

Promotion and Protection of Women's Right to Sexual and Reproductive Health Under Ethiopian Law

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1.1 Introduction

A woman's right to sexual and reproductive health is an essential element of international human rights law. According to this body of law, States are required to take all appropriate measures to respect, protect, and fulfill that right. In addition, the Convention on the Elimination of All Forms of Discrimination Against women (CEDAW) obliges States to pursue this right within the context of a broader policy aimed at the elimination of discrimination against women and the removal of all female stereotypes.

Worldwide there is a growing recognition of the health damage inflicted on women and men as a direct or indirect result of human rights violations.¹ Unlike men, however, women not only have to fear human rights violations because they are human beings, but also because of their gender. The vulnerability of women to human rights violation as well as to health damage is often perpetuated by repressive laws. In this respect it should be noted that sexuality and reproductive health issues – including ages of consent, homosexuality and bisexuality, abortion, and other matters are often exclusively defined within the realm of the criminal law system even though they are presented as threats to individuals or public health.

The health and human rights impacts of both sexuality and reproductive health are now widely known. This has not, however, always resulted in legal reform and the abolition of outdated laws.² In spite of slow progress, however, there is an undeniable, worldwide reappraisal of health as human rights issues.

Ethiopia has shown its commitment to protect and promote the women's sexual and reproductive health through ratification and accession of international legal regime, incorporating it in the domestic system is yet at an early stage. The protection and promotion of the right entails detailed laws and implementation structures besides constitutional and policy framework.

This essay will analyze the role Government can and should play in ensuring the realization of women's sexual and reproductive health as part of their overall responsibility toward the promotion and protection of women's health.

1.2 Definition

The reproductive health of women has received progressively intensifying interest in the last two decades, international fora and documents like the 3rd World Population Plan of Action (1974), CEDAW (1979), the Nairobi Forward looking strategies For the Advancement of Women (1985), the Safe Motherhood Initiative (1987), the Amsterdam Declaration on Better Life For Future Generations (1989), and, more recently, the Program of Action endorsed at the United Nations International Conference on Population and Development (ICPD, 1994) gave emphasis to the reproductive health rights of women in varying degrees. There are also more recent fora and instruments like the International Planned Parenthood Federation (IPPF) Charter On Sexual and Reproductive Rights (1995) and the Beijing Platform for Action (1995).

The development of the concept of reproductive health rights is best seen through analysis of the definitions used in three important international documents. The International Conference on Human Rights in Tehran in 1968 refers to the right to plan the size and spacing of the family.³ The world Population Conference held in Buchares in 1974 formulates the right as:

“All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes in to account the needs of their living and future children, and their responsibilities towards the community.”⁴

On the other hand, the Program of Action of the International Conference on Population and Development 1994 states:

“Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on the basis of equality of men and women, universal access to health care services, including those related to reproductive health care, which

¹ Jonathan M. Mann et al., *Health and Human Rights*, 1 Health and Human Rts. 6-23 (1994).

² Sheila Martin, *A Woman Centered Approach to Laws on Human Reproduction*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 905-18 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

³ UNFPA, *Population Issues Briefing Kit*, New York, (1998), p.2.

⁴ Ibid.

includes family planning and sexual health. Reproductive health care programs should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.”¹

This last understanding primarily conforms to the current understanding of health as complete physical, mental and social well being. It has formulated reproductive health as referring to the reproductive process, system and functions through all stages of woman’s life. Moreover, it lays emphasis on the freedom of couples to decide in matters of reproduction and reproductive health. Finally, the right to information, education and fertility regulation services is given paramount importance.

There are some points worth noting in relation to the current understanding of the concept of reproductive health rights. The first is that it is a right for both men and women. Though it is impossible to avoid emphasis on women, for they are the victims, beneficiaries and ultimately the most important persons in issues of reproductive health for various reasons, the right is the right to all couples and individuals’ as stated in the above quoted ICPD principle. Secondly, as clearly stated in the ICPD plan of Action, “the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights”.² This view is supported by the presence of provisions relevant to reproductive rights issues of women in the major human rights documents. Finally, the current understanding goes far beyond the reproductive system of women. Besides comprising the overall health of women, the concept emphasizes on:

“The ability of women to achieve autonomy and self determination, to strengthen their position in society, to assume control over their own bodies – especially their fertility – to bear and raise healthy children and to live without fear of sexually transmitted diseases or stigmatization.”³

