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## Reproductive Rights as a Human Right: A Critical Appraisal

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### Abstract

Over the last few years, the awareness and need for protection of reproductive rights has been increasing. However in under developed countries like African countries and even in developing countries like India, there is still lack of adequate protection (statutory and administrative) and education/ awareness with respect to reproductive rights.

This research article is an attempt to analyse the International, National Law protecting Reproductive rights and to critically analyse the lacunas in implementation of same.

**Keywords:** Women, Reproductive Rights, International Law

### 1. Introduction

#### A. Reproductive rights as human rights

*Reproductive rights embrace certain human rights that are already recognized in national laws, International human rights documents and other consensus documents* <sup>[1]</sup>. These 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 the information and health. It also includes right to attain the highest standard of sexual and reproductive health. It also includes right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents <sup>[2]</sup>.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women <sup>[3]</sup> in Africa expressly articulates women's reproductive rights as human rights, and explicitly guarantees a woman's right to control her fertility. It also provides a detailed guarantee of women's right to reproductive health and family planning services.

With the adoption of the UN Millennium Development Goals (MDGs) in 2000, Governments of various nations around the world have agreed to address women's reproductive health as key to promoting development. In the document produced at the 2005 World Summit, leaders from around the world made an explicit commitment to achieving universal access to reproductive health by 2015 <sup>[4]</sup>

International statutes on Human Rights have expressly protected reproductive rights as Human Rights. Few of them are as follows;

#### a. Women's Right to Equal and Adequate Health Standard

Amongst many International statutes that specifically protects right of women to adequate health standards and equal access to same, some are as follows;

*Universal Declaration of Human Right* <sup>[5]</sup>

**Article 25(1)** Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family

*Economic, Social, and Cultural Rights Covenant* <sup>[6]</sup>

**Article 10(2)** Special protection should be accorded to mothers during a reasonable period before and after childbirth.

*Convention against Racial Discrimination* <sup>[7]</sup>

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**Article 5** States Parties to guarantee to everyone... (iv) the right to public health, medical care, social security and social services.

*Convention on Elimination of all forms of Discrimination against Women (CEDAW)* <sup>[8]</sup>

As far as women's right to health care and ancillary reproductive rights are concerned, CEDAW was the important development as it prohibited the discrimination against women in these areas. Few important provisions of this Convention are as follows;

**Article 12(1)** States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

**Article 12(2)** States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

**Article 10** requires State Parties to take all appropriate measures for ensuring right to access to specific educational information to help to ensure the health and wellbeing of families, including information and advice on family planning <sup>[9]</sup>.

*Beijing Platform for Action* <sup>[10]</sup>

Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life <sup>[11]</sup>.

Beijing platform also provides that, Men and women have the right to access appropriate health-care services that will enable women to go safely through pregnancy and childbirth....<sup>[12]</sup>

#### **b. Women's reproductive rights relating to children**

*Covenant on Economic, Social, and Cultural Rights*

**Article 12(2)** the steps to be taken by the States Parties to make...:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

*Convention on Elimination of all forms of Discrimination against Women (CEDAW)*

**Article 16(1)** States Parties shall... ensure, on a basis of equality... 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 exercise these rights...

*ICPD Programme of Action* <sup>[13]</sup>

**Principle 8** 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.

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 the information and means to do so... [The definition of reproductive rights] also includes, right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents <sup>[14]</sup>.

#### **c. Reproductive rights of disabled women**

Disabled women's is one of the most vulnerable section of the society. Reproductive rights of this section are often neglected. The International statutory standards on this point are as follows;

*CEDAW* <sup>[15]</sup>

**Article 23(1)** States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships,..., so as to ensure... the rights of persons with disabilities... to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided...

