

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

**Copyright © International Journal for Legal Research & Analysis.
All rights reserved.**

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

REPRODUCTIVE RIGHTS OF WOMEN WITH DISABILITIES - MAJOR CHALLENGES AHEAD- LEGAL AND ETHICAL ISSUES

AUTHORED BY - AJAY KRISHNA S P

“It took me quite a long time to develop a voice, and now that I have it, I am not going to be silent “

- Madeleina Albright

ABSTRACT

This paper delves into the significant difficulties faced by women with disabilities in India concerning their reproductive rights, focusing on the combined discrimination they experience due to both their gender and their disabilities. It explores the historical marginalization of women from ancient times to the present day, emphasizing how societal indifference worsens their isolation, the stigma they face, and their restricted access to essential services such as education, healthcare, and rehabilitation. Utilizing international guidelines like the Universal Declaration of Human Rights, CEDAW, and UNCRPD, along with India's Constitution and important laws including the Rights of Persons with Disabilities Act (2016) and the Medical Termination of Pregnancy Act (1971, amended 2021), the analysis highlights shortcomings in legal protections. Important Supreme Court decisions, such as *K.S. Puttaswamy v. Union of India* and *Suchita Srivastava v. Chandigarh Administration*, recognize reproductive autonomy as a fundamental aspect of privacy, dignity, and bodily integrity under Article 21. Nevertheless, challenges such as the requirement for guardian consent for abortions, involuntary sterilization practices rooted in eugenics, and insufficient protections against sexual violence continue to undermine these women's autonomy. The paper critiques mental health laws and calls for modifications to ensure inclusive policies, specialized training, and empowerment initiatives to protect their sexual and reproductive rights, ultimately promoting a rights-based approach to eliminate systemic obstacles.

Keywords: Reproductive autonomy, Disability discrimination, Indian Constitution, Human rights frameworks, Legal reforms

1. Introduction

Women have been exploited by the men folk throughout the ages. From Vedic and Smriti era until independence the status and position of women remained of subordination and dependency to man in socio economic life. The genesis of discrimination and cruelty against women can be traced to the inexplicable attitude of social apathy on the part of the Indian populace. The Charter of the United Nations in its Preamble along with the number of United Nations instruments embody the principles of equality of men and women and prohibit the discrimination against women. Traditionally, focus on disability matters have been directed as acts of charity. The differently able were not held as subjects of rights but considered as 'objects' of protection, treatment and assistance¹. The essence of Universal Declaration on Human Rights;" All human beings are born free and equal in dignity and rights'. This has steered the United Nation's Disability Program. Human Dignity denotes self-determination, self-respect and integrity. The very notion of human rights means that they are common to all human beings and must consequently be universally germane. But women with disabilities may be particularly at risk due to stigmas associated with both disability and gender and are more likely to suffer discrimination than able bodied women or men with disabilities.² Regardless of their significant numbers, women and girls with disabilities stay behind hidden and silent, their misery unknown and their rights unrecognised.³

Women with disabilities endure a twofold discrimination, both on the basis of gender and of impairment. UNICEF has reported that women and children receive less than 30% of rehabilitation services. Disabled women are less probable than men to make use of many other existing social services, including residential services, owing to social, cultural and religious reasons. The problems that deal with women with disabilities are more severe in the rural areas due to lack of information, awareness, education, income and contact ensuing in extreme isolation and invisibility.⁴ The 2021 Census estimates that there are over 20 million Women with disabilities in India comprising 5.6 % of the population⁵. But these statistics are only the tip of the iceberg when it comes to determining the level of neglect, isolation stigma and

¹ Dr. Mohammed S.Hussain, Rights and Dignity of Persons with Disability, Practical Lawyer (2002)

² Report of Special Rapporteur on the right of Everyone to the Enjoyment of the Highest Attainable standard of Physical and Mental Health, Paul Hunt, submitted in accordance with the Commission Resolution 2002/31E/CN.4/2003/58 paragraph 67

³ Anuradha Mohit, Meera Pillai, Pratiti Rungta, 'Rights of the Disabled'. Ist Edition (National Human Rights Commission, New Delhi, 2006)p.29