1.3 Women’s Right to Sexual and Reproductive Health as a Human Right

For a long time, gender issues have been notoriously absent in human rights documents. Since the 1970s, however, it has become increasingly clear that women encounter different and generally more problems in getting access to adequate and affordable health care than men. In short, it turned out that medicine and health care were primarily men’s issues and that women’s health was pervasively neglected.⁴

Soon after, concerns about women’s health, however, have been reflected in numerous human rights standards. Inspired by Article 12 of the Women’s Convention, CEDAW issued a number of General Recommendations recognizing the gender specific impact of current public health problems, including recommendations on such issues as violence against women,⁵ female circumcision,⁶ HIV related discrimination,⁷ and disabilities.⁸

The importance of women’s right to health care was also explicitly acknowledged at the World Conference on Human Rights in Vienna in 1993:

The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span. In the context of the World Conference on Women, the Convention on the Elimination of Discrimination against Women, as well as the Proclamation of Teheran of 1968, the World Conference on Human Rights reaffirms on the basis of equality between women and men, a woman’s right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.⁹

1.4 Promotion and protection of women’s right of sexual and reproductive health under Ethiopian law

1.4.1 General Provisions

Though meant to be a general standard declaration on human rights, the Universal Declaration on Human Rights (UDHR) contains provisions relevant to the reproductive health rights of women. It is indeed the second international instrument, next to the UN charter to explicitly state the concern about gender equality and non-discrimination. The basic rights incorporated in the UDHR are stated for ‘all humans’ and

¹ Ibid.

² Ibid.

³ A Reproductive Health Profile of the Western Pacific Region, WHO, Regional Office for the Western Pacific, Manila, (1995), p.4.

⁴ Vanessa Merton, *The Exclusion of Pregnant, Pregnable, and Once-Pregnable People from Biomedical Research*, 19 AM. J.L. & MED. 369, 370-71 (1993).

⁵ *General Recommendation No. 12: Violence Against Women*, in *Report of the Committee on the Elimination of Discrimination Against Women [hereinafter CEDAW]*, 8th Sess., U.N. Doc. A/44/38 (1989).

⁶ *General Recommendation No. 14: Female Circumcision*, in *Report of the CEDAW* 9th Sess., U.N. Doc. A/45/38 (1990).

⁷ *General Recommendation No. 15: Avoidance of Discrimination Against Women in National Strategies for the Prevention and Control of AIDS*, in *Report of the CEDAW*, 9th Sess., U.N. Doc. A/45/38 (1990).

⁸ *General Recommendation No. 18: Disabled Women*, in *Report of the CEDAW*, 10th Sess., U.N. Doc. A/46/38 (1991).

⁹ *Vienna Declaration and Program of Action*, World Conference on Human Rights, 78th 23 (1993).

‘everyone’. Particularly express are article 1 which states all human beings are born free and equal in dignity and rights and article 7 which emphasize on equality before the law for everyone.

The statements of UDHR are reemphasized by the subsequent Covenant on Civil and Political Rights (ICCPR). Article 3 of this covenant recognizes on equal right to the enjoyment of all civil and political rights for all men and women. A more practice oriented approach is taken by the Women’s Convention which advocates the modification of social and cultural patterns of conduct to eliminate prejudices and practices based on the idea of inferiority or the superiority of either sex or on stereotyped sex roles under article 5. Article 10 and 12 of the same convention call on state parties to ensure equal rights for women in education and access to health care facilities including information and advice on family planning and health care service related to family planning.¹

The 1995 charter on sexual and reproductive rights adopted by 127 member associations of the International Planned Parenthood Federation also contains similar provisions.² It emphasizes the right to life, the right to liberty and security of the person, the right to equality and to be free all forms of discrimination among other rights recognized for women.

1.4.2 FDRE Constitution

FDRE Constitution under article 35(1) recognized equality in the enjoyment of the rights provided for in the Constitution between the sexes. This makes available a vast array of rights for women. Particularly relevant are rights related to the right to life, security of the person and liberty (article 14, 15, 16, and 17), right to equality, (article 25), marital, personal and family rights (article 34). These rights give the general rights context for the respect and promotion of rights specifically recognized for women and reflect underlying belief on the reproductive health rights of women as an integral part of human rights as a whole.

Another important provision is article 35 (3) which deal with affirmative action in the following terms:

“The historical legacy of inequality and discrimination suffered by women, in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measure. The purpose of such measures shall be to provide special attention to women so as to enable them compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.”

