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## REPRODUCTIVE RIGHTS OF WOMEN: LAW AND JUDICIAL RESPONSE

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**Abstract:** Reproductive rights may include some or all of the following: the right to legal and safe abortion; the right to birth control; freedom from coerced sterilization and contraception; the right to access good-quality reproductive healthcare and informed reproductive choices. Reproductive rights may also include the right to receive education about sexually transmitted infections and other aspects of sexuality, and protection from practices. The courts in India through various decisions had made it clear that though women enjoy a right to reproductive choice, subjected to other laws depending on the circumstances. This research paper discusses the existing laws and the extent of the rights of women to reproduce under such laws and the judicial response on the aforesaid rights of women are analysed.

**Keywords:** Reproductive rights, sterilisation, diagnostic, pre-natal, abortion.

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**Introduction:** The right to free choice in the matters of sexuality and reproduction has been regarded as integral part of human rights. The right to free choice of marital partner and motherhood is a fundamental value of democratic secular society which is sometimes put into question on religion, health, bio-ethics, ideological and other grounds. Free choice must be seen in the context of social health and legal policies concerning marriage, pregnancy, abortion, sex education etc. From human rights perspective, reproductive choice requires the protection of women's body integrity and health and the provision of means to achieve it.

**International Scenario:** At the international level, firstly and at foremost state there is WHO, this clearly states in the preamble of its constitution that it is the fundamental right of every human being to enjoy the highest attainable standard of health. The term 'health' in its ambit includes women's right to reproductive health mostly their biological arrangement and child bearing capacity. By the virtue of Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". Then there is the Universal Declaration of Human Rights, 1948, which under Article 16(1) and Article 25 states that, every individual has the right to give birth in order to start a family. It is a basic human right which has universal application. Further everyone has the right to a standard of living sufficient for the health and well being of himself and of his family. The International Covenant on Economic, Social and Cultural Rights, 1966, under Article 12 (1) have agreed to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health of the member states. Article 12 (2) of the Protocol provides that the steps to achieve this right, in particular with regards to, the right to reproductive health, shall

include those stated in, Article 12 (2) (a), that is, the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; and Article 12 (2) (d), that is, the creation of conditions, which will assure to all medical services and medical attention in the event of sickness. Together Article 11, Article 12 and Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979, provides that the States shall without any discrimination on the basis of sex shall take necessary health-care measures, which guarantees the access to information, counseling and services with family planning is available to all women in equality with men. With regard to the right to procreate the Cairo Programme of Action 1994, states that "Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to all to make decision 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." The Beijing Conference of 1995, under Article 17 provides that all women have the right to control all aspects of their health, especially when it comes to 'fertility', as it is one of the characters of their empowerment. The Maternity Protection Convention, 2000, under Article 3 states that all the Member States shall adopt necessary measures in order make sure that pregnant women or feeding mothers are not made to do any work which shall negatively affect their health or the health of the

child. The Convention under Article 4 further states that all the women to whom the Convention applies will be entitled to maternity leave of not less than 14 weeks only on production of appropriate documents which are approved by the local law of the particular State. The Convention on the Rights of Persons with Disabilities, 2006, ensures that by giving directions to all the Member States shall provide to all the persons with disabilities without any discrimination, the right to enjoyment of the high quality achievable health standard particularly reproductive and sexual health.

