



## A Reproductive Rights: A Critical Study in International Human Rights Documents

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### ABSTRACT

Human procreation and its various features are among the most important topics worldwide. One of the areas of this analysis deals with international human rights documents because these documents show international trends in reproductive rights.

Therefore, this paper aims to prepare a venue to understand the definition, nature or entity, scope and content, right-holder and duty bearer, and the obligations of duty-bearers regarding others' reproductive rights in international human rights organizations.

The findings indicated there is no specific and agreed definition of reproductive rights in these human rights documents. The theories (Hohfeld's theory about a right, the Will-Choice Theory, and the Benefit-Interest Theory) cannot justify the nature of reproductive rights well. There are many epistemological challenges regarding the content and the scope of these reproductive rights and related states' obligations in those treaties, which made the realization of these reproductive rights difficult or even impossible.

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## Introduction

The procreative right is one of those human rights rooted in the post-second world war era. This right is a kind of right that is vital to the life of every human being. Enjoying this right depends upon other rights, such as the right to life and sexual rights. This right has an important position in human life because it is an individual right that is directly related to society.

On the one hand, recognizing movements worldwide in reproductive rights reveals that the topic is a very hot and otherwise challenging matter in every country. It is due to the fact that this issue is related to women and feminism. Moreover, some technological developments in modern medicine have been connected to reproductive rights and have affected these rights. Additionally, as Erikson said: *“some aspects of reproductive freedom, such as to regulate the timing of their childbearing and to avoid unwanted and mistimed pregnancies and unsafe abortion which are crucial for women's status and health, remain unsettled under international law”* (Erikson, 2000).

On the other hand, it is similarly important to note that reproductive rights have been influenced by some important factors like culture, religion, social, and economic factors. Every factor can add some novel aspects to reproductive rights, so the definition and content of these reproductive rights can be improved and promoted in the future. Hence, different claims made about reproductive rights, such as accessing reproductive services and materials, and medical treatment for infertility to have deaf children, lead to critical questions, including what are the rights and wrongs of particular reproductive choices? Here, what are the best criteria for determining rights and wrongs?

Some other concepts are related to reproductive rights, such as harm, justice, freedom, claim, duty, etc., making the concept of reproductive rights ambiguous. Moreover, the relation of reproductive rights to the rights of others, such as a spouse, child, or even society, gives rise to conceptual obscurity of reproductive rights, which is basically due to the asymmetry between the rights not to reproduce and reproduce as two parts of these reproductive rights. In return, the obscurity of the concept has a mutual effect on both illegibility realms mentioned above. As Daniel Sperling specified:

*“Although the right to procreate was acknowledged in case law, much ambiguity surrounds three major aspects relating to it: the content and scope of the right to procreate; the values underlying such a right; and the legal and social institutions supporting and securing such a right. Such ambiguity adds to the general difficulties associated with the rights discourse, and law's*



*interference with bioethical questions, inter alia through the language of rights, more specifically” (Sperling, 2011).*

Additionally, if the concept of reproductive rights becomes clear, it can be interpreted as positive, negative, or both. On the one hand, if it is interpreted as a positive right, individuals ask for access to those services and ensure access to them. Therefore, the state has to assist them. On the other hand, if it is interpreted as a negative right, it will be against state interference with the individuals’ choices. As Robert H. Blank indicated:

*“Because of these problems, several observers reject the concept of reproductive rights as the framework for policymaking in human reproduction. For instance, Holmes criticizes the “unfortunate use” of reproductive rights because “when everyone claims rights for one or another entity, a nonproductive competition between rights arises”.*

Even Robertson notes that reproduction is never exclusively a private matter; therefore, it cannot be completely accounted for in the language of individual rights (such language obscures the social dimensions of reproduction). Furthermore, Ruzek argues that we must move beyond the individual rights model because it is intended to be divisive and ineffectual in dealing with reproductive technologies. Similarly, Corea attacks the use of “reproductive rights” by “antifeminist reproductive engineers” to obscure the impact of new technologies on women as a class.

*“Despite these genuine concerns over the 'rhetoric of rights' in framing reproductive policy issues, rights will continue to provide the legal, if not moral, context within which these issues are fought. The imprecision and inconsistency inherent in the rights discourse notwithstanding, it has become deeply ingrained not only in the legal lexicon but also in the public debate over reproduction” (Blank, 1997).*

As well, *“even strong supporters of procreative liberty, such as John Robertson, do not argue that there is a positive right to procreate. In Robertson’s view, an important point about reproductive rights is that ordinarily, they are rights against the state limiting or restricting an individual’s reproductive choices or efforts to obtain reproductive services from a willing provider” (Sperling, 2011).*

Therefore, reaching a consensus on the definition of reproductive rights and other issues related to them within countries can help every individual to be able to exercise reproductive rights without coercion worldwide. By taking

a strong and well-argued stance on these issues, the states succeed in this impossible task in the scope of reproductive rights.

The author elaborates on the current paper's definition, nature, scope, and content of reproductive rights by examining international human rights. She intends to increase awareness of reproductive rights' meanings and the nature and content guaranteed under international treaties.

