

## Can the right to health entail the right not to be pregnant?

### Abstract

Pregnancy and childbirth have tremendous health consequences. It is contended that the intersection of ICESCR's Article 3 obligation to ensure that men and women enjoy the rights of the covenant equally and the Article 12 obligation to ensure everyone enjoy the highest attainable standard of physical and mental health can create a legal obligation of States to ensure that women can choose whether or not to be pregnant. To construct such a narrative, it must be explored whether or not pregnancy can be considered a condition, as defined by current jurisprudence on the right to health.

### Research context:

Pregnancy and subsequent childbirth, wanted or unwanted, has a potentially detrimental effect on the health of a woman: postpartum depression, fatigue, pain with intercourse, difficulties with bowel movements, gestational diabetes, hypertension and pregnancy sickness.<sup>1</sup> In young mothers, there is a higher risk of maternal death, depression and anxiety as well as a connection to poor nutritional status pertaining to health of both mother and child.<sup>2</sup> Additionally, cases of pregnant women being denied healthcare treatment unrelated to their pregnancy but pivotal to their overall health further emphasise how pregnancy can be a condition detrimental to the health of a woman.<sup>3</sup> Abortion restrictions have severe health consequences in the form of unsafe abortions, with effects ranging from death to permanent disabilities. Article 12 requires States to "...recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...", considering the above mentioned consequences it is argued that pregnancy is a state that interferes with this enjoyment.

The CESCR has emphasised the immediacy of the remedial of any discriminatory violation of a right under the ICESCR.<sup>4</sup> Following this, it is contended that by employing Article 3 and interpreting restrictions of women's reproductive right as an infringement on their right to attain the same standard of health as their male counterparts, a legal basis for the immediate realisation of the right not to be pregnant could be constructed.

The concept of pregnancy as a condition is not a new notion, as noted by the dissent in *Beal v Doe*: "Pregnancy is unquestionably a condition requiring medical services. Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy

<sup>1</sup> Carolyn R. Kline, Diane P. Martin & Richard A Deyo, "Health Consequences of Pregnancy and Childbirth as Perceived by Women and Clinicians" (1998) 92(5) *Obstetrics & Gynecology* 842; Centers for Disease Control and Prevention 'Pregnancy Complications' <<https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm>> (14 December 2016)

<sup>2</sup> UNFPA 'Programme of Action - Adopted at the International Conference on Population and Development, Cairo' (September 1994) UN Doc E/25,000/2004 [36]; CRC General Comment 4 (n 61) [27]; WHO (n 68) 39

<sup>3</sup> UN Committee on the Elimination of Discrimination against Women, 'L.C. v Peru' Comm No. 22/2009 (17 October 2011) UN Doc CEDAW/C/50/22/2009; "Amelia, Nicaragua, Precautionary Measures" (February 26, 2010) MC 43-10

<sup>4</sup> UN Committee on Economic Social and Cultural Rights 'General Comment 20' (2 July 2009) UN Doc E/C.12/GC/20

to term, resulting in a live birth.”<sup>5</sup> Yet pregnancy as a condition and not an inevitable consequence of being a (sexually active woman) is not a prevalent notion legally or socially.<sup>6</sup>

By constructing pregnancy as a condition, it is argued that access to abortion and contraception can both be guaranteed under Article 12 (as curative and preventative care, respectively). Additionally, there is the potential of such a definition addressing a dangerous rhetoric surrounding women’s pregnancies that seems to place the pregnancy experience outside the medical framework with women experiencing lack of professional and factual support in cases of pregnancy sickness.<sup>7</sup> If pregnancy was considered to fall under the legal definition of a condition and not just an unavoidable consequence of being a woman, the subsequent neutrality of both abortion and contraception may help facilitate a rhetoric of reproductive health as an issue pivotal to not only women’s health (a historically neglected area) but to health overall. This would require all medical professionals to be able to perform abortions and have the knowledge required for reproductive health. In constructing such an argument, instances of Courts, seen in the US case *Gonzales v Carhart*, relying on faulty medical opinions may be reduced.<sup>8</sup>

Parenthetically, pregnancy as a health condition may assist in the increasing number of cases of pregnant transmen struggling to access healthcare adapted for both their status as men. Issues with gendered healthcare records and inability to access factual health information, including guidance as to the possibility of chestfeeding, leaves them outside the prenatal healthcare system.<sup>9</sup>

In *Mellet v Ireland* the Irish State argued that the factual biological differences between men and women could not be basis for triggering the obligation to non-discrimination. However, Sarah Cleveland in her dissent contended that non-discrimination must address the separate needs of each sex: “Ireland’s near-comprehensive criminalization of abortion services denies access to reproductive medical services that only women need, and imposes no equivalent burden on men’s access to reproductive health care.”<sup>10</sup> Additionally, it is beneficial to this argument to explore healthcare law regarding other conditions that are biological realities for some groups but not others including hereditary diseases.

