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# **“COMBATING STEREOTYPES” –PATTERNS OF REPRODUCTIVE JUSTICE OF WOMEN WITH INTELLECTUAL DISABILITY.**

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## **ABSTRACT**

*The reproductive rights of women with mental or intellectual disability are a theme of apprehension for all stakeholders, including their parents, family, and caregivers and treating medical practitioners etc. In a patriarchal society like India, access or denial to reproductive rights for women with intellectual disability is a core issue with lots of social stigmatization. Actually reproductive and disability justice are both human right based framework at their core. In India, women with intellectual disabilities, especially those who live on the intersection of different socio-cultural identities, face an extra layer of challenge because the reproductive justice framework includes not only a woman's right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environment. Comprehensively, this definition broaden the frame beyond narrow pro-choice advocacy for an opposition to motherhood of mentally challenged mothers, and a concomitant belief that people with disabilities lack capacity to consent rather than they are subject to the choices of nondisabled parents, professionals, or other do-gooders. Therefore whether the women with mental disability have right to bodily autonomy, right to reproduction, right to permanent sterilization, right to abortion etc is still confused with social stigmas, misunderstandings and miscommunication particularly around abortion. But the new era is reframing this conversation to be more inclusive of the parenthood of multi marginalized communities like LGBTQ and people with mental disabilities etc. Therefore, this article tries to understand how the current law in India and the societal structures protect and support the women with intellectual disability from*

*making reproductive health decisions that are right for them and what policy solution must be drafted to ensure reproductive justice to all sections of society.*

**KEY WORDS:** *Women with intellectual disability, Medical termination of pregnancy, Right to abortion, Permanent sterilization, Reproductive Justice, The Rights of Persons with Disabilities Act, 2016, (RPwD) and the Mental Healthcare Act, 2017.*

## INTRODUCTION

Disability not only pertains to having a physical or mental form of mutilation, it is extracted from the vicinity of social stigma, exclusion and a vicious circle of adversity. It is a heart breaking experience for persons with disability to lead impoverished lives and to be denied socio economic opportunities. This article aims to radiate on a hypothesis of how law correlate with intellectually disabled women in affecting their rights and social inclusion especially in case of reproductive justice. This results in the pro- life versus pro-choice debate and the prospect of reproductive justice distribution in India. Therefore, it will be far-sighted to observe the pro-choice centered activism for intellectually disabled women from the lens of both social and legal aspects to comprehend their issues with clarity.

## REPRODUCTIVE RIGHTS

Reproductive rights are the human rights which include their right to have control over body and decide freely and responsibly on matters related to procreation, sexuality, abortion without coercion, discrimination and violence<sup>1</sup>.

Therefore an individual can choose to plan on having a family, right to child birth, terminate a pregnancy and gain access to reproductive health services etc.

During previous epoch, not much significance was provided to these rights and majority of women were uninformed of these rights, as a consequence of which there was a decline in the socio-economic well-being and overall health of women<sup>2</sup>.

Like other women, women with intellectual disabilities also bear children but a substantial

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<sup>1</sup> Dr. Sushama Sharma, Reproductive Rights and women Health: a New Prospective, 4 Intl. Jnl. of Humanities and Social Science Inventions, 2319, 2319 – 7714 (Apr. 2015).

<sup>2</sup> Palguna M& Jagruthi Rao, An Insight In to The Development Of Reproductive Rights Of Women With Special Reference To India, 1 Indique Law Journal 1-1(2023).

percentage of pregnancies in women with intellectual disabilities are accidental and unintentional. Such pregnancies create distress not only to mother but also to family who may not have emotional and financial resources to manage a child. So society and family even though they have a responsibility to care for such children take a decision to prevent such children being born. It is on the basis that the biological mother is unable to provide them safety and nurturing they require<sup>3</sup>. Furthermore the care givers and medical practitioners argue that the mothers are exposed to medications for their disability, and the children may be exposed to toxic substances in utero and also may face genetic issues, so to prevent birth of high-risk children they suggest abortions in cases of pregnancy even though it is a quasi-ethical solution. So still the conflict and confusion in the intersection of socio-legal field is that what is best for intellectually challenged women and we can find a critical gap. The reproductive rights of mother and the rights of a child to be born in a protective nurturing atmosphere without health issues should be given equal importance.