**Article 6** States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

*The Committee on the Rights of Persons with Disabilities (CRPD)* <sup>[16]</sup>

It provides for Protection of persons with disabilities from arbitrary or unlawful interference with their privacy (CRPD Art. 22) and family (CRPD Art. 23), including in all matters relating to marriage, family, parenthood and relationships; (CRPD Art. 7), right to retain their fertility; take measures to ensure women and girls enjoy the full and equal enjoyment of their human rights (CRPD Art. 6); the right to highest attainable standard of health without discrimination, including in the area of sexual and reproductive health and population-based public health programs (CRPD Art. 25).

Incarceration of persons with disabilities without necessary services or accommodations, has been deemed illegal, degrading treatment as well as a potential violation of the International Covenant on Civil and Political Rights (ICCPR) <sup>[17]</sup>.

#### **d. Right against sexual harassment**

*Vienna Declaration and Programme of Action* <sup>[18]</sup>

**Paragraph 18** Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and International trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.

*ICPD Programme of Action* <sup>[19]</sup>

**Principle 4** Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes.

*Vienna Programme of Action*

The Convention on the Rights of Persons with Disabilities is the first comprehensive International human rights instrument to specifically identify the right to reproductive and sexual health as a human right <sup>[20]</sup>.

*Universal Declaration of Human Rights* <sup>[21]</sup>

**Article 27(1)** Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

## **B. Protection of reproductive rights in India The Constitution of India**

Art. 14 confer and protects right to equality to both men and women. Art. 15 prohibit discrimination on ground of sex. It also gives power to the legislative machineries of the state to pass special legislations for women and children <sup>[22]</sup>. Art. 21 confer and protects right to life and liberty.

The Directive principles of state policy also gives due recognition to the rights of women. The state is expected to ensure, U/Art.39, equality in respect of adequate means of livelihood. It also expects state to ensure principle of equal pay for equal work to both men and women <sup>[23]</sup>.

U/a 42 the state is expected to ensure maternity reliefs.

Fundamental duties U/A 51 (A), casts a duty upon every citizen to renounce practices derogatory to the dignity of women <sup>[24]</sup>.

### **Other Statutes**

- Child Marriage Restraint Act, 1929 <sup>[25]</sup> *restrains the solemnisation of child marriage.*
- Indian Penal Code, 1860 Section 312 – 318 (Offences relating to Miscarriages etc.)
- Maternity Benefit Act, 1961 <sup>[26]</sup> regulates employment of women in certain establishments for a certain period before and after childbirth and provides for maternity and other benefits <sup>[27]</sup>.
- Medical Termination of Pregnancy Act, 1971 to provide for the termination of certain pregnancies by registered Medical Practitioners and for matters connected therewith or incidental thereto <sup>[28]</sup>.
- Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) 1994 <sup>[29]</sup> - prohibits sex selection leading to female foeticide.
- Delhi Artificial Insemination (Human) Act, 1995 <sup>[30]</sup> regulates donation, sale, and supply of human semen and ovum for the purpose of artificial insemination and for matters connected therewith or incidental thereto.
- Maharashtra Family (Restriction of Size) Act, 1976-casts responsibility on every citizen to restrict size of family

### **Protection of reproductive rights: a critique**

The UN Special Rapporteur [on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health], has recently clarified that States which use the law as a tool to regulate the conduct and decision-making of individuals in the context of their sexual and reproductive rights, represents '*serious violations of the right to health of affected persons and are ineffective as public health interventions*' <sup>[31]</sup>.

The right to participate in all decision-making processes that affect sexual and reproductive health and development is a basic right of all women. Yet, many women and girls with disabilities are excluded from participating in decisions that affect their lives on a daily basis, including as active partners in their own sexual and reproductive health care. They are further excluded and ignored in sexual and reproductive health policy, service and program development, including information and education resources <sup>[32]</sup>.

The monitoring bodies of core International human rights treaties <sup>[33]</sup> have found that forced/involuntary and coerced sterilization clearly breaches multiple provisions of respective treaties <sup>[34]</sup>. International medical bodies, such as the *International Federation of Gynecology & Obstetrics (FIGO)* <sup>[35]</sup>, have now developed new protocols and calls for action to put an end to the practice of forced sterilization, shoring up informed consent protocols and clearly delineating the ethical obligations of health practitioners to ensure that women, and they alone, are giving their voluntary and informed consent to undergo a surgical sterilization.