The right to an active and safe sex life has been considered a part of Article 12 by the Special Rapporteur on the Right to Health.<sup>11</sup> Yet, American insurance companies’ rhetoric surrounding female contraception (“a lifestyle drug”) and viagra (“necessary to treat medical dysfunction”) epitomises the faulty notion that women’s potential to be pregnant does not affect their ability to enjoy their sex life and the difference between the intersection of medical matters and men and women’s sexuality.<sup>12</sup>

<sup>5</sup> *Beal v Doe* 432 U.S. 438 (1977), 449

<sup>6</sup> Hilary Hammell, “Is the Right to Health a Necessary Precondition for Gender Equality” (2011) 35(1) University Review of Law & Social Change 145

<sup>7</sup> Finn, Christina, “I was getting sick all day when I was pregnant. The doctor told me to have cold milk and Rice Krispies”, *The Journal*, 16 January 2016.

<sup>8</sup> Yvonne Lindgren, “The Rhetoric of Choice: Restoring Healthcare to the Abortion Right” (2013) 64 *Hastings Law Journal* 385, 404

<sup>9</sup> Anthony P. Berger, Elizabeth M. Potter, Christina M. Shutters, & Katherine L. Imborek, “Pregnant transmen and barriers to high quality healthcare”, (2015) 5(2) *Proceedings in Obstetrics and Gynecology*, 6.

<sup>10</sup> UN Human Rights Committee ‘Mellet v Ireland’ UN Doc CCPR/C/116/D/2324/2013 (9 June 2016)

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<sup>11</sup> UN Human Rights Commission ‘The right of everyone to the enjoyment of the highest attainable standard of physical and mental health - Report of the Special Rapporteur, Paul Hunt’ (16 February 2004) UN Doc. E/CN.4/2004/49 [7.2]

<sup>12</sup> Lisa A. Hayden, “Gender Discrimination within the Reproductive Health Care System: Viagra v. Birth Control” (1999) 13 *Journal of Law and Health* 171, 183

Following this right, it is argued that there is not only a right to contraception, but a right to access contraception. The UN has estimated that 22% of women with partners in certain countries lack access to contraception.<sup>13</sup> The current debates regarding emergency contraception in the United Kingdom make the construction of this right particularly relevant.<sup>14</sup>

In the context of socioeconomic rights, it also important to note that an unwanted pregnancy in a woman will exacerbate circumstances of poverty in a way that it will not necessarily in a man, providing an additional perspective on gender equality. As seen in *Minister of Health v Treatment Action Campaign (No 2)* such an interpretation would mean that the argument of restrained resources, a limitation of the socioeconomic right spectrum, could be rejected.<sup>15</sup> Demonstrations of successfully constructing the right to access abortion from the right to health include Mexico's law reform which, on the basis of equal access, now means public hospitals provide free abortions.<sup>16</sup>

### **Research questions:**

Under the criteria of Article 12 can pregnancy be defined as a condition requiring healthcare in prevention or response? If so, what potential downsides to there are in constructing pregnancy within such a context, such as defining prenatal care outside the realm of women's healthcare or consequences for pregnancy discrimination laws?

Do contraception and abortion fall under the criteria of healthcare as set out by bodies such as the CESCR? Additional questions to explore include if under the right to health there are sexual rights which entail the right to safe sex? If so, is the fact that men can exercise their sexual rights without the possibility of unwanted pregnancy a basis for the triggering non-discrimination obligations such as Article 3 of the ICESCR? These questions ultimately explore the intersection of Article 3 and Article 12 of the ICESCR: if women are not granted access to mechanisms that allow them the same status of non-pregnancy as men, can a State really be fulfilling its obligation to ensure the highest attainable standard of health for its citizens?