This provision gives explicit chance to address the problems of women in the social, political and economic sector as a major priority. This in turn plays a significant role in the empowerment of women which has implications for and wide.

1.4.3 National Policies

Ethiopia has an explicit health policy as of 1993.³ This policy gives special attention to the health problems of women and children.⁴ A similar approach is taken by the population policy which states “sufficiently improving the social and economic status of vulnerable groups,” among which women are one, as one of the primary concerns.⁵ Family size, reproductive behavior and health are among the issues addressed by the policy.⁶ This policy aims at reducing the number of children per woman, which is estimated to be 7.7 at present, to approximately 4.0 by the year 2015.⁷ Establishing teen-age and youth counseling centers in reproductive health and facilitating research programs geared towards the realization of reproductive health.⁸ Finally, the national women’s policy issued by the council of ministers, and reportedly based on the women’s convention, aims at creating conditions conducive to equality between the sexes.⁹ It also aims at increasing the role of women in the social, political and economic life of the country.

1.4.4 Protection under Criminal law of Ethiopia

The Ethiopian Criminal law provides promotion and protection of women’s right to sexuality and reproductive right under the following provisions.

¹ Ethiopia is a founding member of the UN, ratified the ICCPR on June 11, 1993 and the CEDAW on September 10, 1981.

² James E. Rosen & Shanti R Conly, *Africa’s Population Challenge: Accelerating Progress in Reproductive Health*, Population Action International, Washington DC, (1998).

³ *Health Policy of the Transitional Government of Ethiopia*, Transitional Government of Ethiopia, Addis Ababa, (September 1993).

⁴ Id., p. 26-27.

⁵ *National Population Policy of Ethiopia*, Transitional Government of Ethiopia, Office of the Prime Minister, Addis Ababa, (April 1993), P. 27-28.

⁶ Halemariam, Assefa (Ph. D.), *Population Policies and Programs*, Ministry of Education, Institute for Curriculum Development and Research, (1994), p. 19.

⁷ Supra note 20, p. 28.

⁸ Supra note 6, p. 29.

⁹ *National Policy on Ethiopian Women*, Transitional Government of Ethiopia, Office of the Prime Minister, Addis Ababa, (September 1993), p. 9.

Rape as referred under article 620 of the Ethiopian Criminal Code consists of three elements: coercion or lack of consent, sexual intercourse and absence of marital relations. The first element is presumed irrefutable in cases where the victim is below age of 15 as per article 620(2)(a), this is a case of statutory rape. The third element is a controversial one as it excludes marital rape. Though spouses have a duty under law to have sexual relations, coercion can and does happen. This coupled with economic and emotional dependence can have effects identical to rape by a non-spouse or stranger. Article 620 of the code provides for rigorous imprisonment not exceeding 15 years for a rapist. This may be raised to 20 years where the victim is below 15, where she was under the supervision of the rapist in some way or where it is a case of gang rape.

In addition, the Ethiopian Criminal code provides for bodily injury in general terms under terms under article 556 and 560. In one research paper, argument indicting the utility of these provisions for cases of spouse abuse has been stated.¹ The writer of the paper argued that since bodily injury committed in breach of duty is a clear case of aggravated bodily injury under article 557 (b) of the criminal code and since the husband is under legal obligation to protect his wife under article 644 of the civil code, husbands could be held liable for injury they inflict on their wives. This is a logical argument. The provisions dealing with willful injury (article 556), common willful injury (article 558) and injury through criminal negligence (art 559) are clearly applicable for such cases.

The criminal code does extend protection against harmful traditional practices affecting the reproductive health rights of women such as female genital mutilation and early marriage. The Criminal Code penalizes these acts with the view to protect women. To this end, the new Criminal Code has come out with commendable reforms in the light of protecting the rights of women. Accordingly, the Criminal Code included under new chapter on prevention of Harmful Traditional Practices (HTPs) in an achievement worth noting.² Included in the chapter are offences of Female Genital Mutilation (FGM) causing harm to the life of female children. The code has also criminalized the practice of early marriage, marriage by abduction and acts of domestic violence perpetrated against women, rape outrage and sexual harassment of women.

Another aspect of protection of sexual and reproductive health right of women relates to abortion and contraceptive use.

Abortion as a right is not recognized under the legal regime governing the reproductive health rights of women. But, it is interesting to note the following provision of the international conference on population and development:³

“In no case should abortion be promoted as a method of family planning. All governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women’s health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family planning services. Prevention of unwanted pregnancy must always be given the highest priority and all attempts should be made to eliminate the need for abortion. In circumstances in which abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post – abortion counseling, education and family planning services should be offered promptly which would also help to avoid related abortions.”