### **Definition of reproductive rights**

Although some international organizations have mentioned reproductive rights as human rights, there is no *one-size-fits-all* definition for reproductive rights. For example, some scholars (Shalev,2000:42) believed that the 1994 International Conference on Population and Development in Cairo (ICPD) defines reproductive rights as:

*"... reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents, and other relevant United Nations consensus documents. These rights rest on recognizing the basic right of all couples and individuals to decide freely and responsibly regarding 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. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion, and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children, and their responsibilities towards the community"* (ICPD Programme of Action 1994, para 7.3).

By considering this definition of reproductive rights, some points can be understood. First, these sentences are not definitions. Instead, they describe aspects of reproductive rights, such as the number, spacing, and timing of their children, to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.

Second, the last two phrases also cover the quality of exercising reproductive rights and cannot designate them. Before discussing the quality of reproductive rights, it is important to pay attention to the nature of these rights, the origin of introducing reproductive rights as human rights, and the aspects of reproductive rights. Therefore, it is better to establish a powerful basis for these rights in law and then speak about exercising them, the quality of exercising them, and ways to guarantee that a person exercises their rights.

Third, as some authors mentioned: "Several other definitions of vague terms were discussed and developed at the Cairo Conference, such as



“*Regulation of fertility*” and reproductive health”. These terms caused conflicts between countries in such a way that “the Dominican Republic entered a reservation on the same subject, i.e., accepting a content of the terms “reproductive health”, “reproductive rights” and “regulation of fertility” and “other terms” as excluding the concept abortion” (Erikson, 2000).

Fourth, the most important goals about rights and duties in the world are respecting and doing them, respectively. Therefore, it is critical to pay attention to the origin or source of these rights and duties to achieve such goals. A powerful origin can guarantee that a person exercises his or her rights and performs his or her duties. In addition, it can help to make aspects of rights and duties both clear and obvious. For example, considering rights without mutual duties is a great problem we encounter in this era. The author thinks there is no advantage in considering the rights without performing duties connected to those rights for the holders of rights. Furthermore, the limitations and aspects of these rights are unclear and have caused discussions among scholars to arise. It can be seen that many manuscripts, books, and papers have been written about rights; however, there is no consensus about these particular rights. From a practical standpoint, the problem has been made greater, because we do not have enough information about the quality of respecting, protecting, and fulfilling those rights.

### **Nature of reproductive rights**

The nature of reproductive rights is not clear, nor is it discussed in international law. To understand reproductive rights’ nature, one can refer to Hohfeld’s theory about a right, Will-Choice Theory, and Benefit-Interest Theory. Although Commons claimed that the Hohfeldian theory was ‘just as applicable to the shop rules of an industrial concern, or the ethical rules of a family or any of the many cultural concerns, as they are to the supreme political concern’ (Commons, 1925: 375), others (Karimi and Chalabi, 2009; Fontaneau, 2013; O’Rourke, 2009) trust the potential of his theory and using it in many other realms, such as constructional law and human rights. The author has chosen his theory because Hohfeld argued that right and duty are correlative notions. This picture of rights can help us improve the debate on reproductive rights in international law. Hohfeld divided rights into four kinds and two levels: Claim-right, Liberty/ privilege-right, power-right, and immunity-right.

By recognizing international human rights organizations, reproductive rights have been defined as both Civil and Political Rights and Economic,

Social, and Cultural Rights, meaning that reproductive right is a Molecular right that is a compound of atomic rights.

Suppose reproductive rights are considered Civil and Political rights. In that case, they can be a Hohfeldian claim-right, because they are the first generation of human rights and then negative rights that permit or oblige inaction. Accordingly, the principle of liberty is key to civil and political rights notions. Claim-right is a kind of right whereby negative obligations like positive obligations are imposed by it.

Let us consider reproductive rights as economic, Social, and Cultural rights. They will be claim-right since they are the second generation of human rights and then positive rights which permit or oblige action and, as well, the principle of justice is key to the notions of economic and social rights. Consequently, we can deduce that reproductive rights are an element of the claim right since, in international law, reproductive rights are positive and negative rights. Moreover, both are passive rights, and the claim right is similar to passive rights. In conclusion, in Hohfeld's theory, reproductive rights are just a kind of claim, though, in the opinion of some scholars, it does not have any function for the right holder.

In the Will-Choice theory, a right gives the right holder sovereignty; this means that the function of a right is to provide its holder control over another's duty. As a kind of right in this theory, the nature of reproductive rights is sovereignty and authority over others. However, there are some challenges in describing reproductive rights in this theory:

First, the right holder of reproductive rights does not require sovereignty and authority over others' actions. Natural reproduction is a private part of every human's life. All actions taken by themselves and others can only refrain from interfering or helping individuals or couples enjoy their reproductive rights. In assisted reproductive technologies, in the same way, it is the person that wants to have a child by using those methods.