⁴ Ibid

⁵ Report of the Working Group of Empowerment of women in the XI plan, Ministry of women and Child Development, Government of India

deprivation that portray their lives⁶. Women with disabilities have been neglected and has assumed to insignificance of gender as well as other social dimensions such as race, class, ethnicity and sexual orientation. The disabled woman is normally considered as incapable of fulfilling the normative feminine roles as mother, wife or home maker. They are less likely to be given in marriage than disabled man. In other words, woman with disabilities do not have the same preference of marriage and motherhood as nondisabled women. According to WHO/UNFPA guidance note on Promoting Sexual and Reproductive Health for Persons with Disabilities, it has been said that to be a woman and a person with disability is to be doubly marginalized⁷. The difficulties faced principally by women are the following: Survival rates, Unstable relationships and Maternal morbidity and mortality.

2. Constitutional Assembly developments and its importance of fundamental right to privacy

In the preliminary notes on the fundamental rights, prepared and circulated by Shri B.N.Rau and Prof K.T.Shah in 1946 for the use of the members of the Assembly, the thoughts about inter-relationship among fundamental right can be traced⁸. K.T Shah after examining the genesis of civil liberties wrote, 'Life that is to say, the mere right to exist, will have little value if it is to be bereft of any opportunity to develop or bring out what is in every man and woman. It follows inevitable that the right to live is the right to live decently as a member of a civilized society and have all the freedoms and advantages that would go to make life agreeable and living assured in a reasonable standard of comfort and decency. This right and all it implies cannot be conditioned and restricted except by its own corresponding litigations.⁹ Thus liberty and equality together were to form the conscience of the Constitution and pave the path of social revolution. Dr.S. Radhakrishnan laid emphasis on the liberty of human will, which is the basis of individual actions and rights.

2.1 Personal liberty and Right to Privacy

Among the libertarian interests, personal liberty attains a prominent place as it ensures physical integrity attributes of human personhood. Basically, its emphasis is to guarantee autonomy to

⁶ Chandrima Chatterjee, Gunjan Sheoran, Vulnerable Groups In India, Centre for Enquiry into Health and Allied Themes, Mumbai, 2002, p.14

⁷ Promoting Sexual and Reproductive Health for Persons with Disabilities: WHO/UNFPA Guidance Note, World Health Organization, 2009, p10

⁸ B.Shiva Rao, The Framing of India's Constitution (Select Documents), Vol,2,Indian Institute of Public Administration, New Delhi , 1967 p 23-30

⁹ Ibid, p 41

the will, body and mind of the individual. In addition to the above, personal liberty has the components of freedom of locomotion, right to privacy, right to material and domestic Life and other residual rights. The Component right to marriage and family life can be enjoyed by the exercise of freedom of association.¹⁰

Right to privacy of life is valuable for human dignity and for becoming and remaining oneself. It is theoretically based on intrinsic human good or on extrinsic demands for moral respect for human personhood and relationships.¹¹ The conflicting privacy interests, for example individual privacy and family privacy look for the fair balancing. There has been a feminist critique of privacy right with a reasoning that a background of gender inequality, woman's privacy choices for eg. on abortion, instead of liberating woman frees male sexual aggression, and in fact disables woman to interact freely and equally.¹² The choice between social justice and privacy is regarded as difficult to make for women and the have nots because of gender inequality and poverty.¹³ Thus, privacy is culturally a communitarian concept, created and strictly enforced by society, slowing little or no latitude for the individual to prefer than his fellows, In this context of family life, this has a great bearing. As opposed to totalitarian regimentation and comprehensive surveillance it allows evolution and dissemination or when one's religious beliefs are allowed for vindication.

2.2 Human Rights Approach

The breach of the rights of women with disabilities has led to the mobilization for their cause. Apart from the International Bill on Human Rights, a very important development took place with the introduction of CEDAW by the UN General Assembly 1979. CEDAW deals exclusively with the human rights of women and girls. Its adoption greatly increased the visibility of women rights in the human right development. This in turn created the obstacle in the enjoyment of human rights for women and the specific measures needed to remove them. As the CEDAW protection covers all women, they apply equally to women with disabilities and the able bodied women. Disabled women experiences vis -a vis non-disabled women.¹⁴ As the wordings of the provision of the Convention are of general nature, the role of the general

¹⁰ Griswold v. Connecticut 381 US 479 (1965)

¹¹ Richard C. Turkington and Anita L.Allen, Privacy Law: Cases and Materials, 2nd Edn (St.Paul Minn: West Group 1999) p.28

¹² Catharine A. McKinnon, Feminism Unmodified: Discourses on Life and Law, (96-102)1987

¹³ Keith Boone, Privacy and Community, Social Theory and Practice 1 (1983) extracted from Richard C.Turkington and Anita L.Allen, Privacy Law: Cases and Materials, 2nd Edition 1999.

