Voluntary and Informed Consent in Female Sterilisation- positions of Indian courts

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The International Conference on Population and Development(ICPD), 1994 which India has ratified defines reproductive rights as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, to have the information and means to do so, and...to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents." Though India is a signatory to the ICPD, it recognizes "the right of men and women to be informed (about) methods of their choice for regulation of fertility which are not against the law".

In this context, it is left to the Indian courts to use their discretion on the rights to information and consent. This article explores the positions of the Indian courts towards reproductive rights of women, especially her right to voluntary and informed consent in matters related to her own reproduction by looking at some court judgments on female sterilisation.

In the cases of failed sterilisation where a woman gives birth to child/children subsequent to a sterilisation procedure, the Courts have considered these as cases of medical negligence and awarded compensation to the victims (State of M.P. & Ors. vs. Asharam 1997, and State of Haryana vs. Santra 2000). In Kumari Tabussum Sultana vs. State of UP 1997, the Court takes side with the 18 year old woman on whom sterilisation was mistakenly performed. Though these are pro-women judgments, a careful reading however reveal paternalistic, patriarchal and Malthusian mind set. For example, it says losing motherhood is "no less than suicidal death for a young woman". In the cases of failed sterilisation, it was easier for the Court to protect the interests of the women as it also served the so-called "interests of society" (population control). It is important to remember that the Government of India was simultaneously implementing an aggressive family planning campaign.

With increasing number of negligence cases surrounding female sterilisation, many of which even led to death, the medical fraternity was 'rescued' by the Government whereby an insurance coverage was introduced to provide compensations for both doctors and patients. Besides, the Courts also leaned to medical hegemony by attesting to the Bolam test, whereby if a body of medical opinion thinks that only limited information needs to be given and the doctor acts in accordance with this, the court would not penalize him/her. In Shanti vs The Post-graduate Institute Of Medical Education And Research, Nehru Hospital, Chandigarh, 1997, Gauradevi Rameshwar Singh vs. Family Planning Association of India, 1998 and Jaiwati (Smt) vs. PariwarSewaSansthan, 2000, the Courts said that since there is bound to be a chance of failure and hence simply because the procedure failed, it cannot be construed as medical negligence.

Very few cases raise the relevant questions of whether the woman was informed that the sterilisation surgery is not 100% safe, if vasectomy and other methods were discussed and if the woman was asked to follow necessary precautions soon after surgery. While in Chanderwati vs Mool Chand Khairati Ram Hospital 2006 , these concerns were sidelined by the Court, in Mala Devi vs State Govt of NCT of Delhi 2014, the Court relies on the woman's signature on the consent form as a proof that adequate information was given to the woman. However it is known that signatures on consent forms is followed merely as a hurried routine and not in the true principle of informing the patient.

In matters of consent, in both Dr. Janaki S. Kumar vs Mrs. Sara funnisa 1999 and Samaira Kohli vs Dr D Manchanda 1995 , the women claimed compensation for not obtaining their consent and for negligence in performing the sterilisation surgery. The doctors tried to argue that sterilisation was 'medically' necessary and they had obtained consent from her family members. However the Court held that the consent of the family members would not suffice in place of the consent of the patient. It held that "(w)hen one speaks of consent; that should be informedconsent, the person who should give the consent must be aware of the risk involved and on that awareness the patient should give consent". In contrast, in a divorce case judgment delivered in 2007 (Ghosh vs Ghosh, 2004), a woman who sought abortion without the knowledge of her husband was held responsible for causing 'mental cruelty'. The Court seemed to be unaware of or disregard the Medical Termination of Pregnancy Act 1971 and Guidelines which state that spousal consent is not mandatory for seeking abortion services.

In SamairaKohli, the Court again resorts to Bolam test and states that the adequacy of information should be judged based on what other medical professionals in similar circumstances would inform the patient. This leaves a large loophole in cases of poor, uneducated, marginalised women who are considered by a large majority of medical professionals as 'incapable' of comprehending information and making reasonable decisions.

In all these judgments, the courts do not come out strongly on the need to discuss the risk of failure in female sterilisation with the woman prior to the surgery, the need for the doctor to counsel the woman (and her partner) about other safer options, to ensure that signatures on consent form are procured only after its contents have been explained in a language known to the woman, understood and the woman is given the time and opportunity to ask clarifications. Studies have shown both public and private healthcare providers tend to decide for the woman and adopt a range of 'inductive' to 'coercive' strategies to make the woman to accept the recommended contraceptive choices.

The deplorable state of both medical as well as other quality standards adopted when women undergo sterilisation in camps has also been srutinised by the Court. In the judgment of Ramakant Rai vs Union of India 2002 , the Court directed the Centre to issue clear guidelines on how sterilisation camps must adhere to the timing, place, screening, informed consent, post operative care and compensation for victims. Yet, with total disregard to these directions, sterilisation camps continued to be conducted with support from the Government violating basic principles of ethical medical practice and human rights to privacy and dignity. Even as the Court was deciding on this continued callousness in the Devaki Biswas vs. Union of India 2012 petition, 13 women died in Bilaspur following apathetic sterilisation procedures in 2014. Finally in a landmark court ruling on September 14th 2016 , the Supreme Court of India ordered the cessation of sterilisation camp approach. The ruling also requires that all women undergoing sterilisation must first have the possible risks, side effects and consequences of the procedure read to them in their own language. Thus a precedent to Voluntary and Informed Consent in sterilisation has been set by this judgment. However this judgment cannot be celebrated in the context of a historical target based family planning program and policy which has deeply ingrained pro-population control attitudes in the minds of healthcare providers and elites. In Javed vs State of Haryana 2003, the Court validated the use of disincentives to family planning by debarring those with more than two children from contesting panchayat elections. Unless the courts understand how policies based on the fear of population explosion can directly lead to infringement on reproductive rights, either on individual women in a doctor-patient set up or in 'sterilisation camps', women's reproductive freedom will remain on paper.

The judgments discussed above indicate that the Indian courts are still struggling to shed their patriarchal and Malthusian attitudes towards controlling a woman's body and reproductive capacities. This mindset makes it difficult for them to penetrate gender biases in medical practice as well as policies which encourage violations to voluntary informed consent. Only when glaring violations take place and pressure from health rights advocates sustain, the courts have delivered some welcome judgments which place a woman's basic dignity over and above the need to sterilise. There is a continued absence of rights language in policies as well as judgments which makes Voluntary and Informed Consent for women still a distant reality.

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