We can find another idea that will help us promote our discussion about general rights and reproductive rights. There are three theories about right's nature in Islamic law: ownership, sovereignty, and constructive existence. In the first theory, right is the same as ownership. In the second theory, right is considered as sovereignty, but sovereignty in this theory is different from sovereignty in the Will-Choice Theory. In this theory, sovereignty is related to human beings' actions -his or himself- not others' actions, but sovereignty in the Will-Choice Theory is related to others' actions in the realm of rights. Therefore, the true meaning of sovereignty in the area of rights is sovereignty over our actions, which can limit others' freedom or actions. However,



sovereignty is not a complete notion to refer to the third theory. In this view, “right” has a constructive existence made by Allah or the world’s rationalists, and its effect is sovereignty. For example, suppose right has a constructive existence which a legislator makes. In that case, the legislator can define rights, their scope and content, obligations related to the rights, the right holders, and duty bearers.

Second, although all rights in this theory grant control over others’ duties to act in particular ways, thus, the important question is what duties in the area of reproductive rights are. The author means how this theory can justify the existence and necessity of duties in the realm of reproductive rights. What are the roots of these duties in this theory? Then what duties must have been imposed on others?

Third, incompetent infants, animals, and comatose adults cannot have rights within the Will-Choice Theory. This point is incorrect because there is no distinction between the enjoyment of civil rights -having rights and the use of civil rights. It is better said that these persons have reproductive rights, but they cannot use them since they do not have the necessary conditions like wisdom and maturity. It indicates that they are the conditions of using rights, not enjoying or having them. Accordingly, we cannot deny their rights, but we can prevent them from using their rights in some required circumstances due to the above-mentioned reasons.

Fourth, another criticism of the will-choice theory is about a government’s neutrality. If we accept a government’s neutrality, we cannot expect that the government has duties and obligations and carry them out correctly. Consequently, governments cannot easily ignore their duties. Therefore, the author believes that a government’s neutrality is against the function of a right for the right holder, which the Will-Choice Theory claims.

Based on the Benefit-Interest Theory, the function of a right is to promote the interests of the right-holder. Some challenges exist when describing reproductive rights in this theory: first, ignoring equality will make the distribution of resources in the realm of reproductive rights impossible. The important issue in this area is the distribution of financial resources in all of the world’s healthcare systems. One of the central parts of the health care system is reproductive health which has a chief share in reproductive rights. Second, the lack of measuring profits and losses is another problem of this theory for describing reproductive rights. Adding to this problem, the difference and ambiguity of reproductive rights can make it difficult to decide about the profits and losses of these reproductive rights. Apart from these



topics, measuring profits and losses in every aspect of reproductive rights is diverse because their content and scope are extensive and widespread. Third, the notion of interest cannot help us determine reproductive rights' content and scope. This problem has been more complicated when considering reproductive rights as civil and political rights because the notion of interest cannot help us analyze civil and political rights. Fourth, interest is a fluid concept insofar as it includes animals' and humans' interests. Therefore, it is not practical in the area of reproductive rights. Fifth, the ambiguity of the word "interest" is another challenge of this theory. The significant question here is what is the interest in exercising reproductive rights? Who reaps the benefits of exercising reproductive rights? Sixth, collective benefit prioritizes individuals' interests in this theory, so this theory cannot describe the content and scope of reproductive rights. Furthermore, reproductive rights can be a realm in which individual rights are in contrast with collective rights, and reproductive rights are the most obvious examples of individuals rights. Seventh, this theory, likewise, can justify human reproduction as a duty, so it, in itself, has an intrinsic contradiction. How can we imagine reproduction as a duty and not a right simultaneously? It seems that in this theory and the two theories mentioned above, we do not see this potential for considering an act as a right and a duty as well. In Islamic law, it is possible to envisage an action as a combined duty-right, not an absolute right, so the author thinks reproductive rights are a combination of duty and a right.

To sum up, all three of these theories cannot solve some of the challenges and conflicts between a woman's sexuality and reproduction, between individual autonomy and population control, between a woman's reproductive rights and their other rights, between a woman's reproductive rights and her husband/partner's rights, between a woman's reproductive rights and her responsibility of protecting her husband/ partner's rights and other tensions like these above-mentioned topics.

Without a doubt, the area of reproductive rights is very extended, different, ambiguous, controversial, and changeable. Consequently, every part of reproductive rights requires a different theory to manage. Nevertheless, we must take the empirical principles from international treaties and recognize different cultural, social, economic, and even religious values, defining reproductive rights in every country, because as some authors supposed: "limited understanding of rights leads to limited compliance and understanding of obligations" (Erikson. 2000).

### **Content and scope of reproductive rights**

Although the content and scope of reproductive rights are being directly or indirectly addressed by international human rights treaties or instruments,





such as UDHR, OHCHR, ICESCR, ICERD, CEDAW, CRC or UNCRC, CRPD, and CRMW; the content and scope of reproductive rights remain debatable in international law. There are two viewpoints on this matter: some scholars believe that the content and scope of reproductive rights are limited to reproductive choice as a composite right based on human rights to find a family, to decide freely on the number and spacing of children, to have family planning information and to have access to family planning services (Packer,1996), but others believed that reproductive rights include other rights such as the right to life, the right to privacy, etc. According to the second view, there are different ideas about the content and scope of reproductive rights. Some scholars point out the fact that the scope and content of reproductive rights extend to other rights like the right to life, the right to liberty and security of the person, the right to equality and non-discrimination, the right to privacy, the right to freedom of thought, conscience, and religion, the right to information and education, the right to choose whether or not to marry and to found a family, the right to decide whether or when to have children, the right to health care and health protection, the right to the benefits of scientific progress, the right to freedom of peaceful assembly and political participation and the right to be free from torture and ill-treatment (Haslegrave, 2006; Miller & Roseman, 2011). Some scholars also believe that reproductive rights contain the rights to privacy, liberty, physical integrity, non-discrimination, and health (Zampas and Gher,2008). Some important points must be mentioned here about these two perspectives.