**Indian Scenario:** In common language 'procreation' means to produce offspring. The General Clauses Act, 1897, under Section 3 (65), 'reproducing' means 'producing again'. According to Dorland's Illustrated Medical Dictionary, reproduction is defined as the production of offspring by organised bodies; the creation of a similar object or situation, duplication, replication and pregnancy is the condition of having a developing embryo or foetus in the body, after union of an ovum and spermatozoon. The period is 266 days from conceiving till delivery. The Indian Penal Code, 1860, under Section 312 defines abortion as, the delivery or expulsion of human foetus prematurely, that is, before it is yet capable of sustaining life. According to P. Ramanatha Aiyar's Concise Law Dictionary, 'criminal abortion' may be defined as, premeditated or intentional abortion procured, at any period of pregnancy, by artificial means, and solely for the purpose of preventing the birth of living child, the same not being necessary to save the mother's life. The Medical Termination of Pregnancy (MTP) Act, 1971 provides that women in India have a right to medically terminate her pregnancy if and when the pregnancies not exceeding 12 weeks on a opinion of one doctor formed in good faith and in case of pregnancies exceeding 12 weeks but less than 20 weeks, termination needs opinion of two doctors. If giving birth would cause unjust physical or mental harm to the women or, the child if born would be born with severe disabilities. In India Right to health has been recognised as a fundamental right and the term 'health within its ambit also covers 'reproductive health of women'. In the case of, **Kesavananda Bharti v. State of Kerala**, the Supreme Court of India held that, right to life implies right to a basic "healthy life" as provided under the Constitution of India, 1950. In order to regulate sterilization procedures in India, the Supreme Court of India, in the case of **Ramakant Rai & Ors v. Union of India & Ors**; issued following guidelines for the Government of India i) to introduce a system of having an approved panel of doctors which shall be allowed to carry out sterilization procedures in the State that panel should be prepared State-wise, District-wise and Region-wise; ii) the State Government shall prepare and circulate a check-list

which is made mandatory for every doctor to fill before carrying out sterilization procedure, iii) The check-list is to contain the following items: age of the patient, status of health of the patient, and the number of children the proposed patient has. iv) Doctors shall be prohibited from carrying out sterilization without filling the check-list; each State shall establish a Quality Assurance Committee, consisting of Director of Health Services, the Health Secretary and the Chief Medical Officer, for the purpose of not only ensuring that guidelines are followed in respect of pre-operative measures and operational facilities but also post-operative follow ups. The Quality Assurance Committee shall be duty-bound to publish reports of the number of persons sterilized, as well as the number of deaths / complications arising out of the sterilization; each State shall maintain, overall statistic regarding the number of sterilizations carried out, particulars of procedures followed (as there are different methods of sterilization), age of the patients sterilized, number of children the person sterilized has, number of deaths post-sterilization due to surgical complications, and number of persons incapacitated by reason of sterilization programmes; State shall bring to effect insurance policies regarding persons sterilized, to ensure (and secure) safety of health and general well-being of such persons; Union of India, to this effect shall prescribe a standard format. Despite the directions rendered regarding sterilization, situation in India continues to be dismal, for India is still ill-equipped technologically so far as measures concerning sterilization are concerned. The interface between the 'right to procreate' and the 'right to privacy' has long been a topic of contest in India. In the case of **Govind v. State of M.P.**, the Honorable Supreme Court of India authoritatively held that privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. Any right to privacy must encompass and protect intimacies of the home, the family, marriage, motherhood, procreation and child rearing. In case of **State of Punjab v. Shiv Ram & Others**, Apex Court awarded compensation to the respondent in the case of failed sterilisation. The said issue before the court was that the aggrieved couple who already had three children from their 17 year of wedding respond to a campaign carried by FWD. the wife with his husband's consent underwent a sterilization the certificate signed by the concerned doctor and an appropriate authority provided with Rs.150 as award for an operation. But in 1992 she gave birth to another child due to carelessness and negligence of the lady surgeon. In the case of **Suchita Srivastava & Anr v. Chandigarh Administration**, made the following important observation- "There is no doubt that a woman's right to make reproductive choices is