So, non-discriminatory, culture-sensitive, social justice provision of care based assumption is that reproductive justice on marginalized groups are getting worse not better for any women including the disabled<sup>4</sup>.

Most importantly, the right to reproductive justice forms a critical fraction of the intellectually challenged person's human rights frame. A reproductive justice framework believes in social change, in contextualizing rights and locating them within broader concerns such as race, caste, class, sexual orientation, disability and mental health. With innumerable campaigns by the feminist movement across the world, this right has been shaped by concerns about sexuality and morality. A reproductive rights framework lays emphasis on the right of a woman to be able to exercise her right to decide the questions of women's dignity, autonomy, bodily integrity and privacy. It may be general for women but for mentally challenged women, the practicability of giving consent to her reproductive right is a big question before law. Here arise various questions like permanent sterilizations, abortions, marriage and other issues and its decisions are taken by their guardians because they are not they have no capacity to consent. These women's pro-life, pro-choice ideologies clash with political, legal and medical formalities and Indian law opens a

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<sup>3</sup> Renu Addlakha Mahima Nayar, Disability and Sexuality: Intersectional Analysis in India, Centre for Women's Development Studies, New Delhi. Occasional paper No.63 (Aug.2017).

<sup>4</sup> Herring, Jonathan (2021) "The Case for Decriminalization of Abortion 33 Jnl. Of NLU, Delhi 21-38,(2019).

serious query of intellectually challenged women's decisional and reproductive autonomy<sup>5</sup>.

### **MAIN ISSUES FACED BY WOMEN WITH INTELLECTUAL DISABILITY WHILE ACCESSING THEIR REPRODUCTIVE RIGHTS.**

1. Women with disabilities experience double stigma and discrimination in society.
2. Harmful stereo types, norm, morals, taboos, attitudes and manners related to sexual and reproductive rights of women with intellectual disability are a query of formal and substantial equality.
3. Harmful practices such as forced sterilization, medication and child birth and forced marriages and some time denial to family life are faced by them.
4. Gender discrimination may vary from "general comments from public" to domestic violence.
5. Stigmas along with gender disparity leads women of minute intellectual disability being unable to access education, job, societal support, marriage and reproductive right etc.
6. Forced medications, tubal legations, hysterectomy and forced use of contraceptives and other methods to suppress sexuality/ childbirth and to ensure that they keep within the bounds of appropriate behavior in society.
7. Non access to reproductive health services which detrimentally affect the menstrual hygiene, pregnancy and child birth.
8. Violence/ sexual abuses, HIV AIDS and other sexually transmitted diseases vulnerability due to abuses.
9. Forced institutionalization and inhuman treatment experienced by disabled women even in home, work place, health settings and institutions.

Reproductive justice stress on equal relationships in human beings in the matter of marriage, sexual orientation, reproduction, including the right to integrity, consent and shared responsibility for sexual behavior and its consequences<sup>6</sup>. There is a marginalization of mentally ill women in India by saying that the intellectually challenged persons lack capacity to consent. It is inimical to the rights of mentally ill women to allow stereotypes about them to inform policies and decisions that concern something so intimate and personal to a woman. While dealing with this issue, the common mistake is that mental illness and intellectual disability are treated as

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<sup>5</sup> Malavika Parthasarathy, Integrating Mental Health Perspectives in Legal Discourse on Reproductive Justice.

<sup>6</sup> Simi Rose George, Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S, 18 NSLR, 92-103 (Oct.2006).

synonyms and it is surprising that the intersections between them have for so long been ignored or deliberately made invisible even in law.

The crossroads between intellectual health, disability and reproductive justice has not merited much awareness in India. While there has been a wave of progressive judgments<sup>7</sup> delivered by the Indian higher judiciary in recent times recognizing the right to reproductive choices and privacy, the discussion unfortunately has not engaged much with the question of the reproductive rights of women with mental illness. Reproductive rights are a relatively new concept, and it gained traction after the International Conference on Population and Development (ICPD)<sup>8</sup> and not gained that much popularity in India.

