



# REPRODUCTIVE RIGHTS IN INDIAN COURTS

## Introduction

Over the last decade, Indian courts have issued several notable decisions recognizing women’s reproductive rights as part of the “inalienable survival rights” implicitly protected under the fundamental right to life. In certain ground-breaking judgments, the courts have even for the first time recognized reproductive rights as essential for women’s equality and have called for respect for women’s rights to autonomy and decision-making concerning pregnancy. In cases spanning maternal health, contraception, abortion, and child marriage, Indian courts have adopted robust definitions of “reproductive rights” that reflect human rights standards.<sup>1</sup> While court decisions are not uniform, several trailblazing rulings have boldly affirmed women’s rights to remedies for violations of reproductive rights—including the first case globally to recognize maternal health as a right—and laid the foundation for Indian courts to continue to play a strong role in preventing and addressing ongoing violations of these rights.

## Fundamental and Human Rights in India

Reproductive rights are essential to the realization of all human rights. They encompass a spectrum of civil, political, economic, and social rights, from the rights to health and life, to the rights to equality and non-discrimination, privacy, information, and to be free from torture or ill-treatment. States’ obligations to guarantee these rights require that women and girls not only have access to comprehensive reproductive health information and services but also that they experience positive reproductive health outcomes such as lower rates of unsafe abortion and maternal mortality and the opportunity to make fully informed decisions—free from violence, discrimination, and coercion—about their sexuality and reproduction. Violations of reproductive rights disproportionately harm women due to their capacity to become pregnant and legal

protection of these rights as human rights is critical to enable gender justice and the equality of women.

The Constitution of India recognizes many of these same rights as fundamental rights that the government has an obligation to uphold, including the right to equality and non-discrimination (Articles 14 and 15) and the right to life (Article 21) which is understood through jurisprudence to include the rights to health, dignity, freedom from torture and ill treatment, and privacy.<sup>2</sup> India is also a signatory to numerous international conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of the Child (CRC), all of which recognize reproductive rights.<sup>3</sup> Article 51(c) of the Indian Constitution and the judiciary have established that the government has a constitutional obligation to respect international law and treaty obligations.<sup>4</sup>

The government of India also bears a constitutional obligation to ensure legal remedies for violations of fundamental rights and human rights. Article 39(a) requires the government to promote equal access to justice and free legal aid as a means to ensure that “opportunities for justice are not denied to any citizen by reason of economic or other disabilities.”

## Reproductive Rights in India: The Current Situation

Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception, women and girls continue to experience significant barriers to full enjoyment of their reproductive rights, including poor quality of health services and denials of women’s and girls’ decision-making authority. Historically, reproductive health-related

laws and policies in India have failed to take a women's rights-based approach, instead focusing on demographic targets, such as population control, while also implicitly or explicitly undermining women's reproductive autonomy through discriminatory provisions such as spousal consent requirements for access to reproductive health services. Despite a national law penalizing marriages of girls below 18 years of age and policies and schemes guaranteeing women maternal healthcare, in practice India continues to account for the highest number of child marriages and 20% of all maternal deaths globally.<sup>5</sup> Although India's National Population Policy guarantees women voluntary access to the full range of contraceptive methods, in practice state governments continue to introduce schemes promoting female sterilization, including through targets, leading to coercion, risky substandard sterilization procedures, and denial of access to non-permanent methods.<sup>6</sup> In addition, although abortion is legal on multiple grounds until 20 weeks of gestation and throughout pregnancy where necessary to save the life of the pregnant woman under the Medical Termination of Pregnancy Act (MTP Act), 56% of the 6.4 million abortions estimated to occur in India annually are unsafe and result in 9% of all maternal deaths.<sup>7</sup>

U.N. human rights experts and bodies have raised concerns to the Indian government about human rights violations arising from a range of reproductive rights issues, including maternal mortality and morbidity, unsafe abortion and poor quality of post-abortion care, lack of access to the full range of contraceptive methods and reliance on coercive and substandard female sterilization, child marriage, and lack of information and education on reproductive and sexual health. These experts and bodies have called for India to address these violations, as well as disparities in access to reproductive health care.<sup>8</sup> Courts in India have an important role to play in ensuring women's reproductive rights as guaranteed by their constitutional and human rights.