Parenthetically, the framework of socioeconomic rights does not exclude the consideration of fetal rights arguments. These arguments need to be addressed, as they have not been entirely dismissed by the ECtHR, and are used vehemently in anti-choice rhetoric as well as enshrined in the constitutions of some States. Within the socioeconomic rights framework, the question becomes: if pregnancy is considered a medical condition of the woman, are there ever circumstances where the individual right to health needs to be weighed against a fetal right to life? Judgements such as that of the Colombian Court, where it was found unreasonable for a person to sacrifice their own health to protect the constitutionally protected fetal rights need to be explored in light of judgements such as the ECtHR's *Paton v UK* which did not necessarily exclude the relevance of fetal rights.<sup>17</sup>

### **Research Methods:**

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<sup>13</sup> UN Economic & Social Affairs, "Trends in Contraceptive Use Worldwide 2015" (2015) <<http://www.un.org/en/development/desa/population/publications/pdf/family/trendsContraceptiveUse2015Report.pdf>> 2.

<sup>14</sup> British Pregnancy Advisory Service, "Just Say Non" (2015) <<http://www.justsaynon.org.uk/>>

<sup>15</sup> Mehlika Hoodbhoy, Martin S. Flaherty and Tracy E. Higgins, "Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya" (2005-2006) 29 Fordham International Law Journal, 28

<sup>16</sup> Hilary Hammell, "Is the Right to Health a Necessary Precondition for Gender Equality" (2011) 35(1) University Review of Law & Social Change, 152

<sup>17</sup> Hammell (n 16) 151

To fully grasp how health, the right to health and the right to healthcare are defined within this context, the CESCR's opinions on reproductive health and gender equality will be examined along with relevant case law on the extent of State obligation to realise the right to health.

Examining the existing case law from international human rights bodies, regional bodies and national bodies will give a comprehensive view on the current legal conceptualisation of women's right not to be pregnant. Additionally, the different States' laws on abortion as well as healthcare policies on the costs of abortion, contraception and prenatal care are of relevance.

As this research aims to re-conceptualise the definition of pregnancy, to examine the implications of such an interpretation it will also be relevant to examine laws pertaining to employment, discrimination and sexual rights. For an encompassing view of the women's reproductive health it is necessary to consult medical texts and relevant works of policy; studies on healthcare statistics and how guidelines and law reform affect the actions of healthcare professionals are particularly relevant.

### **Significance of research:**

Establishing a concept within the right to health can have immense importance for future policies. The core obligation of the right to health is the equal distribution of healthcare, thus ensuring the substantive right not just to choose abortion or pregnancy but to access treatment. This is of particular relevance for cases where woman can not afford services such as contraception or prenatal care. The reality of women's health worldwide means such a shift is pivotal: 830 women per day are estimated to die from causes relating to pregnancy, unsafe abortion and childbirth.<sup>18</sup> With shifts towards attempts in restricting the right to abortion, seen in the U.S.<sup>19</sup> and Europe<sup>20</sup>, women's access to reproductive healthcare is more important than ever. The emergence of the Zika virus in Latin America, a continent with restrictive tendencies towards contraception, has further emphasised a need to ensure a legal protection for women to determine when and under what circumstances they want to be pregnant. With many women unable to access or afford contraception constructing within the right to health contraception not only as a preventative measure to reduce the need for the curative care of unsafe abortion treatment, but also a measure to prevent the condition of pregnancy, it is possible to create legal pressure for States to ensure free contraception for their citizens. Constructing contraception and abortion within this framework could mimic the success of the enabling access to HIV medication within the right to health.

Fundamentally, conclusions on pregnancy within the right to health can facilitate a remedy towards the gender inequality that exists within healthcare; by constructing pregnancy, a condition that is inherent to women and effects them to various degrees of severity, within a legal right to health, a more comprehensive narrative on women's health is enabled.

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<sup>18</sup> WHO, "Maternal Mortality Fact Sheet" (2016) <<http://www.who.int/mediacentre/factsheets/fs348/en/>>

<sup>19</sup> *Whole Women's Health v Hellerstedt* 579 U.S. (2016)

<sup>20</sup> Katarzyna Wojnicka, "Masculist groups in Poland: Aids of mainstream antifeminism" (2016) 5(2) *International Journal for Crime, Justice and Social Democracy* 36

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