Discrimination is against women with disabilities by stigmatizing and questioning their ability to make decisions, owing to their gender and their disability. When a woman is disabled, she faces double discrimination and a higher risk of maltreatment and exploitation. In a developing country such as India, reproductive rights and sexual wellbeing is still an evolving sphere and viewed with judgmental eyes. An intellectually disabled woman is usually considered as a person who is asexual and dependant on others and hence, assumed to be unable to make decisions regarding their sexual autonomy and reproductive rights. Even the submissive and unresponsive women who are not able to follow traditional gender roles are labeled as abnormal in character. Hence the analysis and identification of a women's intellectual disability should be the core condition to decide whether she should be denied with her reproductive rights as well as care and rehabilitation.

## LEGAL PROVISIONS IN INDIA

### 1. RIGHTS OF PEOPLE WITH DISABILITIES ACT, 2016.

The Act was enacted to implement the UN convention on Rights of Persons with Disabilities<sup>9</sup>. The Act mainly deals with non-discrimination, full and effective participation and inclusion in society<sup>10</sup>. Furthermore, it deals with emphasize on respect

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<sup>7</sup> Joseph shine v. Union of India, (2019)3 SCC 39(India). Nav Tej Johar v. Union of India (2018)10 SCC 1(India), Justice Putta Swami V. Union of India (2017)10 SCC1 (India).

<sup>8</sup> ICPD, held in 1994 in Cairo, helps to highlight the arguments that were made around the abortion debate.

<sup>9</sup> UN Convention on Rights of Persons with Disabilities was enacted in 2006 and India being a signatory adopted convention to national legislation

<sup>10</sup> Rights of People with Disabilities Act, 2016 , No.49 Act of Parliament 2016,sec.3(1).

for difference and acceptance of disabilities as part of human diversity, humanity, equality of opportunity between men and women<sup>11</sup>. The Act also takes care of the protection of people from being subjected to torture, cruel, inhuman or degrading treatment<sup>12</sup>. This Act Widened the definition of disability and it included 21 types of disabilities<sup>13</sup>.

But the main criticism against RPWD Act, 2016 is that the Act does not include any provision related to a person suffering with mental disability or intellectual disability. The Act does not draw any distinction between mental illness and intellectual disability also. It is also pointed out that these legislation should have a clear shift from charity based statute to a Right based statute. But this legislation has not shown clear insight in handling women with intellectual disability. As per the recent Supreme Court decision in marriage is not a fundamental right, still there should be some reference of marriage rights of mentally and intellectually disabled persons. In India, while there are Ministry of Health guidelines for sterilization of men and women, there is no explicit and clear provision against forced sterilization of girls and women with disabilities.<sup>14</sup>

## 2. MENTAL HEALTH ACT, 2017

The definition of mental illness<sup>15</sup> in this Act is a progressive way to address the issues. Mental health Act, 2017 includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of mental illness. This Act includes Right to access to mental health care, Right to mental health record, Right to equality and non discrimination and right to protection from inhuman treatments.<sup>16</sup>

But this Act also faces severe criticism that it does not recognize the rights of mentally disabled persons. Furthermore it excludes the mental retardation which is a condition of arrested or incomplete development of mind of a person, especially characterized by sub normality of intelligence. So there is no provision in this Act to handle the human right issues of intellectually disabled women<sup>17</sup>. So this legislation in respect of mental health is at cross roads and also need a

<sup>11</sup> Rights of People with Disabilities Act, 2016, No.49 Act of Parliament 2016, Sec.4.

<sup>12</sup> Rights of People with Disabilities Act, 2016, No.49 Act of Parliament 2016, Sec. 6.

<sup>13</sup> The disabilities include physical, mental intellectual and disability resulting from neurological conditions

<sup>14</sup> Rights of People with Disabilities Act, 2016, No.49 Act of Parliament 2016.

<sup>15</sup> The Mental Health Act, 2017 NO.10 Act of parliament, 2017, Sec.2(s).

<sup>16</sup> Dipika Jain & Shampa Sen Gupta, Reproductive Rights and disability Rights through an intersectional analysis, 12 JLR, 337-357(2021).

<sup>17</sup> Debutta Naik et.al, Shortcomings of Mental health Act, 2017, Indian Jnl. of Private Psychiatry 1-2 (2023).

process of periodic review and revision to receive priority attention to intellectually disabled women.

