment of life and liberty according to procedure established by law. A new fact was given in *Maneka Gandhi* v. *Union of India*,[37] when by its interpretation, the Supreme Court charged the scenario from one that calls for procedural rights to one that provides for substantial rights. While Constitutionalising these substantial rights with the aid of Article 21, the Supreme Court has drawn support from the International convection on Human Right. Now the State is manded to provide to person all rights essential for the enjoyment of the right to life its various perspectives. Of late, the right to health and access to medical treatment has been included in the plethora of rights brought under the ambit Article 21[38].

---

[35] *Id.*

[36] AIR 1978 SC 597.

[37] AIR 1978 SC 597.

[38] Manickam C. and Sajith S., "Right to Health and Access to Medical Treatment under the Indian Constitution", AIR 1997 (*Journal*) 103, 104.

The judicial observation from *Vincent Panikulanagara*[39] to *Paschim Banga*[40] give a clear picture that access to medical treatment has become a art of Article 21 of the Constitution. The approach in Paschim Banga[41] is more remarkable because the state and Central Government are directed to provide basic medical facilities along with the sophisticated medical treatment. In the case, the Supreme Court made the following observation:

> *The Constitution envisages the establishment of welfare state at the federal level as well as the state level. In a welfare state the primary duty of the Government is to secure the welfare of the people is an essential part of obligation undertaken by the Government is welfare State. The Government discharges this obligation by running hospitals and health centers which provide medical care to the persons seeking to avail these facilities. Article 21 imposes person. Preservation of human life is thus of paramount importance. The Government hospital run by the state is duty-bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to person in need of such treatment results in violation of his right to life guaranteed under Article 21*[42].

Following is the case of a poor lady who has invoked the Court's jurisdiction under Article 226 of the Constitution of India seeking, *inter alia*, a direction to institute complaint for investigation by the police into the acts and omission of Government Maternity Hospital when constitute (1) offences against her body while operating for the delivery of a child (2) other and further action against the Government Maternity Hospital in accordance with law; and (3) to pay compensation consolidated in sum of Rs 8,00,000/- to her for the injuries and sufferings caused to her by the criminal negligence of the doctors of Government Maternity Hospital[43].

The facts of the case in brief are petitioner who hailed from the State of Karnataka had undergone. Caesarean section for the delivery of her third child. In Government Maternity Hospital, Afzalgunj. She consulted and consulted and visited the Government Maternity Hospital, for periodical checkup during pregnancy and since she had not been having sufficient financial backup, she depended upon the free medical services. But after

---

[39] *Vincent Panikulanagara* v *Union of India*, AIR 1987 SC 990
[40] *Paschim Banga Khet Mazoor Samiti* v. *State of West Bengal*, AIR 1996 SC 2426.
[41] *Id.*
[42] *Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal*, AIR 1996 SC 2426
[43] *Shanta* v *State of Andhra Pradesh*, AIR 1998 A.P. 51.

few days of the first operation she developed pain in her abdomen and consequently another operation was conducted on her. She was shocked to learn that her abdomen contained a towel used in previous surgery and few other surgical materials. Because of those remaining foreign bodies in the abdomen, that her small intestine and all other surrounding parts were highly infected and she was almost in jaws of death.

Extending the cherished right of life as in Article21 of Indian Constitution to receive proper and complete medical attention from medical practitioner, whether working in Government Hospital or a private practitioner and describing the work of a doctor as the service of a missionary to sufferings of a human being, the Court in this case observed:

> *The right to health is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which life is a misery. Any one thus who has the opportunity to tinker in any capacity with another, has a duty to ensure that his or her interference with the life of another has done no injury or harm which would affect the life of that person either diminish it or injure it in any manner. A doctor thus to whom a patient is brought for treatment gets full control upon the life of the patient and when he or she treats the patient his or her command upon the patient is all pervasive.*[44]

The question posed before the Court in the instant case was whether the Government Maternity Hospital in any manner affected the life of the petitioner. The Court could not help but held the doctors and the hospital liable for their negligent and callous performance of duties which violated the petitioner's Right to Life under *Article 21* of the Constitution.

The Court found that it would be frightening to the person, more so for a woman, who had to nurse three children and work for livelihood to suffer the presence of foreign body in the abdomen, which slowly would damage the system and create complications and if not attended to on time, would lead to collapse and death. Moreover, the Court visualized the petitioner's anxiety and her desperation to see the Doctors, who were examining her and who operated upon her for treatment of the pain detection of the causes of the pain and for necessary surgery. The Court doubted whether it could successfully quantify the damages in the present case, to make good the loss and injury

[44] *Id.* at 57.

sustained by the petitioner. The Court's doubt was very clear from the following observation when the Court stated.[45]

> *Can Court measure the compensation which would be a restitute for harm sustained by the petitioner? When we care to scan the facts for the said purpose and try to see whether the petittoner can be restored to the position in which she was prior to injury and to loss...This is a case even by conservative estimates of irreparable damages as no certain pecuniary standard is noticeable for measurement of injury of the petitioner. Her injuries...has residual as well as future effects upon her...There is a need...to provide the petitioner, solace for mental anguish, solace for laceration of her feelings, solace for definite and well oriented future and solace for her to fulfill the obligations of a mother towards her three children...*[46]

Taking into consideration all the relevant factors, this Court directed the State Government to provide all necessary medical care to her until she would be completely cured and until her complete recuperation. Further, the State Government was directed to pay Rs. 300,000 to her by way of compensation.