First, in the second view, some scholars declared that some rights like liberty and privacy are a part of reproductive rights, but it is better to say that enjoying reproductive rights depends on some rights like the right to life or freedom. It means that making reproductive decisions, in particular, is derived from the fundamental human right to liberty, and the right to life or freedom is the basis of reproductive rights. Second, the two viewpoints discuss some aspects of reproductive rights, but not all of them. The author intends to say these two views have failed to consider many issues linked to reproductive rights.

By reviewing the legally binding international covenants and treaties and their interpretations by the relevant treaty monitoring committees, we determine the content and scope of reproductive rights. It must be mentioned that the content of reproductive rights covers two sub-levels: positive and negative aspects.

The Universal Declaration of Human Rights declared that: '*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and find a family ...*' (Art. 16/ 1).

It appears to advance the claim that every person is entitled to reproductive rights because founding a family includes reproductive rights and bearing a child or not bearing a child or more. A core challenge for the Universal Declaration of Human Rights on reproductive rights is the ambiguity of the definition of reproductive rights and their aspects. The phrase "founding a family" is unclear and cannot cover all aspects of reproductive rights. Scholars have different ideas about reproductive rights and their positive and negative aspects. Some scholars believe that reproductive rights include bearing or not bearing a child (Brock,2002). Others believe that reproductive rights consist of bearing a child, not bearing a child, and having a child with special characteristics (Blank,1997). It looks that this article of the Universal Declaration of Human Rights only makes mention of the positive aspect of reproductive rights. Although there are diverse families, the phrase seems to refer to extending a family by bearing a child or children. In some families, the right to marry is enough to form a family, but in others, it seems that establishing a family needs to bear a child or children.

Subsequently, in Article 10 of the International Covenant on Economic, Social and Cultural Rights, the United Nations has agreed that:

"The State's Parties to the present Covenant recognize that:

1. ... Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During the said period, working mothers should be accorded paid leave or given leave with adequate social security benefits" (Art. 10/ 1 & 2).

To some extent, we find some aspects of reproductive rights, such as reproductive health and having a child in them.

The covenant similarly ignored many aspects of reproductive rights and could not define reproductive rights. It means that, in the same way, the ambiguity of nature, definition, and aspects of reproductive rights is an important epistemological challenge of this covenant. Although these documents must have been able to establish legal foundations for these claims in the area of human reproduction, they could not provide adequate legal grounds to justify such claims.

It seems that the International Covenant on Civil and Political Rights has drawn attention to reproductive rights in two below parts:



1. *'Sentence of death ... shall not be carried out on pregnant women'* (Art. 6/ 5).
2. *'The right of men and women of marriageable age to marry and find a family shall be recognized'* (Art. 23/ 2).

The convention authors confirm that "founding a family" is an aspect of reproductive rights. Founding a family has two parts: founding a spouse and bearing one child or more or not bearing a child. It must be mentioned that this Convention indicates the right to marriage in Note 2 of Article 23, not reproductive rights because we can see many other kinds of families that do not have any children.

The next document in this area is the Convention on the Elimination of All Forms of Discrimination against Women. This Convention illustrates its viewpoint in two articles about reproductive rights (Art. 12 and 16):

Article 12 of the Woman's Convention acknowledges that every woman and man has the right to healthy reproduction. The healthy reproductivity right is the most important aspect of reproductive rights. Although the Convention declares the right to healthy reproductivity, it does not define and describe it. It only refers to the accessibility to free reproductive health care services, the time of health care services, and adequate nutrition during pregnancy and lactation.

In Article 16, the Convention proclaimed and agreed that there are the same rights and responsibilities during marriage for men and women. One of these rights is the reproductive right, but these instruments do not mention it directly. It means that you can understand the meaning of this sentence. In this part, the Convention accepts the validity of reproductive rights as a whole. This viewpoint is confirmed by the next part: *"The same rights and responsibilities as parents"*. All of these sentences refer to the reproductive right indirectly. In Note (e), the Convention announced reproductive freedom by expressing these words: "deciding freely and responsibly on the number and spacing of their children". Another point in this act, included in reproductive rights' content, is "accessibility to the information, education and means to enable them to exercise these rights".

In Note (f), we can see "adoption of children" as one way of having a child. This way is recommended, especially in Christianity, and it is a legal and normal process that happens in every society except in Islamic countries.

In Article 17 of the Convention on the Rights of the Child, “well-being and physical and mental health”, in Article 23 “access to and the receiving of an education, training, health care services” and in Article 25, “protection or treatment of his or her physical or mental health” are professed and “reproductive health” and “accessibility of reproductive health care service and education” can be involved in these three phrases.

In Article 24, we can see that all the sentences also confirm the two aspects mentioned above of reproductive rights.