also a dimension of “personal liberty”. The Supreme Court observed that the explicit consent of a woman categorized as ‘mentally retarded’ may not be a necessary condition for the termination of pregnancy. However, obtaining consent is an essential condition for the termination of pregnancy. The court observed that the victim had not given her consent to the termination of pregnancy. It is held that dilution of the requirement of consent would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. Coming to the exercise of *parens patriae* jurisdiction of the High Court in ordering the termination of pregnancy, it was held that the court should be guided by the best interest of the victim and not of the stakeholder. The judgment observes that victim would need care and assistance and that would entail some costs. But this could not be the ground for denying the exercise of reproductive rights. In **Air India v. Nargesh Meerza & Others**, the Supreme Court laid down that the rule could suitably be amended so as to terminate the services of an air hostess on third pregnancy provided two children are alive which would be both salutary and reasonable for two reasons. In the first place the provision preventing third pregnancy with two existing children would be in the large interest of health of the air hostess concerned as also for the good upbringing of children. Secondly, it will not only be desirable but absolutely essential for every country to see the family planning programme is not only whipped up but maintained at sufficient levels. The Apex Court further observed the women after bearing children would continue in service or if she would find difficulty in looking after her children, that is her personal matter and corporation had nothing to do with it. In these situations the reason given for imposing bar are neither logical nor convincing. The factors considered must have a close nexus to the nature of the organization and the duties of the employees. In **Javed v. State of Haryana**, the Javed decision invoked Supreme Court and High Court precedents to reinforce the point that a religious practice that is not an essential and integral part of practice of that religion is not protected by Art.12. Further the Constitution permits limitations on religious freedom for the preservation of public order, morality and health. Thereby, rendering Art. 25 inapplicable to a legislation in the interest of social welfare or reform which are obviously part and parcel of public order, national morality and collective health of the nation’s people. Though it is submitted that the above stated decision minimizes the Act’s negative impact on reproductive and political freedom and its harmful consequences for women and children-all of which violate not only fundamental rights but also directive principles and India’s international treaty obligations.

In **CEHAT & Others v. UOI**, the Supreme Court took a note of the fact that the law which aims at preventing the practice of sex selection and sex determination, it is not being implemented at all. Hence, after calling for data and compliance reports from both Central and State regarding the implementation of the Act the Supreme Court passed various Order from time to time and finally disposed the petition giving various directions to Central Govt., Central Supervisory Board, State Govt. and UT Administrations and Appropriate authority. In **Bashir Khan v. State of Punjab & Another**, the High Court declared that the victim of the rape who becomes pregnant should not lose time by applying from court to court there shall be general instructions given by the DGP to all the police station who register cases of rape and who came by the information that the victim has become pregnant to render all assistance to secure appropriate medical opinions and also provide assistance for the admission in government hospitals and render medical assistance as a measure of support to the traumatized victim. In the case of **Voluntary Health Association of Punjab v. Union of India & others**, despite of the fact that as early as in 2001 and 2003 the Supreme court had in those case of **CEHAT v. Union of India** issued several directions for proper implementation of the Act, as those directions were not complied with the various states, this writ petition was filed. The most important direction given in the decision is to take the steps to educate the people about the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the state and district levels. It was felt by the Apex court that the reason for non-implementation of the provisions of the Act was the failure on the part of the authorities to change mind sets that discriminated against women and girls. According to the court, in addition to the awareness of legal provisions what is necessary is the awareness in other spheres also. In other words of the court, women play a seminal role in the society and it is a requisite need of the present day that people are made aware that it is obligatory to treat women with respect and dignity. Hence, the court directed that a cosmetic awareness campaign would never serve the purpose. The people involved in the camps must take it up as a service a crusade. They have to equip themselves with Constitutional concepts culture, philosophy. Religion, scriptural commands and injunctions and the mandate of the law as engulfed under the Act. They should have boldness and courage to change the mindset of the people. Thus Indian Judiciary has been cognizant enough and very cautious in deciding in cases relating to women’s reproductive rights. This is well illustrated by the decision in Javed’s case to recent decisions in

Voluntary Health Association of Punjab v. Union of India and Others and Bashir Khan v. State of Punjab and Anr. Indian Courts and policy makers have consistently refuse to recognize that although the

goal of limiting population growth is a legitimate one, there is little justification for infringing the fundamental right of women to procreate, in order to achieve this end.

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