### **Judicial Recognition of Reproductive Rights as Fundamental and Human Rights**

The Supreme Court of India and several state high courts have made important strides in recognizing the denial of reproductive rights as violations of women's and girls' fundamental and human rights. This section highlights key decisions that have broken ground in clearly establishing that women's and girls' legal rights to reproductive healthcare and autonomy give rise to a range of government obligations, including providing affordable, timely, and quality maternal health care; guaranteeing access to the full range of contraceptive methods in a non-coercive, quality, and target-free manner; preventing child marriage; and ensuring freedom from forced pregnancy through access to safe, legal abortion.

#### Maternal Health

In 2008, Human Rights Law Network in India began filing a series

of petitions in high courts throughout India seeking accountability for pregnancy-related deaths and injuries, resulting in groundbreaking judicial recognition of women's rights to survive pregnancy and childbirth as a fundamental right. These cases—two of which are discussed below—have been cited globally, including in a recent case in Kenya, to uphold women's rights to maternal health care with dignity.<sup>9</sup>

In 2011, the Delhi High Court issued a landmark joint decision in the cases of *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.* and *Jaitun v. Maternity Home, MCD, Jangpura & Ors.* concerning denials of maternal health care to two women living below the poverty line. The Court stated that **“these petitions focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the reproductive rights of the mother.”** Citing CEDAW and ICESCR, the decision held that **“no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background... This is where the inalienable right to health which is so inherent in the right to life gets enforced.”**<sup>10</sup>

In 2012, the High Court of Madhya Pradesh echoed the Delhi High Court's judgment in *Sandesh Bansal v. Union of India*, a public interest litigation seeking accountability for maternal deaths, recognizing that **“the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India”** and **“it is the primary duty of the government to ensure that every woman survives pregnancy and child birth.”**<sup>11</sup> Importantly, the Bansal decision specifically rejected financial constraints as a justification for reproductive rights violations, and established that government obligations under Article 21 require immediate implementation of maternal health guarantees in the National Rural Health Mission, including basic infrastructure, such as access to blood, water, and electricity, in health facilities; timely maternal health services and skilled personnel; and effective referral and grievance redressal mechanisms where maternal health care is denied.

#### Contraceptive Access

In 2016, the Supreme Court issued a judgment in the case of *Devika Biswas v. Union of India & Ors.* that moved beyond the reproductive health framework to also recognize women's autonomy and gender equality as core elements of women's constitutionally-protected reproductive rights.<sup>12</sup> Claims of violations of reproductive rights arising from coercive and substandard sterilization and the lack of access to the full range of contraceptive methods have been brought before the Supreme Court of India and high courts for over a decade.<sup>13</sup> In *Devika Biswas*, the Supreme Court established that state policies

and programs leading to sterilization abuse violate women's fundamental and human rights.<sup>14</sup> This decision marks a significant step forward from past Supreme Court cases which have justified violations of reproductive autonomy due to concerns about population growth.<sup>15</sup>

In its decision, the Supreme Court unequivocally held that Article 21 includes the “reproductive rights of a person.” The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21, and defined such rights to include 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 behaviour.” The Supreme Court found that **“the freedom to exercise these reproductive rights would include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion.”**<sup>16</sup>

Significantly, the Supreme Court also linked government policies focusing on female sterilization to violations of women's substantive equality. The Supreme Court emphasized the obligation to ensure the “reproductive freedoms” of economically- and socially-marginalized groups, expressing concern that informal targets and incentives have deprived them of any “meaningful choice.”<sup>17</sup>