In the Convention on the Rights of Persons with Disabilities, we can find two articles related to reproductive rights: Articles 23 and 25.

The Convention urged for a right-based approach in Article 23 about reproductive rights by taking into account ‘founding a family’, ‘deciding freely and responsibly on the number and spacing of their children’, ‘accessibility to age-appropriate information, reproductive and family planning education’, ‘retaining fertility disabilities on an equal basis with others’, ‘adoption of children’ and ‘assistance to persons with disabilities in the performance of their child-rearing responsibilities’ as aspects or content of reproductive rights.

In Article 25, the Convention announced other aspects of reproductive rights such as ‘reproductive health’ and ‘providing these health services and health professionals’.

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination states two aspects of reproductive rights:

1- ‘The right to public health, medical care, social security, and social services and

2- ‘The right to marriage and choice of spouse’. These two aspects are indirectly related to reproductive rights because the right to public health care embraces reproductive health care and the right to marriage is related to founding a family”.

It seems that the authors of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in Articles 28 and 70 supposed that reproductive health, as a part of public health, is the right of all migrant workers and the members of their families and in Article 43, they declared other aspects of reproductive rights: ‘Accessibility to social and health services’.

In addition to these treaties mentioned above, treaty-monitoring bodies’ interpretations and jurisprudence have also played an important role in understanding and describing the content and scope of reproductive rights



because each of the major international human rights treaties establishes a committee to monitor their compliance with it. So, ‘general comments’ or ‘general recommendations’ of these committees help us define and recognize aspects of reproductive rights in detail and States’ obligations to respect, protect and fulfill those reproductive rights enshrined in particular treaties. If the content and scope of reproductive rights are defined in general comments or recommendations, they will have enormous potential to influence national laws.

**Table 1. Aspects (content and scope) of reproductive rights in the general comments or recommendations**

Aspects (content and scope) of reproductive rights	General Comments or recommendations
Equality of rights and responsibilities of spouses as to marriage, during the marriage (in childbearing)	General Comment No. 19 (1990) of Human Rights Committee (CCPR)
The possibility to procreate	<p>General Comment No. 19 (1990) of the Human Rights Committee (CCPR)</p> <p>General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)</p> <p>General comment No. 4 (2003), No. 9 (2006), No. 14 (2013), No. 15 (2013) of Committee on the Rights of the Child (CRC)</p>
Reproductive health	<p>General comment No. 1 (2014), No. 2 (2014), No. 6 (2018), No. 7 (2018) of the Committee on the Rights of Persons with Disabilities (CRPD)</p> <p>General recommendation No. 15 (1990), No. 24 (1999), No. 27 (2010), No. 28 (2010), Joint general recommendation No. 31 (2014), No. 33 (2015), No. 35 (2017), No. 36 (2017), No. 37 (2018) of the Committee on the Elimination of Discrimination against Women (CEDAW)</p>

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	General Comment No. 22 (2016), No. 14 (2000) of Committee on Economic, Social and Cultural Rights (CESCR)
	General Comment No. 2 (2008) of Committee against Torture (CAT)
	General comment No. 15 (2013) of the Committee on the Rights of the Child (CRC)
Reproductive freedom	General comment No. 1 (2014), No. 5 (2017), No. 6 (2018) of the Committee on the Rights of Persons with Disabilities (CRPD)
	General comment No. 1 (2011) of Committee on Migrant Workers (CMW)
	General recommendation No. 19 (1992), No. 21 (1994), No. 36, No. 37 (2018) of the Committee on the Elimination of Discrimination against Women (CEDAW)
	General Comment No. 22 (2016), No. 14 (2000) of the Committee on Economic, Social and Cultural Rights (CESCR)
	General Comment No. 2 (2008) of the Committee against Torture (CAT)
	General comment No. 3 (2003), No. 4 (2003), No. 11 (2009), No. 12 (2009), No. 14 (2013), No. 15 (2013), No. 21 (2017) Draft General Comment No. 25 (2020), Joint general comment No. 4 (2017) of the Committee on the Rights of the Child (CRC)
Accessibility to a whole range of reproductive health facilities, goods, services, resources, education and information	General comment No. 6 (2018) of the Committee on the Rights of Persons with Disabilities (CRPD)
	General comment No. 2 (2013), No. 4 (2017) of the Committee on Migrant Workers (CMW)
	General recommendation No. 21 (1994), No. 24 (1999), No. 26 (2008), No. 28 (2010), Joint general recommendation No. 31 (2014), No. 34 (2016), No. 35 (2017), No. 37 (2018) of the Committee on the Elimination of Discrimination against Women (CEDAW)

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Availability of reproductive health care facilities, services, goods and programs, female trained medical and professional personnel and skilled providers	General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)
	General recommendation No. 37 (2018) of the Committee on the Elimination of Discrimination against Women (CEDAW)
Affordability of publicly or privately provided reproductive health services	General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)
Guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women	General Comment No. 16 (2005) of Committee on Economic, Social and Cultural Rights (CESCR)
Fertility and reproductive autonomy	General comment No. 6 (2018) of the Committee on the Rights of Persons with Disabilities (CRPD)
Founding a family	General comment No. 6 (2018) of the Committee on the Rights of Persons with Disabilities (CRPD)

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All of the aspects of reproductive rights which were mentioned in the international covenants and treaties and their interpretations can be categorized into these groups:

**Group one-** Reproductive freedom, which includes deciding freely and responsibly on the number and spacing of their children, the possibility to procreate, fertility and reproductive autonomy, founding a family, adoption of children, and having a child or not.