¹⁴ Kelly D.Askin and Dorian M.Koenig, Ardsley N.Y, Transnational Women and International Human Rights Law, 2001, Vol III, p 262-282

recommendations is to elaborate and apply CEDAW in specific contexts.

But even within the women's movement women with disabilities rarely figured as a distinct group in international covenants until the Beijing declaration in 1995. In its platform for action this document specifies women with disabilities as a particularly vulnerable group but again group with little access to information on their fundamental right.¹⁵ Finally the giant change took place with the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD). It was adopted in 2006 with a broad categorisation of persons with disabilities and reaffirm that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. The Preamble to the Convention not only recognizes the difficult conditions faced by person with disabilities on the basis of sex, but also with the greater risk of women and girls with disabilities both within and outside the violence, injury and abuse, neglect or negligent treatment as well as the need to incorporate a gender perspective for the promotion of human rights and fundamental freedoms of differently abled persons.¹⁶ But the most commendable is the inclusion of a specific article dealing with the special attention required for women with disabilities. It stresses on the full development, advancement and empowerment of women with disabilities so that they can enjoy and exercise their human rights to the fullest.¹⁷

2.3. Disability Law in India

In India, although a rights based approach has entered the disability rights movement, the specific concerns of women with disabilities have not found adequate representation in government policies and programmes the voluntary sector. Ironically or expectedly, the disabled rights movement all over the world including the male dominated.¹⁸ The Constitution of India ensures equality, freedom, justice and dignity to all individual and implicitly mandates an inclusive society for all including persons with disabilities. Art 15(3) regarding special provisions for women has equal application for disabled women. In India, the legal framework

¹⁵ International Norms and Standards Relating to Disability at www.un.org accessed on 16/04/2025

¹⁶ Preamble to UNCPRD, cl (s): Emphasising the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities

¹⁷ Preamble to UNCPRD, Art 6 – Women with disabilities

1. State parties recognize the women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedom.
2. State parties, shall take all appropriate measures to ensure the full development, advancement and empowerment of women for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present convention.

¹⁸ People with disabilities in India: From Commitments to Outcomes, Human Development Unit, South Asia Region, the World Bank, May 2007, p 22

consists of The Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999, Rehabilitation Council of India Act, 1992 and the Mental Health Act, 1987. But, the legal provision on disability does not make special provision for women with disabilities. But under the National Disability Policy 2006, the Government aims the following for women with special needs:

1. Special programs for education, employment and providing of other rehabilitation services to women with disabilities keeping in view of special needs
2. Programs to rehabilitate abandoned disabled women/girls by encouraging their adoption in families
3. Encouragement of the projects where representation of women with disabilities is ensured at least to the extent of 25% of total beneficiaries.

The National Action Plan for Inclusion in Education of Children and Youth with Disabilities, 2005 also stresses on the need of access to girls with disabilities to government hostels.

In developing countries like India, women are too often denied access to education, rehabilitation, labour protection and health care because of cultural preference. The most important challenge faced by women with disability is in the area of health and employment opportunities. Women's health services, for the most part are not available to women with disabilities due to problems in the physical structure of the health care facilities, the medical equipment, the professional capacity of the staff to deal with patients with disabilities and their manner in relating to such patients. Because of this, women with disabilities are unable to perform diagnostic tests, the percentage of women with disabilities who are victims of sex crimes or of violent crimes are much higher than the percentage of women without disabilities who are victims of these crimes.¹⁹This makes it harder for a woman with disabilities to receive, among other things fertilization therapy or authorisation for adoption.²⁰ Women with Disabilities (WWD) and their reproductive health needs in India are limited. ²¹Hence, the disabled women's lack of access to health care will aggravate their disability and make it difficult for them to be rehabilitated quickly and this in turn ensures that their positions will not improve. Reproductive health of women with disabilities is a grey area which barely finds any mention in the legislative framework.

