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# **LEGAL PROTECTION OF REPRODUCTIVE**

## **HEALTH OF WOMEN IN INDIA**

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### **Abstract**

As a subset of human rights, reproductive rights were developed. Parents have a basic human right to make their own decisions such as the number and spacing of their children in a rational way. Regardless of the population's socioeconomic status, religion, or culture issues concerning reproductive rights are fiercely disputed. There are certain international conventions which talk about the reproductive rights of women such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has helped ensuring reproductive rights as basic human rights.

Generally, reproductive rights refer to an individual's ability to choose whether or not to procreate and to maintain reproductive health. This could include the right to start a family, end a pregnancy i.e. to have an abortion, use contraception, learn about sex education in public schools, and obtain reproductive health services.

In case of our own country India, supreme court through its decision has ensured that the reproductive rights are a part of women's fundamental rights. After such decisions the women in India are not able to exercise their reproductive rights because of our societal structure. The India society is still stereotypical in case of sex education, neither the girls and boys are taught about it nor told by peers instead it's a taboo to even talk about topics like sex and if a person use terms like sex, pregnancy, contraception etc. the person is seen with condescending views by the society and its peers. A women asking about contraception is considered as a taboo in India and people call them inappropriate and of low moral character.

Keywords: Reproductive Rights and health, CEDAW, sex education, contraception, abortion, fertility treatment.

## Introduction

Social change is never easy, especially when it involves fundamental male-female relationships in families and society. There is a developing understanding of how the laws controlling men and women's opportunities, societal endowments, and behaviors affect their chances of accelerated development and justice. To create a better living for both women and men in the period of globalization and urbanization, societies require their own answers, based on a vision of justice and gender equality and congruent with their cultures and conditions.

Reproductive rights, according to the International Conference on Population and Development (ICPD), "rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."

The language is taken from Article 16(1)(e) of the Women's Convention, which states that States Parties shall ensure on a basis of equality of men and women:

"the same rights to decide freely and responsibly on the number and spacing of their children, and to have access to the information, education and means to enable them to exercise these rights."

In today's time reproductive rights is a major concern on the International front because except the developed countries both the developing and under-developed countries still does not recognize reproductive rights of women as of the women's rights. In certain countries women does not have basic human rights, while the concept of reproductive rights is still alien to them. The women in these countries are treated for pleasure or pronatalism. The simpler concepts such as reproductive health and sex education are not heard by them or they simply ignore them as they fear change.

Reproductive health is defined in paragraph 7.2 of the ICPD Programme of Action as "a state of complete physical, mental and social well-being ... in all matters related to the reproductive system", which "implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so." Reproductive health is also a very serious matter as many women lose their life due to low reproductive health and pregnancy complications.

According to WHO Reports, Maternal Mortality is the highest in U.S. with 26.4 MMR (deaths per 100,000 live births), second highest in U. K. with 9.2 MMR. The global maternal mortality rate in 2020 was 152 deaths per 100,000 live births. When developed countries like U.K. and U.S. have such high mortality rate the underdeveloped countries have a higher risk. The United Nations have worked forward in securing women's reproductive rights through 2 documents:

1. Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979
2. The International Conference on Population and Development held in Cairo in 1994 (also known as Vienna Declaration and programme of Action)

As for India the Acts applicable for the protection of women's reproductive health are:

1. Constitution of India
2. Medical Termination of Pregnancy Act, 1972
3. Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994

We will be discussing both the International perspective and its applicability in India in this Chapter.

## **International Perspective On Reproductive Rights**

Governments have forged a series of human rights treaties and international conference agreements over several decades, increasingly influenced by a growing global movement for women's rights, to offer a legal foundation for ending gender discrimination and gender-based rights violations. They help in ensuring equal rights to both men and women and direct state to take actions in case of its contravention or discriminatory practices. The Vienna Declaration and Programme of Action, The International Conference on Population and Development (ICPD) and the Platform for Action which was adopted through the Fourth World Conference on Women (FWCW) and CEDAW are the international agreements whose objective is to secure women's empowerment and gender equality. These agreements along with the human rights law emphasis on the Reproductive and sexual rights of women.

The WHO defines reproductive rights as:

*“Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have*

*information to do so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.”*

Some of the reproductive rights of Women are:

1. Right to control one's reproductive functions
2. Right to access reproductive choices which are free of coercion, discrimination and violence.
3. Right to acquire sexual and reproductive education including contraception, sexually transmitted diseases and freedom from coerced sterilization and contraception.
4. Right to legal and safe abortion
5. Right to resist gender based practices such as genital cutting and mutilation.