In 2013, the UN Special Rapporteur on Torture [and other cruel, inhuman or degrading treatment or punishment], clarified that forced sterilization of people with disabilities, regardless of whether the practice is legitimized under national laws or justified by theories of incapacity and therapeutic necessity, violates the absolute prohibition of torture and cruel, inhuman and degrading treatment <sup>[36]</sup>.

#### *Forced contraception*

Forced contraception has been recognised as a form of torture <sup>[37]</sup>. Contraception is commonly used on women and girls with disabilities to suppress menstruation or sexual expression for various purposes, including eugenics-based practices of population control, menstrual management and personal care, and pregnancy prevention (including pregnancy that results from sexual abuse) <sup>[38]</sup>.

#### *Lack of Access to Sexual and Reproductive Health Services & Programs:*

In a country like India, wherein large part of society still remains in villages, there is not only lack of access to adequate health care standards, but lack of access to sex education and awareness of reproductive rights is also a big challenge that remains unaddressed.

Even where sexual and reproductive health services and programs are available, women with disabilities are inadequately served, due to a wide range of factors, such as inaccessible venues; lack of transport; lack of appropriate equipment; non-inclusive and/or inflexible service policies and programs; lack of skilled workers; and pervasive stereotypes and assumptions that women with disabilities are asexual <sup>[39]</sup>.

#### *Lack of Access to Information and Education on Sexual and Reproductive Rights*

##### *Lack of Access to Justice*

The right of access to justice is among the most important civil and political rights as it determines the extent to which individuals can secure and enforce their other substantive human rights <sup>[40]</sup>.

##### *Women in indigenous groups*

Barriers from conflicting or overly complex traditional and contemporary service systems result in a jurisdictional quagmire and they may lack information about access to health services and response <sup>[41]</sup>.

*Women in Conflict or Post-Conflict Situations (Refugee, War victims, Riot Victims):* Reproductive rights of this section are often neglected.

##### *Lesbians or other sexual minorities*

Due to confronting social barriers and isolation from both sexual minority status, they face a complex matrix of ableism and discrimination on the basis of sexual orientation and both heterosexuality and ableism function as a social matrix, with exclusionary practices that operate in similar ways <sup>[42]</sup>.

Women who are members of minority or indigenous peoples, or who are lesbian, trans-gender or intersex or who live in

poverty, or who are older, or who are incarcerated in institutions or prisons, prostitutes can be subject to particularised forms of violence and discrimination. Protection rights of these sections are still a distant aim to achieve. Social sanctions on identity status or life experiences can further increase the risk of group or individual exclusion and denial of sexual and reproductive rights for women with disabilities.<sup>[43]</sup>

### Gender biasness

Curriculum and teaching materials remain gender-biased to a large degree, and are rarely sensitive to the specific needs of girls/women. Lack of gender awareness by educators at all levels strengthens existing inequities between males and females by reinforcing discriminatory tendencies and undermining girls' self-esteem. The lack of sexual and reproductive health education has a profound impact on women and men<sup>[44]</sup>.

### Suggestions

- Education /Awareness about reproductive rights
- Imposition of sanctions on nations failing to protect reproductive rights
- Separate comprehensive (National) legislation for protecting reproductive rights
- Special tribunal for speedy disposal of claims of violation of reproductive rights
- Inclusion of reproductive rights in Curriculum of all PG departments

### Conclusion

Protection and awareness of reproductive rights has become need of an hour in the 21<sup>st</sup> century. The problems identified in this article are universal and hence require more attention of International Community. Responding to this need, UN in its Millenium Development Goal has taken steps in this direction. However, reproductive rights have not touched the life of women's with disabilities, HIV affected, lesbian, Prostitutes etc. The above mentioned suggestions may be few positive steps to do away this situation, but they are not the complete solution. Hence the area is open for further research in this regard.

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