**Group two-** Equality of rights and responsibilities of spouses as to marriage, during the marriage (in childbearing)

**Group three-** Reproductive health, which is divided into four groups, is as follows:

A- Accessibility to a whole range of reproductive health facilities, goods, services, resources, education, and information

B- Availability of reproductive health care facilities, services, goods, and programs, trained female-trained medical and professional personnel, and skilled providers



C- Affordability of publicly or privately provided reproductive health services

D- Guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.

The important note is that reproductive rights encompass many aspects that are not mentioned in these documents and their interpretations. For example, deciding on the characteristics of every person's child is an aspect of reproductive rights that had not been revealed in these documents.

We can envision three aspects of reproductive rights:

1- Maternal and child physical and mental health policies: It must be mentioned in this part that health policy is a central aspect of reproductive rights since most governments' positive obligations in the area of reproductive rights have been realized and or imposed. Policymakers in every country play a significant role in changing people's behavior to improve their lives. In this way, policymakers apply different kinds of policy instruments to achieve this goal, such as giving people enough information about the country's healthcare system and other issues related to health, especially reproductive health, enacting specific and perfect laws about reproductive rights, and reproductive health, conducting research into reproductive health for making the best policy on it, taxation and investment, and budget allocation.

2- Reproductive freedom in making decisions: In this section, we have three important aspects:

A- Positive aspects of reproductive rights (bearing a child). This aspect encompasses some ways of having a child, such as ARTs (Assisted Reproductive Technology), surrogacy, human reproductive cloning, reproductive organ transplant, and adoption. In addition to these ways, there are two important points: The goals of childbearing and the quality of childbearing. In the first aspect, it is possible to discuss helping with the medical treatment of the next child and relieving the pains of the first child's death as some probable goals of having a child. In the quality of childbearing, the number of wanted children, birth spacing, considering some spiritual and material characteristics or aspects (a healthy or unhealthy child), time of childbearing, sex selection, women's preferences of the method of delivery (Cesarean Section or vaginal delivery), and the parents' preferences in raising children are considered.

B- Negative aspects of reproductive rights. This aspect includes contraception, sterilization, and abortion.

C- Reproductive cell and tissue donation, banking, and their usage for human medical applications or scientific research purposes.



After stating these points, we can then discern the difference between the content and scope of reproductive rights and some other factors which have affected them, such as physical factors (They involved age, physical disabilities, and diseases), mental factors, marriage, civil cohabitation, and marital status, the dissolution of the marriage or cohabitation, cultural factors (such as religion, race, entity, and access to information, drug or alcohol addiction, criminal record, nationality, rights of other and confliction with their rights (these persons include the spouse, fetus, child, other participants in assisted reproductive techniques and the medical practitioner).

### **Right holder and duty bearer of reproductive rights**

It is time to address the next important questions: who enjoy reproductive rights or is the right-holder of reproductive rights, and who bears the correlative duty?

Regarding the first question, it must be said that only natural persons can enjoy reproductive rights, not legal persons. In the theories described above, only natural persons can enjoy reproductive rights. According to the first and the third theory, all natural persons can enjoy this right; however, based on the second theory, only adult human beings have this right, not children and animals. By considering international human rights treaties or instruments, special focus is placed on the fact that every person, such as adults and children, women and men, disabled and healthy, immigrant and citizen, and minority and majority has reproductive rights.

The answer to the second question, due to the aforementioned theories, is that the duty, in this dominion, is one carried out by all natural or legal persons such as the government, so we can imagine, for a government, two obligations that require that it does not interfere with or coerce another to reproduce, or not reproduce, and to provide equal opportunity for people to enjoy reproductive rights and to make easy access to facilities which are needed in natural childbearing and fertility treatments available and also natural persons have been obliged not to interfere with another's reproductive rights. Therefore, this sentence means that reproductive rights are '*in rem rights*', which means duty bearers are not special persons, instead duty bearers are all individuals and all kinds of persons.

The last vital note is that international human rights instruments, states and their governments, intergovernmental organizations, and non-state actors are the main duty bearers in the realm of reproductive rights.