## **The Convention On Elimination Of All Forms Of Discrimination against Women (Cedaw)**

This Convention On Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 mainly defines the rights of women to be free from any type of discrimination. It is the only human rights treaty which talks and provides for the reproductive rights of women. This Convention directs its state parties to submit periodic reports of women's status in their country.

The Convention's preamble states unequivocally that "extensive discrimination against women continues to exist," and that such discrimination "violates the principles of equality of rights and respect for human dignity." Discrimination is defined as "any distinction, exclusion, or restriction made on the basis of sex...in the political, economic, social, cultural, civil, or any other field," as specified in article 1. The Convention affirms the principle of equality by requiring States Parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, with a view to ensuring their exercise and enjoyment of human rights and fundamental freedoms on an equal footing with men"<sup>1</sup>.

It lay emphasis on many civil, social, political and economic rights of woman. But apart from this it also focuses on reproductive rights of the women. The preamble of the act also emphasis on the reproductive rights that "the role of women in procreating should not be a

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<sup>1</sup> Article 3 of CEDAW Convention

basis of discrimination". Article 5 of the Convention stated that to understand completely of maternity is a social function and it ensures that both sexes equally take responsibility in rearing a child.

Similarly, provisions relating to child care and maternity protection are incorporated in the convention in all fields be it family law, core health and medical laws, education and employment.

Certain measures to be taken during maternity to protect a women are also incorporated and are said to be non-discriminatory.<sup>2</sup> It also states that a woman has a right to decide to procreate or not i.e. she has a reproductive choice. Also, this was the first human right treaty on family planning.

Another aspect this Convention directs the state parties to change their stereotypical, cultural and political beliefs to ensure women's reproductive rights by providing maternity leave with full remuneration, comparable social benefits, prohibition of dismissal on grounds of pregnancy or on marital status, to provide child care facilities, special protection during pregnancy and protection of health and safety including function of reproduction.<sup>3</sup>

Also, the center for reproductive rights have established 12 Human rights as a key to Reproductive rights which are:<sup>4</sup>

1. The Right to Life
2. The Right to Liberty and Security of Person
3. The Right to Health, including Sexual and Reproductive Health
4. The Right to Decide the Number and Spacing of Children
5. The Right to Consent to Marriage and to Equality in Marriage
6. The Right to Privacy
7. The Right to Equality and Non-Discrimination
8. The Right to be Free from Practices that Harm Women and Girls
9. The Right to Not Be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment
10. The Right to be Free from Sexual and Gender-Based Violence
11. The Right to Access Sexual and Reproductive Health Education and Family Planning Information
12. The Right to Enjoy Scientific Progress

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<sup>2</sup> Article 4 of the Convention

<sup>3</sup> Article 11 of the CEDAW convention.

<sup>4</sup> Center for Reproductive Rights, The International Legal Foundations.

## **The International Conference On Population And Development (ICPD)**

This convention set up a new standard in case of human reproduction and health. This conference first time focused an interrelationship between human rights and health and threw a light on women's empowerment by promoting reproductive health. The approach adopted by this conference was to depart from the view that women are instruments and arrived on a view that women themselves are concerned about their reproductive health and well-being. It changed women's reproductive capability from a tool for population control to a means for women to exercise personal autonomy over sexual and reproductive health in lieu of her social, political and economic rights. The primary principle of the ICPD is to promote and develop population programs in terms of a women's reproductive health. ICPD tried to achieve these goals by first defining the scope of reproductive health and reproductive rights. Article 16(1)(e) of the convention provides the right to decide the number and spacing between children. The convention also promotes the right to work in safe conditions including protecting the function of reproduction<sup>5</sup>. It also prohibits female genital mutilation or cutting along with a women's right against sexual violence, to deny any sexual relations to protect herself from HIV/ AIDS and reproduction.

The woman also has an autonomy concerning her sexuality and fertility which need to be free of coercion and violence. This right provides a co-relative duty to doctors and women to keep confidentiality and provide all alternatives to choose and to exercise the right to refuse treatment. It is also the duty of the health workers to make a women make decisions on her own without involvement of anyone else as an individual.

“So, the ICPD and CEDAW recognized women's rights to reproductive and sexual health being key to women's health. Rights to reproductive and sexual health include the right to life, liberty and the security of the person; the right to health care and information; and the right to non-discrimination in the allocation of resources to health services and in their availability and accessibility.”<sup>6</sup>

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<sup>5</sup> Article 11(1)(f)

<sup>6</sup> Dr. Carmel Shalev (expert member, CEDAW), Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women, 1998

## **National Perspective Of Reproductive Rights**

Despite the fact that India was one of the first countries in the world to develop legal and policy frameworks ensuring access to abortion and contraception, women and girls continue to face significant obstacles to fully exercising their reproductive rights, including poor health services and denials of decision-making authority.