#### Abortion and Forced Pregnancy

Recent jurisprudence concerning abortion in India also reflects progressive evolution in the judiciary's articulation of reproductive rights. Although a 2004 Supreme Court ruling undermined women's reproductive autonomy by holding that a woman's decision to undergo abortion or sterilization without her husband's consent could constitute mental cruelty,<sup>18</sup> subsequent judicial decisions have moved toward greater constitutional protection of this right. In 2009, the Supreme Court recognized women's reproductive autonomy as a fundamental right, stating that **“There is no doubt that a woman's right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21.”**<sup>19</sup> In 2011, the High Court of Punjab and Haryana reiterated women's rights to reproductive autonomy by dismissing a suit filed by a husband against a doctor who had performed an abortion without the husband's consent saying that **“[i]t is a personal right of a woman to give birth to a child...No body [sic] can interfere in the personal decision of the wife to carry on or abort her pregnancy...unwanted pregnancy would naturally affect the mental health of the pregnant women [sic].”**<sup>20</sup> Further, in the 2013 case of *Hallo Bi v. State of Madhya Pradesh and Others*, the High Court of Madhya Pradesh affirmed the importance of providing victims of rape access to abortion without requiring judicial authorization, stating **“we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health.”**<sup>21</sup>

Since 2008, cases have been filed nationwide seeking interpretation of Section 5 of the MTP Act, which explicitly allows abortion to save the life of a pregnant woman, to also permit abortion past 20 weeks on health grounds in cases of rape or fetal impairment. While the Supreme Court still has two cases pending seeking recognition that the Constitution requires access to abortion past 20 weeks on broader grounds, since 2015 the Supreme Court has ruled three times to permit abortion in individual cases past 20 weeks where medical panels found that forcing the women to continue the pregnancy would pose risks to their mental and physical health.<sup>22</sup> In 2017, the Supreme Court clarified that abortion at 24 weeks is legal in the case of anencephaly, which is a fatal fetal impairment that also endangers the pregnant woman's life, stating that her rights to bodily integrity and reproductive autonomy permit her to “preserve her own life against the avoidable danger to it.”<sup>23</sup> Although state high courts have had mixed rulings, two recent cases in Gujarat and Chhattisgarh have also progressively interpreted the MTP Act to allow abortions past 20 weeks in cases of sexual violence.<sup>24</sup> Importantly, these decisions recognize the significance of access to second trimester abortions for women's mental and physical well-being.

In the 2016 case of *High Court on its Own Motion v. State of Maharashtra*, the Bombay High Court ruled to improve women prisoners' access to abortion and strongly affirmed women's rights to abortion as an aspect of the fundamental right to live with dignity under Article 21. The judgment recognizes that unwanted pregnancies disproportionately burden women and states that forcing a woman to continue a pregnancy “represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.” The decision boldly recognizes that

**an unborn foetus 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>25</sup>

#### Child Marriage

There has similarly been growing recognition by Indian courts of child marriage as a human and fundamental rights violation. The Delhi High Court issued two decisions in 2010 and 2012 framing child marriage as a violation of human rights. These decisions further found that child marriage implicates girls' fundamental rights, although they did not explicitly recognize child marriage as a violation of fundamental rights. The Delhi High Court expressed concern that child marriage typically involves young, vulnerable girls and exposes them to domestic violence, sexual abuse, and social isolation underscoring that child marriage is a violation of



the “right to lead a life of freedom and dignity.”<sup>26</sup> The Delhi High Court has also noted the impact of lack of education on married girls, stating that it limits girls’ knowledge about sexual relations and reproduction, which is compounded by cultural silence concerning reproductive and sexual health, and denies them the ability to make informed decisions about health, sexual relations, and family planning. Finally, the court has recognized that child marriage results in an “unrelenting cycle of gender inequality, sickness and poverty.”<sup>27</sup>

The Madras High Court similarly recognized child marriage as a human rights violation in 2011,<sup>28</sup> and in 2015 issued an important decision establishing child marriage as a violation of girls’ fundamental rights under Articles 14 and 15 of the Constitution. This decision, *M. Mohamed Abbas v. The Chief Secretary*, confirmed that the Prohibition of Child Marriage Act (PMCA), establishing 18 as the minimum legal age of marriage for girls, supersedes personal laws without violating Article 25 (freedom of religion) of the Constitution; rather, the ruling emphasizes that under CEDAW, fundamental rights, and directive principles of state policy, girls should be empowered and that child marriage is not in girls’ interest. The Court further stated that PCMA “**is in favour of all the girl children getting proper education and empowerment and equal status as that of men in the Society, as guaranteed under Articles 14, 15, 16 and 21 of the Constitution.**”<sup>29</sup>