Thus in *Shanta* v *State*[47] it has been well established that right to health and health-care is protected under *Article 21* of the Constitution and *Article 21* castes the obligation of the state to preserve life. A doctor at the Government hospital positioned to meet this state obligation is, therefore, duty bound to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statues or otherwise which would interfere with the discharge of this obligation can not be sustained and must, therefore give away.[48]

Accordingly even when lack of adequate resuscitative facilities and trained staff responsible for death of a patient adopting for tubectomy operation, not the negligence of

---

[45] *Id* at 59.
[46] *Id*
[47] AIR 1998 A.P. 51.
[48] *Pt.Paramanand Katara* v *Union of India* 1990 (2) Bom. CR 96 at 101, 102.

the concerning doctor; the state became vicariously liable to pay compensation of a Rs.1 lakh to husband of the deceased.[49]

Motherhood is the most precious possession of a woman's life. If in any case she is made to sacrifice the motherhood which she is yet to enter upon, it is no less than suicidal death for a young woman. Anyone who is responsible for such incident by his callous, careless and negligent deeds should be awarded the maximum punishment.

In *Tabassum Sultana's*[50] case, the victim was a young newly married lady had been operated upon for tubectomy for Government sponsored scheme and thereby lost the most precious possession of her life i.e. motherhood. All this was done in a Family planning Camp organized by Government officials. The Allahabad High Court very boldly stated that she was treated like an animal and then dragged to the operation table to get butchered her motherhood.[51]

As it was a Government sponsored Scheme, the Court found the Government vicariously liable for the negligence of the Government officials and awarded Rs. 3 lacs as compensation to be paid by the State.

Subsequently, the matter of medical negligence in performing surgery on a woman came up before the Gujarat High Court.[52] The plaintiff lady had undergone surgery upon thyroid gland. Medical and expert evidence indicated that as result of surgery, plaintiff lady suffered permanent partial paralysis of larynx (voice box) as a consequence of damage to or cutting of recurrent laryngeal nerve the surgeon performing the said operation specifically admitted that he had made absolutely no attempt to identify or separate that nerve. The Court though did not hesitate to hold the concerned doctor negligent in taking appropriate precautions before and during surgery, was not of similar opinion with the amount of damages awarded by the trial Court. Regarding the question of quantum of compensation, the Court held that the trial Court had grossly overestimated the compensation to which the plaintiff would be entitled. Thus the appeal was partly allowed by awarding rupees one lakh twenty thousand to the plaintiff.

---

[49] *Rajmal* v *State of Rajasthan* , AIR 1996 Raj 81.
[50] *Tabassum Sultana* v *State of U P.* AIR 1997 All. 177.
[51] *Id. at 179.*
[52] *State of Gujrat* v *Laxmiben Jayantila lSikligar*, AIR 2000 Gujarat 186.

(iv) Women and HIV

The advent of HIV/AIDS has added a new dimension to the already poor health situation of the population, with specific and serious implications for women's health. By the year 2002, it is estimated that over 40 million women and men will have been infected with HIV. The pandemic is concentrated in the poorest parts of the world with 90 percent of those who are HIV-positive living in the developing world.[53]

Data, though limited, show a rapidly increasing number of HIV/AIDS cases, including those among women, particularly adolescent girls and women involved in sex-trade. India has been hit the worst by the HIV/AIDS pandemic, where between 3.5 million and 4.1 million people are HIV-positive, almost 40 percent of them are women.

In India, in every 3,300 children under 15 years of age has lost his/her mother or both parents to AIDS. A Mumbai antenatal clinic reported that 5 percent of pregnant teenagers consulting the clinic are HIV-positive.[54]

Women in India are vulnerable to HIV primarily because they are unable to insist on safe sexual practices with their spouses or partners. This vulnerability arises due to a number of factors. Biologically, there is a great likelihood of HIV infection passing from man to woman in unprotected sexual relation than from woman to man. Economically the status of women is subordinate to that of men. Most women are financially dependent on the male members of the family. Women are often unable to access information and services like health care and this has a direct impact on their ability to protect themselves from HIV infection. Moreover, India law does not recognize marital rape if the wife is above 15 years. In case of forcible sex, the wife does not have any remedy except to sue the husband for divorce on the ground of "cruelty". The inferior status of women in domestic sphere often prevents her to take decisions about use of contraceptives.

(v) HIV Infection and Pregnancy of Women

Most of the women come to know about their HIV positive status only when they are tested for HIV at the antenatal stage usually late on the pregnancy. If they are tested HIV positive, they are left with little option bout to deliver the child, as they cannot abort

---

[53] *Health of Girls and Women*, Human Development in South Asia 2000, 129, 130.
[54] Source: The Nation 1999; UNFPA 1999; Quoted in *Id.*129-130.

at that late stage.[55] Most hospitals do not offer adequate medical intervention to reduce the chance of HIV transmission from mother to child, even though HIV testing is done in antenatal stage. For the interventions to be carried on, the HIV status of the mother has to be determined. This required ante natal testing of pregnant woman. This can only be done with informed consent of the woman. It has to be done voluntarily. This involves pre-test and; post-test counseling. Before the test is done the health care worker would be required to provide the pregnant mother with the necessary information regarding the implication of testing HIV positive, the chances and risks of infection being transmitted to the and the medical intervention (with alternatives) necessary for reducing the transmission if she opts for delivery. She would also have a choice for abortion within the permissible period under the Medical Termination of Pregnancy (MTP) Act, 1971.

(vi) Refusal to Self Treatment

Can the pregnant HIV positive mother refuse medical treatment for her unborn child? At common law, the state has the right to protect the rights of the child already born under the doctrine of *parens patriae*. But no such right exerts in the case on an unborn child.