In the past, India's reproductive health laws and policies have failed to prioritize women's rights, instead focusing on demographic goals such as population control, simultaneously implicitly or explicitly undermining women's reproductive autonomy through provisions which are discriminatory in nature such as consent of spousal to access the reproductive health services. Despite a national legislation prohibiting girls under the age of 18 from marrying and laws and initiatives ensuring women's maternal healthcare, India continues to have the greatest number of child marriages and 20 percent of all maternal fatalities worldwide.

India has committed to ethical and professional standards in family planning services, including the right to personal reproductive autonomy and collective gender equality, as a signatory to the International Conference on Population and Development in 1994.<sup>7</sup> At least on paper, Indian policies and regulations appear to reflect this idea. The right to a voluntary and informed choice in contraception is affirmed in the National Population Policy of 2000.<sup>8</sup>

The major legislations protecting the reproductive rights of women are discussed below:

### **Constitution Of India**

The first right is granted through Article 13 of our constitution which prohibits the state to frame such laws which violates a person's fundamental right. The reproductive right is also embodied in Various Articles given under Part III of the Constitution of India. These are Article 14,15,16 & 21.

Within India's jurisdiction, Article 14 bans the state from denying anyone equality before the law or equal protection under the law.so, this right guarantees the women same freedom as that of men to decide about their reproductive rights. This also includes the right to use contraception and to protect oneself from Sexually Transmitted diseases.

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<sup>7</sup> United Nations International Conference on Population and Development (ICPD), 5-13 September 1994 Cairo, Egypt.

<sup>8</sup> National Commission on Population, government of India: National Population Policy, 2000

Article 15(1) prevents the state from discriminating against citizens on the basis of religion, race, caste, sex, birthplace, or any combination of these factors. Articles 15(2) and 15(3) allow the state to make particular arrangements for women and children, as well as for socially and educationally disadvantaged citizens (including women), Scheduled Castes, and Scheduled Tribes. No matter which caste, literacy level a woman belongs she has the same Reproductive rights.

While India's Constitution does not directly recognize the right to health (or reproductive rights), various Supreme Court rulings have construed the right to health and the right to prompt and adequate medical treatment as crucial to the right to life. The Supreme Court held in *Parmanand Katara v Union of India*<sup>9</sup>, a public interest litigation (PIL) involving the provision of emergency medical treatment to injured victims of motor vehicle accidents, that Article 21 of the Constitution requires the State to preserve life, and doctors at government hospitals are obligated to provide medical assistance to save lives.

In *Suchita Srivastava and Others v Chandigarh Administration*<sup>10</sup>, the Supreme Court declared that reproductive autonomy is a facet of human liberty protected by Article 21. It stated, "It is critical to recognize that reproductive choices can be used to both procreate and refrain from procreation." The most important aspect is to respect a woman's right to privacy, dignity, and bodily integrity. This indicates that there should be no restrictions on a woman's ability to exercise reproductive choices, such as the right to decline sexual engagement or the insistence on the use of contraceptive techniques. Furthermore, women have the option of using birth control measures such as sterilization treatments.

In the cases of *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.* and *Jaitun v. Maternity Home, MCD, Jangpura & Ors.*, the Delhi High Court issued a historic joint ruling in 2011 involving denials of maternal health treatment to two women living below the poverty line. "These petitions focus on two inherent survival rights that form part of the right to life: the right to health (which would include the right to access) and the right to food," the Court stated. and are provided with a basic level of treatment and care in public health-care facilities and, in particular, women's reproductive rights.

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<sup>9</sup> AIR 1989

<sup>10</sup> (2009) 14 SCR 989

## **Medical Termination Of Pregnancy Act, 1972**

This Act provides for legally terminating such pregnancies by registered medical practitioners for reasons such as the women's health etc. This Act also provides for certain pregnancies which will be considered as illegal such as-

- Forcing a woman for abortion
- Abortion carried by midwives, nurses or quacks.
- For the purpose of female infanticide.

Terminating a pregnancy affects a women's body in many ways sometimes even leading to deaths. Therefore, the right to choose to get abortion is also one of the reproductive right guaranteed in India.

## **Pre-Conception And Pre-Natal Diagnostic Techniques Act, 1994**

This Act mainly focuses on the pre- natal diagnostic i.e. to confirm the sex of the child before its birth. It is prohibited to confirm the sex before birth to avoid cases of abortion which are a result of female feticide. This Act also prohibits to sell such diagnostic machines to unregistered medical practitioners and a punishment is also pertained if the medical practitioners are found guilty of pre- natal diagnosis which is an imprisonment of 5 years and fine of Rs. 10,000/- or it may even lead to removal of his name from medical practitioner's register.