## The Road Ahead

The cases above illustrate the significant and evolving role the judiciary can play in India to address the legal and practical barriers which operate to deny women and girls their reproductive rights. While litigation has its challenges, including long time frames and difficulty in implementation of decisions, the robust recognition of reproductive rights as fundamental rights emerging from Indian courts has created a mandate for the government to shift away from population control approaches, confront discriminatory stereotypes that limit women’s authority, and instead center women’s rights to dignity, autonomy, and bodily integrity in reproductive health-related laws and policies. The judiciary also has a key role to play in monitoring implementation of existing decisions.

Further, in the coming years, Indian courts will rule in long-pending cases, such as those seeking progressive interpretations or reform of the MTP Act or strengthening of the legal framework prohibiting child marriage, as well as on emerging issues such as surrogacy. The legal guarantees articulated in the judgments discussed above create a strong call to action for the judiciary to continue to defend and uphold women’s reproductive rights—defined to include both reproductive health and autonomy—including for marginalized populations in upcoming litigation.

## Endnotes

- <sup>1</sup> See, e.g., *Devika Biswas v. Union of India*, W.P. (C) 95/2012.
- <sup>2</sup> *Parmanand Katara v. Union of India*, (1989) 3 S.C.R.997; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, A.I.R. 1996 S.C.C. 2426; *Chameli Singh v. State of U.P.*, (1996) 2 S.C.C. 549; *Consumer Education and Research Centre v. Union of India* (1995) 3 S.C.C. 42; *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, A.I.R. 1981 S.C. 746; *Kharak Singh v. The State of U.P. & Others*, A.I.R. (1963) 1 S.C.C. 332.
- <sup>3</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, adopted Dec. 18, 1979, art. 4(2), 5(b), 10(h), 11(1)(f), 12, 14(2)(b), 16, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (entered into force Sept. 3, 1981); *Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20<sup>th</sup> Sess., 1999), paras. 11-12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008); *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16, 1966, art. 12, para. 1, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976); *Convention on the Rights of the Child*, adopted Nov. 20, 1989, art. 24(2)(d), G.A. Res. 44/25, annex, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990); see also *Committee on Economic, Social, and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, (22<sup>nd</sup> Sess., 2000), in paras. 8, 11, 14, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).
- <sup>4</sup> See, e.g., *Apparel Export Promotion Council v. Chopra* (1999) 1 SCR 117, para. 27.
- <sup>5</sup> WORLD HEALTH ORGANIZATION (WHO), CHILD MARRIAGES: 39,000 EVERY DAY, U.N. Press Release (2013); see also Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, *Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt—Addendum—Mission to India*, para. 94, U.N. Doc. A/HRC/14/20/Add.2 (April 15, 2010).
- <sup>6</sup> *Devika Biswas v. Union of India & Others*, W.P. (C) 81/2012.
- <sup>7</sup> FROST, JENNIFER, KALYANWALA, SHVETA, MOORE, ANN, SINGH, SUSHEELA, STILLMAN, MELISSA, ABORTION IN INDIA: A LITERATURE REVIEW, GUTTMACHER INSTITUTE (2014) referencing the *Report on Medical Certification of Cause of Death*, 2010, New Delhi: Registrar General of India, 2014; see also Duggal, R., Ramachandran, V., *The abortion assessment project - India: key findings and recommendations*, REPRODUCTIVE. HEALTH MATTERS 12, 122-129 (2004).