### 3. MEDICAL TERMINATION OF PREGNANCY ACT,1971<sup>18</sup>

In 2021, parliament amended the law to allow for abortion of pregnancies based on the advice of one doctor from 20 weeks to 24 weeks. The amendment made Indian abortion law more progressive but it did not recognize abortion on demand as a pregnant person's right<sup>19</sup>. But it was a reply to the repeating requests to safe medical support to avoid unwanted pregnancies beyond gestational period. Regardless of fulfilling the legal necessities of mentally challenged person's reproductive rights were considered against a checklist for eligibility for termination beyond 24 weeks were found wanting .Sec.3(2)(b)of MTP Act,2021 protections which covered sexual assault survivors, minors, disabled persons ,mentally ill persons ,fetal abnormality or pregnancy during humanitarian crisis<sup>20</sup>.

Indian law does not properly differentiate between mental illness and intellectual disabilities as a ground for termination of pregnancy. In various cases<sup>21</sup>, judiciary also failed to understand the multiple submissions regarding mental health, postpartum depressions, psychosis, suicidal tendencies and tendency to cause harm to her and to children. Court refused to grant permission on the basis of these grounds and sometimes even endorsed the harmful stereotypes while drafting decisions.

### CASE LAWS RELATED TO REPRODUCTIVE RIGHTS OF DISABLED PERSONS

In India, the debate bordering reproductive rights has been pushed to the forefront of contemporary legal discussion following some recent developments. They are the following **Suchitra Srivastava v. Union of India**<sup>22</sup>, is a landmark judgment which held that a women's right to make reproductive choices was a component to of right to personal liberty under Art.21 of Constitution. The rape victim of this case was abandoned by her parents at an early age and she was suffering from an intellectual disability. An expert body examined the women's mental status and opined that she is suffering from mild mental retardation.

<sup>18</sup> The Medical Termination of Pregnancy Act, 1971, Act No.34 of 1971.

<sup>19</sup> Ambika Gupta, A critical Analysis of the short comings of MTP (Amendment) Act 2021, 1, VULJ, 86-103,(Nov.2021).

<sup>20</sup> Poorna Sharma v. Union of India, M.A.2157/2023 in W.P(C) No. 1137/2023 (India). X v. Family Welfare Department 2022 SCC Online SC 905(India).

<sup>21</sup> X v. Principal Secretary 2022 SCC Online SC 1321(India)..

<sup>22</sup> (2009) 9 SCC 1(India).

There were concerns regarding the victim's mental competence to cope up with the maternal responsibilities and child care. High court invoked the concept of "*parens patriae*" and directed for termination of pregnancy for the best interest of the victim.

Supreme Court differentiated between mental illness and mental retardation. People with mental retardation if they are above 18 years old can take decisions over their reproductive rights was decided and it was a transformative judgment which upheld the reproductive autonomy of intellectually disabled women.

Further more in **Mamta Verma v. UOI**,<sup>23</sup> and **Meera Santhosh Pal v. UOI**<sup>24</sup> unequivocally pronounced that the freedom to make reproductive choices is a facet of women's personal liberty. **Tapasya Umesh Pisal v. UOI**<sup>25</sup>, Court observed that compelling to continue unwanted pregnancy will impact their physical and mental health also.

**Cry For Life society v. Union of India**<sup>26</sup> was a case decided in 2020, where the petitioner argued for a writ to be passed declaring article 3(2)(ii) of the Medical termination Of Pregnancy Act unconstitutional as it violated article 21 of the constitution. The court assured her that it was the choice of the women to protect her body integrity and have privacy which are conferred to her under Article 21 of the constitution<sup>27</sup>.

In **XYZ v. State of Gujrat**<sup>28</sup>, it was held that a women along has the right over her body and is the ultimate decision maker on the question of her reproductive rights. In **X v. Principal Secretary**<sup>29</sup>, Supreme Court articulated that MTP Act, 1971 act as an aid of interpretation and it should be used to interpret the injury to metal health and right to reproductive autonomy must be ensured through this. It was also pointed out that women is the ultimate decision maker in her reproductive choices.

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<sup>23</sup> (2018) 12 SCC 57(India)..

<sup>24</sup> (2017) 3SCC 462 (India).

<sup>25</sup> (2018) 12 SCC 57(India)..

<sup>26</sup> Cry For Life society v. Union Of India, W.P(C) No.10130/2013(India).

<sup>27</sup>Gauri Pillai, Shades of Life in Indian Abortion Law, 16 NLSJ, 128-134(2022).