In case the child is already born, different considerations arise. The child already born has right of her/his own, say to be administered medical treatment, despite opposition from her/his parents. In *re C (a child)* (HIV test)[56] the question was whether the Court can order an HIV test of a child. The *mother*, after discovering that she was HIV positive, became pregnant. She believed in alternative medicines and not allopathic ARV therapies. She rejected the advice of administering ARV therapy during pregnancy, had natural water birth at home and breast fed the baby immediately after birth. The mother then rejected the advice of testing the baby for HIV. The local authorities commenced proceedings to have the baby tested for HIV.

The English High Court held that parent's wishes were of great importance. The baby had rights of her/his own. The reasons for overriding the wishes of the parents and testing the baby were over whelming. On testing positive the baby may require monitoring and even ARV therapy.

---

[55] Anand Grover and Veena Johari, Legal issues: Pediatric HIV Infection, *Lawyers collective*, Nov. 2001, at 21.

[56] *In re C* (1999), TNLR 652, (14th Sept. 1999).

In a famous American case[57], a 4-year old HIV-positive son of HIV-positive parents was advised to undergo Highly Active Anti-Retroviral Therapy (HAART) an experimental therapy at that time. The mother refused to let her son undergo HAART. The state moved that the son be protected and receive the said therapy and the mother in refusing to allow the therapy was jeopardizing the son's health and welfare. The Court held that it was incumbent on the state to prove that the mother in refusing to allow the son to undergo HAART constituted imminent threat of serious harm to her son. Since the state did not prove the benefit of the therapy and that harm would result if the son did not undergo the therapy, the decision to undergo HAART was left to the discretion of the parents.

In the Canadian case of *In re IB*[58] the question was whether the mother could regain the custody of her HIV positive sons, which she had previously lost, because she refused to consent ARV therapy at the instance of the State. The Court held that following the Supreme Court's decision in RB which laid down that the decision of the parents must be respected which they made after following mature and objective reflections, the decision of the mother who believed in alternative medicine, could not be said to be infirmed made after "mature and objective reflection". Although the "mother became well-informed and read many books... the mother's research was only done to confirm her own views and justify her position". The Court went on to state "perhaps, as she claims, it is not proven that HIV can be transmitted by breast feeding, but why take the risk of such magnitude when comparative benefits of breast feeding remain, after all relatively minor."

(vii) Refusal to Treat HIV

This issue that remains of grave importance is the refusal of health care workers to treat HIV positive people, particularly in the private sector. Under the Indian Constitution, the public health care sector is bound by equality provisions and is therefore duty bound to treat all patients. The equality provisions of the Constitution do not apply to the private health care sector. Unfortunately, most private health care institutions providers do not carry out deliveries after the woman is tested HIV positive. Pregnant

[57] *Re Nikolas E.* Maine Supreme Judicial Court, United States, 1998.
[58] *Re IB* 2000, *JQ* 490, Canada.

HIV-positive women are referred to public sector hospitals for deliveries. The discriminatory attitude of the health care workers makes health more and more inaccessible to the vast majority of population. What is needed is anti-discriminatory legislation that would mandate the private sector to follow anti-discriminatory practices.

In this regard, the famous judgement of US Supreme Court in the *Bragdon* case[59], may be remembered. It has held that it is illegal under the Americans with Disabilities Act (ADA) for a dentist to refuse to treat a patient with HIV based on the fear of HIV transmission from a patient to dentist.

The question today in the HIV scenario is how to empower the women so as to enable her to insist on having safer sex with her spouse or partner. By empowering the woman in areas that are still considered taboo, we may be able to take a positive step towards reducing the transmission of HIV and the overall development of society as a whole. Further, it is pertinent to prevent mother to child transmission so as to reduce pediatric AIDS and a healthy future generation. Mass education and information, education on hygiene and sanitation are the need of the hour. The more delay in the government awareness the worse the situation will get, considering the fact that health care in rural areas is minimal in urban areas, out of the reach of the poor. The time to act is now else, it might be too late even to repent.

(viii) Women and Family Planning

Family planning is a National Programme. It is being implemented through the agency of various hospitals and health centers and at some places through the agency of Red Cross. It is expected that everybody involved in the implementation of programme will perform his duty in all earnestness and dedication so that the national programme may be successfully completed and purpose sought may bear fruit. It is well awarded fact that India is the second most populous country in the world and in order that it enters into an era of prosperity progress and complete self-dependence, it is necessary that the growth of population is arrested. It is with this end in view that the family planning programme has been launched by the Government which has not only endeavored to bring about an awakening about the utility of the family planning among masses but has

[59] *Bragdon v Abbott*, 118 S. Ct. 2196.

also attempted to motivate people to take recourse to family planning through any of the known devices or sterilization operation.

It is to be remembered here, that Indian women often have little power to make decisions concerning the number of children they will have. The decisions to adopt methods of family planning almost always lie with the husband. Under these circumstances, when a poor woman co-operates by offering herself voluntarily for sterilization, it is reasonably expected that after undergoing such operation she would be able to avoid further pregnancy and consequent birth of an additional child. If family planning fails due to the negligent performance of duties by the government medical officer, do they become liable of sabotaging a scheme of national importance?

One Smt. Santra had offered herself for complete sterilization. The doctor who performed the operation acted in a negligent manner. The possibility of conception by Smt. Santra was not completely ruled out as her left fallopian tube was not touched. Smt. Santra did conceive and gave birth to an unwanted child.[60]

The question which was to be decided by the Supreme Court was "*who has to bear the expenses in bringing up the unwanted child*". The explanation offered by the officers of appellant State was that at the time of the sterilization operation, only the right fallopian tube was operated upon and left fallopian tube was untouched. This explanation was rejected by the trial Court on the ground that Smt. Santra had gone to the hospital for complete and total sterilization and not for partial operation. This decision was confirmed by the High Court. When the case came up to the Supreme Court on appeal it was contended by the State that:

(i) The negligence of the Medical Officer in performing the unsuccessful sterilization operation would not bind the state Government and the Government would not be liable vicariously for any damages and

(ii) The expenses awarded for rearing the child and for her maintenance could not have been legally decree as there was no element of "tort" involved in it nor had the petitioner suffered any loss which could be compensated in terms of money.