- <sup>8</sup> *Committee on the Rights of the Child, Concluding Observations: India*, U.N. Doc. CRC/IND/CO/3-4 (2014); *CEDAW Committee, Concluding Observations: India*, U.N. Doc. CEDAW/C/IND/CO/4-5 (2014); *Joint Communication Letter to India, Mandates of the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences* (2015).
- <sup>9</sup> *Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Attorney General and others*, H.C.K. 562/2012.
- <sup>10</sup> *Consolidated Decision, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, W.P. (C) No. 8853/2008; *Jaitun v. Maternal Home MCD, Jangpura & Others*, W.P. (C) 8853/2008 & 10700/2009, Delhi High Court (2010).
- <sup>11</sup> *Sandesh Bansal v. Union of India* W.P. (C) 9061/2008.
- <sup>12</sup> *Devika Biswas v. Union of India & Others*, W.P. (C) 81/2012.
- <sup>13</sup> *Ramakant Rai v. Union of India*, W.P. (C) 209/2003; *Himmat Mahila Samooh v. Haryana*, W.P. (C) 12623/2014.
- <sup>14</sup> *Devika Biswas v. Union of India & Others*, W.P. (C) 81/2012.
- <sup>15</sup> *Javed and Others v. State of Haryana*, A.I.R. 2003 S.C. 3057; *State of Haryana and Others v. Smt. Santra*, (2000) 5 S.C.C. 186.
- <sup>16</sup> *Devika Biswas v. Union of India & Others*, W.P. (C) 81/2012.
- <sup>17</sup> *Id.*
- <sup>18</sup> *Ghosh v. Ghosh* (2007) 2004 S.C. 151.
- <sup>19</sup> *Suchita Srivastava & Anr v. Chandigarh Administration*, (2009) 11 S.C.C. 409.
- <sup>20</sup> *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others*, C.R. 6337/2011; *Ajay Kumar Pasricha & Others v. Anil Kumar Mahotra & Others*, C.R. 6017/2011; *H.C. Punjab and Haryana at Chandigarh* (2011).
- <sup>21</sup> *Human Rights Law Network (HRLN), The High Court of Madhya Pradesh allowed a pregnant female prisoner to exercise her reproductive rights under the Medical Termination of Pregnancy Act* (2013).
- <sup>22</sup> *Ms. X v. Union of India and Others* (2016) C.W.P. 593 (IND); *Chandrakant Jayantilal Suthar v. State of Gujarat*, (2015) 8 SCC 721; *Mrs. X and Mrs.Y v. Union of India & Others* (2016) C.W.P. 308; *Nikhil D. Datar v. Union of India* (2014) C.A. No. 7702.
- <sup>23</sup> *Meera Santosh Pal & Others V. Union of India & Others.*, (2017) W.P. (C) No. 17.
- <sup>24</sup> *HRLN, High Court of Chhattisgarh will frame MLC guidelines; Court decision dated Aug. 4, 2008, Dr. Nikhil D. Datar, Gynaecologist, Mr. X and Mrs. X being wife of Mr. X v. Union of India (UOI) through its Govt. Pleader and Advocate General*, W.P. (L) No. 1816 of 2008 (Bombay High Court); *Madhuben Arvindbhai Nimavat v. State of Gujarat High Court*, (2016) 1 S.C.R. 662; *Ms. X v. State of Kerala*, W.P. (C). No. 35034 (2016) (High Court of Kerala).
- <sup>25</sup> *High Court on its own Motion v. The State of Maharashtra*, W.P. (CRL) No. 1/2016, *Maharashtra H.C.*; *Court on Its Own Motion Lajja Devi v. State*, W.P. (CRL) No. 338 (2008) (High Court of Delhi).
- <sup>26</sup> *Association for Social Justice & Research v. Union of India & Others*, W.P. (CRL) No. 535/2010, Delhi H.C. (2010); *Court on Its Own Motion Lajja Devi v. State*, W.P. (CRL) No. 338 (2008) (High Court of Delhi).
- <sup>27</sup> *Id.*
- <sup>28</sup> *T. Sivakumar v. The Inspector of Police*, H.C.P. 907/2011, para. 1, Madras H.C.
- <sup>29</sup> *Mohammed Abbas v. Chief Secretary*, W.P. (MD) No.3133 of 2015, Madras H.C.