<sup>28</sup> 2023 Live Law (SC) 680(India)..

<sup>29</sup> 2022 SCC Online SC 1321 (India).

In **X v. Union of India**<sup>30</sup>, Supreme Court by overruling various decisions<sup>31</sup> denied the termination of pregnancy and this decision was criticized by the supporters of reproductive rights. The Court observed that statutory period of 24 weeks crossed in this case and there were no foetal abnormalities and two medical reports emphasized that the petitioner has no physical issues also. But petitioner argued that she is having severe mental issues but the court denied the termination of pregnancy. Unfortunately, the issues underlying the reproductive rights debate have not received sufficient focus by Indian courts<sup>7</sup>.

### RECOMMENDATIONS

There is a need for judicial or legislative intervention to clarify the many legal issues involved in the reproductive rights of intellectually disabled women. Following are some recommendations for the same.

1. Recognize the rights of women with disabilities.
2. States should be accountable for respecting, protecting and fulfilling their rights.
3. Right based disability inclusive and gender responsive policies, programmes and legislation making is the need of the hour.
4. Provide equal opportunities for education, self development and work for girls and women with disabilities.
5. Access to comprehensive sexuality education and sexual and reproductive health information to girls and women with disability.
6. Prevention and timely respond to violence and abused experience by women in all settings including home, work place etc.
7. Reduce stigmas, stereotyping and discrimination by raising awareness on disability and reproductive rights and include women with intellectual disability in to society through change of mind sets.
8. Inclusion of women with disabilities in to main stream of society through integration rather than segregation.
9. State should withdraw from the provider centric approach to a right based approach and women in all conditions if capable to give consent should be provided with decision making power with autonomy over her body.

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<sup>30</sup> (2017) 5 SCC 458 (India).

<sup>31</sup> Sharmishta Chakraborty v. UOI(2018) 4 SCC 289(India).. , Nisha Suresh Alam v. UOI, W.P (S.T)No.36727/2017(India),. A v. UOI (2018)14 SCC 33(India).

10. The constitutional status of reproductive rights or the more fundamental right to privacy should be dealt with more clarity.
11. There is an imperative need to sensitize the legislature and the judiciary to the fact that reproductive choices as personal choices with which the State must not interfere lightly.

## CONCLUSION

The women are disempowered in India due to the hetero patriarchal system in India and are subjected to the denials inflicted by society. But the Constitutional framework in India holds a transformative movement towards reproductive rights to reduce discriminatory gender stereotypes. While there are limitations to ensure the rights of intellectually disabled persons still the state and judiciary is trying for an affirmative obligation of reducing discrimination of intellectually disabled women and provide recommendations to a general face of reproductive justice. It aims at moving away from the traditional emphasis to a more holistic approach to humanity of intellectually disabled women. In various decisions<sup>32</sup>, Supreme Court articulated and highlighted the transformative potential of privacy, right to life, equality and reproductive rights among all gender types. It is high time that every woman's right to self-determination and control over her own body should work together to achieve the goal of equal recognition irrespective of their status. The reproductive justice frameworks, which grants sexual and reproductive agency to intellectually and mentally ill women, must be adopted into Indian legal discourse and inform future developments in laws on gender and sexuality without by-passing a right based approach. Moreover, there is a need for the disability inclusive and women friendly legal framework in national, regional and international laws to address and recognize the promotion and protection of reproductive rights of intellectually challenged women in India. The comprehensive health education on sexual and reproductive health services is the need of time because reproductive justice is critical for equality for all gender types and disabled persons. There is a need for the government to take initiative to make reproductive right as a prime concern in the health policies since reproductive right is the indicator to know the status of women in the society. There is a need to have access to appropriate, affordable and quality health care facilities and related services for challenged and disabled women. The proper monitoring of health programmes made with more result oriented scheme is necessary. There is an urge to have a comprehensive and robust legislation on reproductive justice in order to protect and promote equality and

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<sup>32</sup> Komal Hiwale v. State of Maharashtra, (2020) SLP NO.7379 of 2020(India). Akhila .k v. UOI (2021) SCC Online Ker.804 (India).

reproductive health of intellectually challenged women. Reproductive right should not be the eugenics of state to interfere in the dignity and decisional autonomy of women.