---

[60] *State of Haryana v Santra* (2000) 5 SCC 182.

While deciding the case, the Supreme Court found domestic legal scenario on this question almost silent except one or two stray decisions of the High Court[61]. So on this particular issue, the Court had to consider the decisions of Courts of various countries around the globe and discovered that Courts in the different countries are not unanimous in allowing the claim for damages for rearing the unwanted child out of a failed sterilization operation. In some cases[62], the Courts refused to allow this claim on the ground of public policy, while in many others, the claim was offset against the benefits derived from having a child and the pleasure in rearing that child.[63] In many other cases, if the sterilization was undergone on account of social and economic reasons, particularly in a situation where the claimant had already many children, the Court allowed the claim for rearing the child.[64]

Relying on this decision, the Supreme Court observed:

> *Our is a developing country where the majority of people live below the poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on a account of failed sterilization operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages can not be strictly applied to Indian conditions so far as poor families are concerned...*[65]

According to the Court, the public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour

---

[61] In *State of M.P.* v *Asharam* 1997 ACJ 1224 (MP) the High Court allowed the damages on account of medical negligence in the performance of a family planning operation on account of which a daughter was born after fifteen months of the date of operation.

[62] *Undale* v. *Bloomsbury Area Health Authority* (1983) 2 All. ER 522; *Johnson* v. *University Hospital of Cleveland* (1989) 540 NE 2nd 1370 (Ohio).

[63] *CES* v. *Superclinics (Australia)* Pty Ltd. (1995) 38 NSWLR 47.

[64] In South African case in *Administrator Natal* v. *Edouard* (1990) 3 SA 581 damages were awarded for the cost of maintaining the child in a case where sterilization of the wife did not succeed. It was found in that the wife had submitted for sterilization for socio-economic reasons and in that situation the father of the child was held entitled to recover the cost likely to be incurred for maintaining the child.

[65] *State of Haryana* v *Santra* (2000) 5 SCC at 195.

class who earn their livelihood on a daily basis by taking up the job of an ordinary labour can not be denied the claim for damages on account of medical negligence.

Having regard to the above observations the Court was positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up family planning as an important programme, every unwanted birth creates additional economic burden on the person who has chosen to be operated upon for sterilization.[66]

In the instant case, the unwanted girl child born to the respondent, a poor woman having seven children already has created additional burden for her on account of the negligence of the doctor, who performed the sterilization operation upon her. Therefore the doctor as also the State must be held responsible in damages. The state is held vicariously liable for the negligence of its officers and therefore the respondent is clearly entitled to claim full damages to enable her to bring up the child least till she attains puberty.

(ix) Women's Reproductive Health

The socio-biological processes of conception, child birth and child-rearing are profoundly affected by broader social and cultural factors, particularly by inequalities between the sexes in the household. In India, these factors can act as threats to women's vulnerable health status, especially within contexts of socio-cultural restriction and economic scarcity.

(a) Maternal Morality and Morbidity

If a pregnancy goes wrong, lack of obstetrical care can be fatal. Millions of Indian women continue to face this risk every year. The average Indian women is 100 times more likely to die of maternity related causes than a woman in the industrial world; about 15 percent of pregnant women in India develop life threating complications during pregnancy[67]. This picture represents an important indicator of the social and economic inequalities between women in industrialised and developing countries. In industrialised

---

[66] *Id.* at 196.

[67] Health of Girls and Women, *Human Development in South Asia* (2000) 127.

countries, maternal morality is rare and can be as low as 13 death per 1,00,000 live births[68]

Maternal morality rate vary between regions within a country. In areas where health facilities are not easily available and cultural traditions limit women's mobility and freedom to access health services, rates are much higher. Again, high maternal morality rates are a consequence of the overall ill-health and nutritional deficiencies in women if India. Anemia iron deficiency is one of the major causes for high maternal death rate. The ill effects of these nutritional deficiencies are exacerbated by the barriers that women face in gaining access to antenatal and post natal care and emergency obstetric care. In addition to limited access to antenatal care, three delays account for a large proportion of maternal deaths in India; delay in seeking care; delay in reaching a health institution; delay in receiving care at the health facility.[69]

Maternal death not only means death of a woman, but also a difficult life for surviving children. For instance, a study in India found that a mother's death sharply increased the chances of death of her children upto the age of ten years, particularly of her girl children, whereas the death of a father had no significant affect on his children's morality rate.[70]

Maternal morbidity is also very high in India. The major reasons for morbidity include a lack of pre and post natal professional health care, exacerbated by the low socio-economic status of women within the household. For every woman who dies of a pregnancy related cause in India, there are 541 cases of morbidity. Almost 5 percent of Indian women report at least one life-threatening illness during pregnancy and puerperium.[71]

Tetanus toxoid is one of the most common diseases contractible by both the mother and the new born child, Practices such as spreading cow dung on the floor and applying it to the newly-born umbilical cord, and cutting the umbilical cord with un-sterilized implements are common causes of tetanus. Although noe-natal tetanus can be

---

[68] *Id.* at 128.
[69] *Id.*
[70] Source: Tinker (1993), Quoted in *Id.*
[71] *Id.*

prevented by immunizing the mother, it accounts for more infant deaths in this region than any region of the world.[72]

(b) Reproductive Tractinfections (RTS) and Sexually-Transmitted Diseases (STDS)

In past, health policies have focused upon family planning issues to the exclusion of other aspects of women's physical mental well being. The main aim of reproductive health policy has been fertility control to reduce the rate of population growth. Sexually transmitted diseases and reproductive tract infections were, and still are almost totally ignored especially among women. The shame and taboos that accompany these diseases hinder women from seeking health care for such diseases. Many women suffered in silence, or turn to traditional treatments which often have serious side effects. The focus of reproductive health is now shifting to incorporate a greater emphasis on overall health status, and a life cycle approach to reproductive health[73].