¹⁹ Dr.Sruti Mohapatra, Abuse and Activity Limitation: A study on Domestic Violence and A study on Domestic Violence against the Disabled Women in Orissa, Swabhimani, 2005, p 5

²⁰ Jeeja Ghosh, Empowering women with Disabilities, Disability News and Information Service, Vol 2 Issue 18, Sep 15,2004.

²¹ Ibid at p 42

3. Constitutional and Human Right Foundation for the Reproductive Justice in India

Constitution of India guarantees the right to life with dignity²², right to health²³, to personal liberty (Including sexual, reproductive and decision autonomy)²⁴, right to privacy²⁵, right to equality etc., The Constitution also empowers the Supreme Court and High Court to provide remedy for violation of fundamental rights.²⁶ Courts also relied on international human right norms to determine the contours and contents of rights under the Indian Constitution and correspondingly the State Obligation to secure that social justice²⁷.

In *K.S.Puttuswamy v Union of India*²⁸ the nine judge bench of the Supreme Court affirmed that the Indian Constitution guarantees the right to privacy as a fundamental right. The Court held that the right to privacy protects the ability of individuals to exercise control over the vital aspects of lives, including in matters relating to contraception and procreation. Nariman and Chelameswar J recognised that a women's decision to procreate or abort a pregnancy falls within the realm of right to privacy, Chelameswar J also affirmed that right to make informed choice regarding sterilization is also included in the right to privacy.²⁹

In *Suchita Srivastava v. Chandigarh Administration*³⁰ women's right to reproductive autonomy emanates from right to privacy, dignity and bodily integrity under Art 21. This includes the right to refuse participation in a sexual activity, insist on use of contraceptive methods, adopt birth control measures, carry a pregnancy to its full term and raise children or seek abortion.

In *Z v State of Bihar*³¹ Supreme Court relied on Suchita Srivastava's articulation of reproductive autonomy and linked it to prohibition against torture. Court held that denial of her statutory rights would in these circumstances entitle the women to damage for the violation of their fundamental right under Art 21. In *Z*, court also emphasized that the adult women who are not suffering from mental illness the MTP Act (1971) which governs induced abortion only requires the women's consent for divorce.

²² *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (AIR 1981 SC 746)

²³ *Paramanand Khatara v UOI* (1989) 4 SCC 286

²⁴ *Navtej Johar v Union of India* (2018) 10 SCC 1

²⁵ *Supra* 22

²⁶ Art 32 and 226 of the Indian Constitution

²⁷ In *Vishaka v State of Rajasthan* (AIR 1997 SC 3011) ruling was based on an interpretation of Art 51(c) of the Constitution of India which mandates the state to endeavour to foster respect to international law.

²⁸ (2017) 10 SCC 1

²⁹ In *Devika Biswas v. Union of India* (2016) 10 SCC 726/733 where the court held that right to health including reproductive rights is an integral part of Art 21 of Indian Constitution

³⁰ (2009) 9 SCC 1

³¹ (2018) 11 SCC 572

In *Anil Kumar Sharma v Dr. Mangla Dogra*³² the Supreme Court refused to interfere in a decision of the Punjab and Haryana High Court which has held that a husband is not entitled to damages from his wife, or her doctor on account of the wife's decision to terminate a pregnancy without his consent. This rooted in the recognition of a woman's reproductive autonomy therefore calls into question the basis of the previous dictum that termination of pregnancy without spousal consent amounts to cruelty to marriage.

The Bombay High Court in *High Court on its Own Motion v State of Maharashtra*³³ has recognised that forcing a woman to continue with an unwanted pregnancy violates her right to bodily integrity and is deleterious to their mental health. The court recognised that a foetus is not a right bearing entity and its interests cannot be put on a higher pedestal than the right of a living woman. Thus according to the Court, the Fundamental Right under Art 21 of the Indian Constitution protects the life and personal liberty which covers a women's decision to terminate an unwanted pregnancy.