This Act allows ultrasound of the fetus only in certain conditions by the medical practitioner such as-

- check for any abnormalities,
- when the age of women is above 35 years,
- when the women have had 2 or more spontaneous fetal losses,
- when the pregnant women have been exposed to drugs or harmful radiations,
- to diagnose any genetic diseases

## **Indian Judicial Perspective On Reproductive Rights**

Reproductive rights are not directly provided in or Constitution or any legislation but our judiciary has interpreted that the right to life given under Article 21 entails right to health. And reproduction forms the most important part of a women's health, so somewhere reproductive rights of a women are fundamental rights guaranteed under Article 21 of the Indian Constitution. In this judgement, the Supreme Court stated explicitly that Article 21 covers "a person's reproductive rights." The Supreme Court defined reproductive rights as the right to "access a range of reproductive health information, goods, facilities, and services to enable individuals to make informed, free, and responsible decisions about their reproductive behavior" as part of the right to health and as an aspect of personal liberty under Article 21. "The freedom to exercise these reproductive rights includes their right to make a choice about sterilization on the basis of informed consent and free from any kind of coercion," the Supreme Court said.<sup>11</sup>

The Medical termination of Pregnancy Act allows termination of pregnancy up to 20 weeks, but between April 2016 till now the Supreme Court has allowed termination of pregnancy of nearly 55 petitions, out of which around 35 were cases of rape victims.

Women's autonomy and gender equality were recognized as key parts of women's constitutionally protected reproductive rights in the case of Devika Biswas v. Union of India & Ors<sup>12</sup>., which went beyond the reproductive health framework. The state policies and practices that lead to sterilization abuse, according to the Supreme Court, infringe women's fundamental and human rights.<sup>13</sup> This decision is a big step forward from previous Supreme Court decisions that supported abuses of reproductive autonomy based on population growth concerns.<sup>14</sup>

In a case of High court on its Own Motion v. State of Maharashtra (2016), the Bombay High Court decided that the women prisoners also have full right to terminate their pregnancy and also affirmed that having an abortion does not challenge her right to live with dignity under Article 21. The court also recognized that unwanted pregnancies is a burden on women's health and to continue such pregnancy: represents a violation of her bodily integrity and

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<sup>11</sup> Devika Biswas v. Union of India, W.P. (C) 9061/2008

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

<sup>14</sup> Javed & Ors. V. State of Haryana, AIR 2003 SC 3057; State of Haryana & Ors. V. Smt. Santra, (2000) 5 S.C.C. 409.

aggravates mental trauma resulting in poor mental health”. The court recognized that

“an unborn fetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make.

The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant”<sup>15</sup>

The Indian courts have been working hard by addressing legal and practical barriers which does not allow a woman to exercise her reproductive rights.



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<sup>15</sup> High Court on its Own Motion v. the State of Maharashtra, W.P. (CRL) NO. 1/2016, Court on its Own Motion Lajja Devi v. State, W.P. (CRL) No. 338(2008) (High Court of Delhi)

## Conclusion

Reproductive health and right to reproductive health is not only women issue it is a family health and social issue. The ultimate aim of the right to reproduction is well being of the family and individuals. At the same time, it becomes the responsibility of the governments to give quality reproductive health care and protect the individual reproductive rights while being sensitive to local and cultural issues. There is increased need for sensitization of the judicial and government while protecting the reproductive rights of people with disability especially mental retardation and mental illness. There is also a greater demand for judicial system enlightenment on the procedure of consent to abortion. Men's involvement and active community participation are required to achieve high-quality reproductive health care (spouse).

Comprehensive health rights include reproductive and sexual health rights. To guarantee that these rights are fulfilled, a country must have a well-developed public health system that is capable of providing comprehensive, high-quality health care services that are accessible to all, free at the point of use, and, above all, responsible to citizens.

Unfortunately, India's public health system is beset by a slew of problems, including a lack of public investment, inadequate infrastructure, including medical and diagnostic facilities, and under-skilled human resources.

With the health system there is a great social lag also in our country where the women talking about process like sterilization, contraception's and a NO to sexual activities is considered to be of bad moral character. Saying NO is compared with not complying with your husband wishes who a woman should consider Gods. But if the husbands are Gods than that makes a Women a Goddess and her wishes must be respected by allowing her to make her own decisions about her reproductive health.

With advent of time the people will put their beliefs back and the women will be able to enjoy their reproductive rights. Though, we are long way away from providing the women their reproductive rights the Indian Courts are working hard to uphold women's reproductive rights, reproductive health and autonomy, emerging issues if surrogacy and also includes marginal populations in upcoming litigations.