In India, the prevalence of STDs among the general population is reported by the National Aids Control Organization to be 5 percent[74]. A study in rural Maharashtra revealed that, in 1989, 92 percent of women suffered from one or more gynecological problems and that a majority had never sought any treatment for these problems. Similarly, community-based studies in rural West Bengal and Gujrat, and urban Baroda and Bombay show that the prevalence of clinically diagnosed RTSS ranges from 19 percent to 71 percent, and in rural Karnataka over 70 percent of women have clinical evidence of RTSS.[75]

If not properly treated, RTSs can have serious consequences on women's health/ Child birth, abortions, and unhygienic conditions during menstruation can lead to infections of both the lower reproductive tract which if untreated may cause pelvic inflammatory disease, and the upper reproductive tract, causing difficult in pregnancy, chronic pain and even infertility. Infertility can be particularly traumatic for Indian women, since in these societies mother is perceived as a women's primary role.

---

[72] Source: UNICEF (1996), Quoted in *Id.*
[73] *Id.* at 129.
[74] Source: Go 9 1998a; Quoted in *Id.* at 129.
[75] *Id.*

(c) Mental Health of Women

The nature of women's domestic lives can adversely affect their mental health. The reasons behind this are many. Low status is awarded to domestic work and lack of economic and social support makes them being felt isolated. Indian women are vulnerable to violence because of their low social status within the household and community. From womb to tomb, women are exposed to violence, be it in the form of mental and emotional torture within the household, or through the denial of their right to be born by abortion of female fetus, or in the form of acid burning, rape or dowry deaths.

Cases of violence against women are often considered as legal issues[76] yet the health consequences should not be ignored. The women who are the victims of violence often need immediate and long-term medical assistance. Not only that, sometime that fearful experience shatters a woman's confidence and leaves her in need of psychological support and counseling. There is often a lack of support from immediate family and friends of victims. In patriarchal society of India, it is often seen that women have been conditioned to suffer in silence. In this context, there is a serious need to spend more resources on the mental health aspect of violence.

Thus we conclude that the issue of women's health is one of human rights violation, exploitation and oppression in Is it not a tragedy that our country which has manufactured the nuclear bomb, does not have the ability to prevent epidemics and provide appropriate health care to women?

The emergence of concepts like globalization and latest economic trends hitting the India market, low priority to health must not be tolerated. When a country projecting itself as a nuclear power to the world, one can not excuse it for the primitive procedure and process which affect public health specially the women's health[77].

However, India Government has adopted various plans and programmes of actions to achieve the targets and goals of the International Conference for Population and Development (ICPA)[78]. Main features of these plans of Action include a call for:

---

[76] Health of girls and women , *Human development in South Asia* ,2000. 119.

[77] Shalu Nigam, Denial of Right to Health to Women, *Legal News & Views*, April 1999, 11.

[78] The International Conference for population and Development (ICPD) were held in Cairo from 5 to 13th September 1994. The ICPD programme of Action agreed on a comprehensive and

- Gender equity and empowerment of women
- Integration of family planning in reproductive health
- Increasing men's role and responsibility in bringing about gender equity and equality.
- Recognition of reproductive health needs of adolescents as a group.
- Family, basic unit of society, to be strengthened and protected.

These plans and programmes aim to improve the health situation and condition of Indian women and focus on the life cycle approach of women's health. But the most important of all, is to increase women's participation in her own health related issues. She should be given the full opportunity to exercise the right to have children by choice. For this a lot of struggle is due on part of women and they have to go long way to achieve equality and live in dignity.

(B) SOCIAL AND ECONOMIC EMPOWERMENT OF WOMEN

Women constitute the half of the world population, perform nearly two thirds of work hours, receive one-tenth of the world's income and own less than one-hundred percent of world's property[79] This information shows how women are discriminated in all spheres of life and have been subjected to all inequalities. Actually, women's work has never been considered as work. The invisibility of women's work, domestic chores and other tasks are part of a cultural/traditional attitude which views man as the primary bread winners. The comfortable stereotype which man has created: it is he who carries the major burden of economic work. Women's work carries no economic value. Such work may be essential but banish the thought that it should ever enter national income accounts, or even surface in separate satellite accounts. It is no doubt a successful conspiracy to reduce women to economic non-entities. Surprisingly, women also report

---

detailed strategy for population and development in the next 20 years. The main feature of the programme of Action is that it places human rights and well being of women explicitly at the center of all population and sustainable development activities. It establishes that population issues can not be dealt with in isolation, but must be seen in a broader context of sustainable development. *Human Development in South Asia* 2000, 131.

[79] As quoted in, C. *Masilmani Madaliar*, v *Idol of Swaminathaswami, Thirukoil*, AIR, 1996, SC 1697.

themselves as non workers because they tend to regard their Labour as "domestic responsibilities" and therefore outside market related or remunerated work.[80]

(i) Unremunerated Caring Activities of Work

The caring activities carried out by the women at the house-hold level, goes largely unremunerated. Because care economy is impossible to quantity. A review in India shows that whereas men put in only about 0.2 to 0.5 hours of time per day in non market work, women spend 2.7 to 5.5 hours per day in such activities. Women account for 60 percent of unpaid family works and 98 percent of those engaged in domestic work.[81]

Despite immense direct and indirect contribution that women make to the economy through their caring labour there is almost no recognition and no compensation paid to them. The basic reason for this lack of recognition is that women's "reproductive" and "nurturing" role is taken for granted as their primary responsibility.