## States' Obligations in the Context of reproductive rights

In this area, conventions impose a duty under international law to respect, protect, and fulfill the reproductive rights articulated there. There are more specified and detailed obligations in committees' general comments and general recommendations. Thus, we can picture these obligations better in the following table:

**Table 2. States' obligations within the realm of reproductive rights in the conventions and their general comments or recommendations**

States' obligations	The conventions/ General Comments or recommendations
Refraining from directly or indirectly interfering with the exercise by individuals of the right to reproductive health	General Comment No. 22 (2016)/ No. 14 (2000) of the Committee on Economic, Social and Cultural Rights (CESCR)
Refraining from limiting or denying anyone access to reproductive health	General Comment No. 22 (2016)/ No. 14 (2000) of the Committee on Economic, Social and Cultural Rights (CESCR)
Respect	General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)
Refraining from enacting, laws and policies that create barriers in access to reproductive health services	General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)
Avoiding retrogressive measures	General Comment No. 22 (2016) of Committee on Economic, Social and Cultural Rights (CESCR)
Protecting mothers, especially working mothers, during a reasonable period before and after childbirth, such as paid leave or leave with adequate social security benefits	Article 10 of the International Covenant on Economic, Social and Cultural Rights
protect	Article 6 (5) of the International Covenant on Civil and Political Rights
Prohibiting from carrying out a death sentence on a pregnant woman	Article 6 (5) of the International Covenant on Civil and Political Rights
Taking appropriate steps to ensure equality of rights	Article 23 (4) of the International Covenant on Civil



and responsibilities of spouses as to marriage, during marriage and at its dissolution

Taking measures to prevent third parties from directly or indirectly interfering with the enjoyment of the right to reproductive health

Preventing any discrimination on internationally prohibited grounds in the provision of health care and health services

Ensuring to people (especially women and children) appropriate facilities, goods and services (such as safe abortion) in connection with reproductive health (pregnancy, confinement and the post-natal period), granting free services where necessary, as well as adequate nutrition during pregnancy and lactation

The compatibility of national provisions with the provisions of the covenant in adopting family planning policies and children's right to health

Providing detailed information concerning the

and Political Rights, General Comment No. 19 (1990) of the Human Rights Committee (CCPR)

General Comment No. 22 (2016); No.14 (2000) of the Committee on Economic, Social and Cultural Rights (CESCR)

Articles 12 (1) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women; General Comment No. 16 (2005) of the Committee on Economic, Social and Cultural Rights (CESCR); General Comment No. 15 (2013) of the Committee on the Rights of the Child (CRC)

Article 12 (2) of the Convention on the Elimination of All Forms of Discrimination against Women; General Comment No. 22 (2016) of Committee on Economic, Social and Cultural Rights (CESCR); General Comment No. 4 (2003) of the Committee on the Rights of the Child (CRC)

General Comment No. 19 (1990) of Human Rights Committee (CCPR); General Comment No. 15 (2013) of the committee on the Rights of the Child (CRC)

Article 17/ 23 (4) of the Convention on the Child's Rights;

fulfill

nature of such measures and the means and sexual and reproductive health

General comment No. 11 (2006), No. 14 (2013); Draft General Comment No. 25 (2020) of the Committee on the Rights of the Child (CRC); General Comment No. 19 (1990) of the Human Rights Committee (CCPR); General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)

Adopting appropriate legislative (such as liberalizing restrictive abortion laws), administrative, budgetary (available through international assistance and co-operation), judicial, promotional measures as well as other measures to ensure the full realization of the right to reproductive health

Comment No. 22 (2016)/ No. 14 (2000) of the Committee on Economic, Social and Cultural Rights (CESCR)

Guaranteeing physical and mental health care for survivors of sexual and domestic violence in all situations

General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)

Ensure that health care providers are adequately trained and equitably distributed throughout the state

General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)

Providing age-appropriate, evidence-based, scientifically accurate comprehensive education for all about sexual and reproductive health

General Comment No. 22 (2016) of the Committee on Economic, Social and Cultural Rights (CESCR)

Eliminating discrimination against individuals and groups

General Comment No. 22 (2016) of the Committee on



## Economic, Social and Cultural Rights (CESCR)

Removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care based on equality

General Comment No. 16 (2005) of the Committee on Economic, Social and Cultural Rights (CESCR)

Providing those who do not have sufficient means with the necessary health insurance and healthcare facilities

General Comment No. 16 (2005) of the Committee on Economic, Social and Cultural Rights (CESCR)

Identifying situations such as deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence and the measures taken to punish and prevent them in their reports

General Comment No. 2 (2008) of the Committee against Torture (CAT)

Providing adolescents with disabilities with adequate, and where appropriate, disability-specific information, guidance and counseling and fully take into account the Committee's general comments No. 3 (2003) on HIV/AIDS and the rights of the child

General comment No. 9 (2006) of the Committee on the Rights of the Child (CRC)

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Although these human rights documents and their general comments or recommendations are not legally binding, they can affect domestic laws and are often used to support policy reform and interpretations of national and international law. Therefore, there are some important arguments in this part: The definition and nature of these obligations, the kinds of obligations, the quality of imposing these obligations on states, and the quality of performing these obligations by a state's parties. In this part, we attempt to explain these points briefly.

The first fact concerns the division of obligations into positive and negative obligations and their nature. It seems that 'negative obligations', parallel to state 'abstaining', were regarded as a means of fulfilling civil and political rights, while 'positive obligations' correspond to state 'assistance', which have been considered a means of fulfilling economic, social, and cultural rights. In line with this thinking, both positive and negative obligations can be conceived as a means of fulfilling reproductive rights because, as mentioned earlier, we considered reproductive rights as both civil and political rights and economic, social, and cultural rights. However, we can claim that there is no reason for considering this division. This indicates that both obligations can be considered and applicable to every right without difficulties.