The Fourth world conference on women further called for the revision of laws punishing women who have undergone illegal abortion and recognized coerced abortion as a violation of basic rights and principles.

These two conferences, though without covenants with binding form, have been attended by delegates of governments, inter-governmental and non-governmental agencies. Thus, they fairly represent the concurrent understanding and substantial consensus.

The Criminal Code makes it a punishable offense to terminate pregnancy intentionally under article 545. This is so even where the woman gave her consent or where she busily commuted the act. The punishment is nonetheless mitigated in these circumstances ranging from a minimum of 3 months on a woman who committed the act or herself to a maximum of 5 years. Where the victim was not capable of giving consent or where she was coerced, the penalty is 3 to 10 years rigorous imprisonment per article 547(2). Where the abortion was committed by a person other than the woman herself, for gain or by a medical professional, fine and loss of a license to practice medicine may imposed as additional penalties under article 548.

The code also provides for circumstances in which abortion may be justifiable and where guilt might be mitigated. The exception stated under article 551 includes grave permanent danger to the life or health of the woman which could not be averted in circumstances and where the child has an incurable and serious deformity. Moreover, punishment is mitigated where there is grave state of physical or mental distress especially following rape or incest or because of extreme poverty (article 550).

¹ Tadesse, Hillina, *Sexual Violence Against Women under Ethiopian Law*, Addis Ababa University, Faculty of Law (1993).

² FDRE Criminal Code, Book V, Title I, Chapter III, Arts 561-570.

³ Supra note 17, p. 24.

The municipal law on contraceptive use is at most scanty. Advertisements relating to contraceptives were punishable offenses under article 802 of the old penal code. The parliament has recently issued a law authorizing the advertisement and sale of contraceptives.

1.4.5 The Labour Proclamation No. 377/2003

The promotion and protection of women's sexual and reproductive health right, further, reinforced under the Labour Proclamation. The first right recognized for women under article 87(1) of the labour proclamation is equality in terms of employment and payment. Then there are a set of rights relating to pregnancy and childbirth. Prominent among these is maternity leave. Maternity leave under article 88 of the labour code consists of leave for medical examination related to pregnancy, pre-natal confinement leave of up to 30 days and post – natal confinement leave of up to 8 days. Moreover, articles 87(3) and 87(4) prohibit the assignment of a woman for night or overtime duty and for work outside her normal workplace unless transferred for her safety. Finally, an employer cannot fire an expectant woman or before a postnatal period of four months unless the woman gives her consent or it is a result of reduction in work force (articles 89(5) and 87(6)).

1.5 Conclusions

The 1995 FDRE Constitution emphasizes on women's rights in a broad and comprehensive set of provisions. Issues of equality, special rights of women and even affirmative action are properly dealt with. Supportive rights like the right to bodily integrity, education and health care services are also covered. In short, the Constitution provides for a viable context in which reproductive health right could be protected and prompted as an integral part of women's human rights.

The policy framework also goes a long way in addressing the issues at hand. Besides the emphasis on girls and woman in the health, education and population policies, there is an explicit women's policy in operation. These policies are generally in line with the current international framework on reproductive health rights. The policy framework recognizes the multi faceted nature of the right and covers the possible grounds for its protection and promotion.

Despite obvious advances in the constitutional and policy aspects, the laws *per se* have yet a long way to go. Though the Criminal Code has strict provisions on rape and other forms of sexual violence, the issues of domestic violence and marital rape are not given space. This is in direct conflict with the fact that spouse abuse, sexual or otherwise, represents a substantial threat to the reproductive health right of women. A woman is more likely to be abused by her marital partner than by any other person. In addition, the law manifests lower age of marriage for women and priorities to the husband in household and family. This makes the law stand at substantial variance with the constitutional and policy framework. Furthermore, the law on abortion is, at least theoretically, a restrictive one. It only permits the practice in conditions set as exceptions to the rule.

Finally, the practice clearly shows that whatever the law and other past approaches to the problem have achieved is not enough. The indicators at various levels testify to the fact that the reproductive health situation of Ethiopian women very poor even by African standards.

Thus, it is the view of the writer that intensive work should be done for instance awareness creation on reproductive health, education of girls, revision of the law in light of the constitution and creation and strengthening of regulatory structure.

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