(ii) Women's Economic Empowerment: A Human Right Issue

Human right of women is those minimal rights without which a woman cannot live with dignity. A dignified life of a woman is possible only when she takes the decisions of her life on her own and this is possible only in her personality is developed. The two ways to do that are to educate her properly and to make her economically independent by providing suitable job opportunities and giving her property rights[82]. If any one is in search of the answer of the question: why economic empowerment has become a human right issue in India? He has to take a look over the following information:

---

[80] Women and the economy, *Human Development in South Asia* (2000) 55.

[81] *Id.* at 56.

[82] *Article* 11 of Convention on the Elimination of All forms of Discrimination Against Women, 1979 speaks for the economic empowerment of women in the following languages: Women should get the right of same employment opportunity, free choice of profession and employment; (A women should get the right to social security, particularly in cases of retirement, unemployment sickness, invalidity and old age in other incapacity to work, as well as the right to paid leave; she should not be discriminated against in case of remuneration and equal treatment should be given to her in respect of work equal value. She should also expected to have the right to protection of her health and safety to working conditions, including the safeguarding of the function of reproduction.

Indian employees feel themselves to be at a disadvantageous position to employ women workers who have to be given many benefits. Because it has been found that the provisions of maternity benefits[83]*, or welfare amenities like crèches*[84] *and separate sanitary facilities often increases the cost of employment female workers.*

Women of India work for longer hours and contribute more than men in terms of total labour energy spent by household members. Average hours of unpaid work done by married women outside the home vary from 6.13 to 7.53 hours per day, with some women working more that 10 hours per day. Apart from domestic duties, women engaged in agricultural operation work on average 12 hours a day doing farm work and taking care of cattle.[85]

Economic and social empowerment of women as a human right issue been recognised globally and India also does not work to be lagged behind. Our Constitutional fathers were well aware of the inferior status of women within and outside the domestic spheres. That is why our Preamble which aims at equality of status and opportunity starts with the words "we, the people..." this obviously includes the women also.

Indian Constitution guarantees not only equality of status and opportunity to women[86] but also confers certain affirmative rights. On the one hand, it is provided in Indian Constitution that state shall not discriminate against any citizen on the grounds of sex and at the same time states are vested with powers of making any special provisions for the protection of women.[87] Indian Constitution also secures to every person right to a life which is something more than more animal existence.[88]

The Directive Principles of State Policy contained in Part IV of the Constitution direct the state to protect the human rights of women including the right to equal pay for equal work.[89] The right to health and work in hygienic conditions, the right to maternity benefits.[90] Our Directives are absolutely in tune with the declarations embodied in the

---

[83] The maternity Benefit Act, 1961.

[84] *Section* 48 of the Factories Act 1948, *Section* 12 of Plantation Labour Act, 1961, *Section* 14 of the Beedi and Cigar Workers (condition of employment) Act, 1966. The Contract labour (Regulation and Abolition) Central Rules, 1971 and the Mines Crèches Rules have provided for Crèches for children of women workers under six years of age.

[85] Women and Economy, *H.D.S.A.* 2000, 54.

[86] *Article* 14, Constitution of India.

[87] *Article* 15(3), Constitution of India.

[88] *Article* 21, Constitution of India.

[89] *Article* 39(d), Constitution of India.

[90] *Article* 42, Constitution of India.

Universal Declarations of Human Rights.[91] Although these Directive are not justiciable, they are not mere pious declarations. They are the basis of all legislative and executive action.

It is the duty of the Court to respond to the human situations to meet the felt necessities of the time and social needs, make meaningful the right to life and give effect to the Constitution and the will of the legislature. Accordingly, the Supreme Court in 1997 had recognised, highlighted and enforced the right to economic empowerment of weaker section as a Fundamental right.[92] The Court observed that right to life should be interpreted in such a way so as to bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV. Therefore, Fundamental right to life must include within its ambit economic empowerment of weaker section.

(C) RIGHT TO EMPLOYMENT

The right to work and employment is the most essential requirement of life. One had to make his livelihood through his work or employment. Therefore, it is important to give a broad recognition to right to work. The United Nation Charter aims at promoting the higher standard of living and full employment.[93] It is also well recognised in the Universal Declaration of Human Rights, "every person has the right to life, liberty and security of person."[94]

When the women stepped in the outer world to become economically independent, their path was not at all flowery. The job opportunities for women were very limited because of their poor literacy rate. Majority of India illiterate and economically active women[95] are involved in agriculture. Though women's labour and knowledge of agro economic system are being utilized, women are excluded from the ownership of the means of production, they are also excluded from the decision-making about the allocation of material and economic resources. Beside agriculture, women

---

[91] Universal Declaration of Human Rights, 1948.

[92] *Ashok Kumar Gupta* v *State of U P* (1997) 5, SSC 2001. *See* also *Madhu Kishwar* v *State of Bihar*, AIR 1996 SC 1864. *Nazar Sings* v *Jagjit Kaur*, AIR 1996 SC 855 and *Kalavati Bai* v *Sourya Bai*, AIR 1981 SC 1581.

[93] *Article* 55(a), The United Nation Charter.

[94] *Article* 3, The Universal Declaration of Human Rights 1948.