Moreover, the central element of exercising reproductive rights or other rights is the positive obligations because negative obligations also need actions to realize them. Refraining from interfering with and limiting reproductive rights requires some actions such as enacting, and providing information, budget, services, and other means. States must ensure respect for and protect reproductive rights by taking active steps. In my opinion, the fundamental nature of the obligations here involved only actions or engagements in the effective activities by states, not other things, because respecting, protecting, and fulfilling reproductive rights requires actions. By advocating this solution, we can hope that reproductive rights are better realized and that it will be possible for people to exercise and enjoy them.

The other chief point here is that states' obligations are divided into three groups: respecting, protecting, and fulfilling the conventions mentioned above. The conventions and their general comments and recommendations also appear to disregard access to any remedy as the obligations of states. Ruggie presented a framework (the 'Protect, Respect and Remedy' Framework) that clarified the respective roles of States and businesses (Anonymous, 2013). According to his opinion, victims of human rights violations by third parties or governments, or other organizations need easier access to grievance and sanctions procedures, both judicial and non-judicial (Anonymous, 2013), but in these conventions and their general comments or recommendations, no obligations exist which are cover this important part of reproductive rights. Other authors such as Erikson associated with him: *"This is undeniably an encouraging development, since the rape and other grave violations of women's reproductive rights under international humanitarian law committed all over the world have for centuries remained "the least condemned crimes" (Erikson. 2000).*

It is worth noting that the list mentioned above of obligations in these treaties and general comments or recommendations is not complete and cannot





encompass all of the obligations which have been required in the area of reproductive rights for them to be realized. It means that enjoying or exercising reproductive rights requires the imposing and performing of many more of these obligations by states. For states, picturing these obligations well can help them fulfill their obligations better. Through these conventions and their general comments or recommendations, the state's margin of appreciation is thus narrowed to an obligation to enact and apply effective criminal sanctions for respecting and protecting reproductive rights in their territory. So, taking an international standard into account cannot merely help them understand their obligations in the scope of reproductive rights. To put it another way, in this era, states must play new roles in making reproductive rights and other rights practical and effective as to how these legal obligations are fulfilled.

These two kinds of obligations must then be imposed on states worldwide. It requires an international power, but no definitive argument has been given about this power and the role of treaties and their international monitoring bodies in making it. In other words, if we view this point from the perspective of the right-holder, it will be better for them to know about states' obligations and the quality of fulfilling these obligations in the realm of reproductive rights. Consequently, there must be a common universal standard to fulfill legal obligations.

The last point involves the quality of fulfilling these obligations by a state's parties. In other words, we must see this topic from the states' viewpoints. States did not originally agree to be bound by such new obligations. An insufficient justification for imposing these positive obligations upon states may increase concerns because the imposition of these obligations can sometimes cause conflict between domestic authorities regarding international standards in the scope of reproductive rights. Therefore, considering these conflicts can help us propose some positive obligations that most countries can do. By way of explanation, in this area, we need perfect and general standards for defining and describing states' obligations in this argument.

## **Conclusion**

The lack of clarity of the concept, content, and scope of reproductive rights in the area of the documents on human rights has rendered these reproductive rights, recognized and guaranteed by those legal documents, ineffective. As a result, in the eyes of domestic law, exercising reproductive rights is made more complicated and complex; thus, little has been done to date to improve reproductive rights. In addition to the problem mentioned above, more funds

are required for improving these rights. Moreover, these strategies also varied from country to country. In this paper, through a critical view, we try to explain the ambiguous aspects of reproductive rights.

Although some scholars believe that ICPD defines reproductive rights, it is not a definition, and it describes only some aspects of reproductive rights. The nature of reproductive rights is neither clear nor discussed in international law. For understanding their nature, we can refer to Hohfeld's theory about right, the Will-Choice Theory, and the Benefit-Interest Theory.

Suppose reproductive rights are considered civil and political rights and economic, social, and cultural rights. In that case, they can be a Hohfeldian claim right, but the important point is that in the viewpoint of some scholars, it does not have any function for the right holder.

There are some challenges in describing reproductive rights in the Will-Choice Theory, such as the ambiguity of the concept of sovereignty, the roots of imposing duties, the lack of basic human rights for incompetents, and a government's neutrality and similarly, there are some problems with Benefit-Interest Theory such as ignoring equality, the lack of measuring of profits and losses, the ambiguity of the notion of interest and using this theory for considering human reproduction as a duty.

Although international human rights treaties or instruments directly or indirectly address the content and scope of reproductive rights, the content and scope of reproductive rights remain debatable in international law. It seems that all human rights documents have similarly ignored many aspects of reproductive rights and have been unable to define reproductive rights. According to the above-mentioned theories, only natural persons can enjoy reproductive rights, not legal persons and the duty in this dominion is one borne by all natural or legal persons such as the government.

Finally, there are some important arguments about states' obligations, such as the definition and nature of these obligations, the kinds of obligations, the quality of imposing these obligations on states, and the quality of performing these obligations by states' parties. The ambiguity of these concepts is one of the factors that makes the realization of reproductive rights difficult.

### **Ethical Considerations**

**Ethical considerations of the research:** There is no ethical approvals.

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**Authors' contribution:** I contributed to the conception and design and data collection. Then I edited and approved this paper's final version for submission.



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