[95] In India, 78 percent of the female labourers work in agriculture. women and the Economy, *HDSA*, 2000, 58.

labour force are gradually entering in other areas also, such as in plantations, mines and factories.[96] Limited opportunities for education have hampered women's progress from the very beginning. Be it in public sector or in Private, only lower leveled jobs have been offered to them.[97]

Though, the Constitution of India provides for equal access irrespective of sex, in reality, access to "sensitive" and "prestigious" positions in service is really available to women. When ever women were about to secure good position on the ground of their marriage or pregnancy. (Which is a natural phenomenon in women's life)? And wage discrimination between two sexes whether in organized or unorganized sector is the passion of Indian employers.

(D) WAGE DIFFERENTIALS

The Problem in this area is that men and women are though doing "same or similar work" nature being differently paid by the employers by introducing an artificial difference in the nature of work.[98] Work for women are generally classified as women's work and occupational segregation of work leads to the disadvantage of women workers.

The preamble of Indian Constitution strikes at the very root of this problem of wage discrimination when it speaks of "securing to all citizens of India equality of status and of opportunity as well as justice, social economic and principles of equal pay for equal work is not expressly declared by our Constitution to be a Fundamental right but it certainly is a Constitutional Govt.[99] which must colour the interpretation of Article 14 and 16 so as to elevated to the rank of Fundamental rights, denial of which must result in an "irrational classification.[100]

---

[96] Most of the female labour force in India is concentrated in the informal or unorganized sector, Gender and Governance, *HDSA*, 2000, 157.

[97] In Private sector, only 13 percent of women are in managerial and influential position. Though 48 percent of women in the formal sector are working in the Government offices, most of them have occupied only lower leveled position and mostly in local bodies.

[98] *M/s Mackinnson Mackenzie and Co. Ltd* v *Audry D Costa*, AIR 1987 SC 1281.

[99] *Article* 39(d) Directive Principles of state policy envisages that equal pay for equal work should be given to men and women doing equal work.

[100] *Randhir Singh* v *Union of India*, AIR 1982 SC 879.

However the passing of equal Remuneration Act[101] during International Women's Decade is the testimony of the fact that Government of India is determined to confer equal status and equal pay on men and women as is envisaged in the Constitution of India. Indeed the pressing needs of the social and economic development can be met most effectively only with the active participation of women along with men and through the social and economic equality which may perhaps change the concept of equality of life in and outside the homes.

The deciding factor for the successful pursuit of a claim for equal wages under the Act is that work being performed be either "same or similar nature"[102]. The same or similar work criteria leads to adoption of indirect means for fixing lower wages for women, viz. classifying the job into grade I and grade II with women employed in grade II jobs earning lesser wages.[103] The lower grading and lower wages are granted to women from the traditional nation that women usually do lighter work. This is often not justified. For illustration, women specific tasks in agriculture which are termed light have been found in fact to be more energy consuming.

The case brought by air India against their employers highlighted the weakness of having the test of "equal pay for same or similar work" in the Equal Remuneration Act.[104] It was contended on behalf of the air hostesses that they were being discriminated as against assistant flight pursers who did more or less the same kind of work on flight, had better service conditions, later date of retirement and other facilities.

In order to set at rest, all doubts with regard to violation of the provisions of the equal remuneration Act, the government issued that the "difference in regard to pay etc, (of air hostesses and flight pursers of these categories of employees) are based on different conditions of service and not on the difference of sex."[105]

---

[101] Equal Remuneration Act, 1976, was passed to implement the Constitutional mandate and Equal Remuneration Convention of 1951.

[102] *Section* 2(b) of the Act defines such work as "work in respect of which skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.

[103] Socio-Economic conditions of women workers in plantations, ministry of labour, labour Bureau, Shimla, 1980, 37.

[104] *Air India* v *Nergesh Mirza*, AIR 1981 SC 1829.

[105] *Id.* at 1847.

The Supreme Court indorsed this declaration and held that if at the threshold the basic requirements of two classes were absolutely different and poles apart even through both the classes might during the flight, work as cabin crew, they would not became one class of service.[106]

The Court while granting some marginal concessions to the air hostesses like raising their age of retirement and declaring the provision requiring termination of service as unconstitutional upheld the other discriminatory conditions of service even as it conceded that "the functions of the two though obviously different overlap on same points but the difference, if any is one of degree rather than of kind.[107]

However, in *M/s Mackinnson Mackenzie & Co. Ltd.* v. *Audrey D Costa,*[108] the Court held that in deciding whether the work is of same or similar nature and in ascertaining whether the differences are of any practical Importance the authority should take a broad view of the matter. This is because the very concept of similar work implies "differences in detail". These differences should not defeat the claims of equality on trivial grounds but look at the duties actually performed and not those theoretically possible.[109]

The Court further held that there should be proper job evaluation whenever sex discrimination is alleged.[110] This, the Court directed, should be done on the basis of non-discriminatory criteria which look directly to the nature and extent of the demands made by the job and do not apply different values for men and women on the same job. If it is found that men and women employed on this jobs are paid differently then sex discrimination clearly arises.[111]

Applying these criteria to the case on one hand the Court was of the opinion that if the lady stenographers were doing work of the same kind as the male stenographers irrespective of the place where they were working, the employers was obliged to pay equal remuneration. It was held that unless women were shown as not fit to do the work of male stenographers, the employer could not create such conditions of work so as to

---

[106] *Id.* at 1843.
[107] *Id.* at 1845.
[108] AIR 1987 SC 1281.
[109] *Id.* at 1287.
[110] *Id.* at 1286.
[111] *Id.* at 1287.

drive away women from a particular work which they could otherwise perform in order to pay them less wages.[112]

The Court pointed out that if women were at a particular job, it was only because management wanted them there, and not because they could not do the work assigned to the male stenographers, equal wages could not be denied to them.[113]

(E) MATRIMONIAL HOME

A woman often she is married in our current social set up has no place in her parent's home. However, the security in her marital home often out to be short lived one. The woman needs a place to house herself and her children if any during and after matrimonial dispute. In the absence of cone rate legislation in this regard, a Human Rights sensitive Court has always made use of other materials to dispense justice to the women. And in such cases, provided the homeless woman with a home.

In *Shanti Wadhwa* v *Purshottam Mohandas Wadhwa*, wife had sought judicial separation on cruelty by the husband and wanted to stay in the home. The Court hold that the wife's right to maintenance by the husband under the *Hindu* Adoption and Maintenance Act 1956 included residence and ruled that the matrimonial home itself was maintenance to which she was due. The Court said that it was in material whether the husband or wife or both the property. In *BHP & v. ltd* v *Vishakhapatanam* the husband had deserted the wife who continued to live in a flat rented from the husband's employer and the husband terminated the lease the employer sought to evict her. The Court ordered the husband to continue paying the rent and told that there was a need to take a socialist view of property rights in which the pasties ownership rights and to be subordinated to the Fundamental Constitutional Rights of the Wife.

(i) Maintenance

Smt. Savitri v *Govind Singh Rawat*[114] death with the maintenance of a needy wife. The specific point to be decided was whether the magistrate before when an application for maintenance has been made has the power to make an interim order directing the husband to pay a reasonable sum of money to the wife pending final disposal of the case.

---

[112] *Id.*
[113] *Id.* at 1289.
[114] AIR 1986 SC 984.

Venkataramiah, J., pointed out that though there was no express provision laid down for an interim order, the purpose underlying the provision in the Criminal Procedure Code, 1973 was to provide a quick remedy to the applicant to protect her against starvation. In view of the social purpose that underlies the provisions the Court felt that to giver a strict interpretation that interim relief has not been expressly provided would defeat the objective of the legal provisions. Accordingly, the Court ruled that the magistrate should have the implied power to order the payment of a reasonable sum by way of maintenance pending final disposal of the case.

In *Smt. Kuldip Kour* v *Surinder singh*,[115] the husband was wiling to go to jail rather than provide his wife with maintenance. The Supreme Court held that purpose of maintenance was to prevent destitution and to ensure that the wife received maintenance. Even if the husband was jailed, her need to support herself would not be met. It would only bed met if she actually received the money. The husband thus was bound to pay and could be jailed until he made the payment.

The mother of a daughter had filed a case before the sub divisional judicial magistrate, Howrah under section 125 Cr. P.C. claiming maintenance for herself and her daughter. The father had refused to accept the responsibility of maintenance from her father.

When the case came up to the High Court, in his judgment, Barua J., referred to a recent Supreme Court decision on a similar dispute in a Muslim family. The SC. Held that a Muslim father's obligation like that of a Hindu father to maintain his minor child was also absolute till the children attained majority and in case of female children this obligation extended till their marriage.

Section 125 of Cr. P.C. does not provide for maintenance to a major female except for cases where the child suffers from mental or physical disabilities.

Barua, J. has interpreted the Supreme Court judgment which extended such maintenance to a female child of a Muslim Father like that of a Hindu father.

[115] AIR 1989 SC 232.

The judge has ruled that irrespective of religion, a father has the obligation to maintain his major daughter till her marriage.[116]

(ii) Custody of Children

A Hindu wife whether living with the husband or not, whether divorced or not is equally entitled to the custody of her minor children, of course subject to the satisfaction of the Court by virtue of section 26 of the act[117]. Even though there were certain guidelines as to the right to custody of the minor children, the Courts held that the custody of a child below 5 years of age shall be with the mother unless special circumstances injurious to the child's interest are shown.[118]

It was connected in *Githa Hariharan* v *Reserve Bank of India*[119] that Section 6(a) of the Hindu Minority and Guardianship Act[120] and Section 19(b) of guardian and Wards Act are violative of the equality clause of the Constitution on the ground that the mother of the minor is relegated to an inferior status on ground of sex alone since her right, as a natural guardian of the minor, is made cognizable only "after" the father.

The Court observed that gender equality is one of the basic principles of our Constitution an in the event the word "after" is to be read to mean a disqualification of a mother to act as a guardian during the life time of the father, the same would definitely run counter to the basic requirement of the Constitutional mandate and would lead to differentiation between male and female. Since our Constitution is Supreme, normal rules

---

[116] The statesman(Kolkata), 22 March, 2002

[117] Section 26 states that priority should be given to the welfare of the minor.

[118] *Radhabai* v *Surendra*, AIR 1971 Mys. 69.

[119] AIR 1999 SC 1149.

[120] Section 6 of the HMG Act reads as follows: "The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a bay or an unmarried girl- the father, and after him, the mother provided that then custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her the father;

(c) in the case of married girl-the husband; provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of the section-

(i) if he has ceases to be a Hindu, or

(ii) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation- In this section the expression "father" and "mother" do not include a step-father and a step-mother.

of interpretation shall have to be in accordance there with and not de hors the same. The father by reason of a dominant personality cannot ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter the word "after" shall have to be interpreted on terms of Constitutional safe guard and guarantee so as to give a proper and effective meaning to the words used.[121]

The Court opined that the word "after" shall have to given a meaning which would sub-serve the need of the situation viz. welfare of the minor, and in this case the word "after", does not necessarily mean after the death of the father on the contrary, it depicts on intent so as to ascribe the meaning there to as "in the absence of" be it temporary or total apathy of the father towards the child or even inability of the father by reason of ailment or other wise.[122]

[121] *Githa Hariharan* v *Reserve Bank of India*, AIR 1999 SC 1149, 1159-1160.
[122] *Id.* at 1160.