Without reproductive autonomy a woman can never have complete sexual autonomy. The Supreme Court recognised the interrelatedness of sexual and reproductive autonomy in *Independent Thought v Union of India*.³⁴ In striking down an exemption from criminal liability for rape within marriage where the victim was between 15 to 18 years of age, the Court held that depriving a girl the right to deny sexual intercourse to her husband's violates the bodily integrity of the girl child and her right to reproductive choice.

In *Javed v State of Haryana* 35 the Supreme Court refused to recognise the right to decide the number of children one has as a facet of reproductive autonomy protected under Art.21 of the Indian Constitution. Instead, the Court emphasized that goals of population control and socioeconomic welfare which according to the court justified a law that disqualified persons with more than 2 children from being elected to certain local government goals.

3.1 Human Right Norms with regard to Reproductive Rights

Autonomy is a core component of the rights to life, privacy and liberty among others, and includes, individual rights to make informed decisions about their bodies, including their reproductive and sexual lives. The right to privacy is enshrined in Art 17 of the ICCPR. The Human Right Committee has repeatedly recognised the state obligation to ensure reproductive autonomy arises from the right to privacy. The CEDAW Committee has also stated that the

³² Civil Appeal No 4704/ 2013 decided on Oct 27, 2017 by a bench comprising of Chief Justice Deepak Mishra, Justice A.M.Khanwilkar and Dr.Justice D.Y.Chandarchud.

³³ 2017 CrLJ 218 (Bom)

³⁴ (2003) 8 SCC 369

right to autonomy for women requires measures to guarantee the right to decide freely and responsibility on the number and spacing of their children.³⁵ It also expressed concern where countries fail to ensure the reproductive rights of women, which include the right to women to make autonomous decision making about their health.³⁶ The Human Rights Committee has found that the failure to act in conformity with a women's decision to undergo a legal abortion is a violative of the right to privacy including when the judiciary interfere with such a decision. In certain cases, human rights law recognised that denial of reproductive autonomy as a result of violence or coercion may constitute a violation of inhuman and degrading treatment.³⁷ The Human Rights Committee has also found that in certain circumstances denial of access to abortion services can lead to physical or mental suffering that amounts to ill treatment. Denial of Reproductive rights including access to reproductive health care, has been found by courts to violate the protection of right to life under Art 21 of the Indian Constitution. In *Sandesh Bansal v Union of India*,³⁸ the High Court of Madhya Pradesh found that shortage not only of infrastructure but of the manpower to implement maternal health schemes led to the inability of woman to survive pregnancy and childbirth which violates the fundamental right to life guaranteed under Art 21 of the Indian Constitution.

In *Devika Biswas v Union of India*,³⁹ Supreme Court adopted international human rights norms with respect to reproductive health and stated that the right to reproductive health is the capability to reproduce and the freedom to make informed, free and responsible decisions.

In *Laxmi Mandel v Deen Dayal Hari nagar Hospital*,⁴⁰ the Delhi High Court stated that a women's right to health, including her right to reproductive health is a facet of her inalienable survival rights under Art 21 of the Indian Constitution.

The denial of reproductive rights also risks a woman's broader physical, mental and social well-being. The MTP Act itself recognises and presumes that carrying certain unwanted pregnancies constitute a 'grave injury' to the mental health of the pregnant woman.⁴¹ The Bombay High Court held in *High Court in its own motion v. State of Maharashtra*,⁴² forcing a

³⁵ CEDAW, Decision 57/11 statement by the Committee on the Elimination of Discrimination Against Women on Sexual and Reproductive Health beyond the 2014 review of the International Conference on population and development, UN Doc A /69/93 -38 (2014)

³⁶ Committee against torture (CAT Committee) concluding observations: Kenya. Para 27 UN Doc CAT/C/KEN/CO/2 (2013)

³⁷ Ibid

³⁸ Writ Petition No 9061 of 2008 order dated 6th February 2012

³⁹ (2016) 10 SCC 726

⁴⁰ (2010) 172 DLT 9/2010 SCC Online Del.2234

⁴¹ (2017) CrLJ 2018 (Bom)

⁴² Indumati Rao, Equity to Women with disabilities in India, CBR Network (South Asia) 2004 available at https://unipd-centrodirrmani.it/public/docs/32747_gender.pdf accessed on 16/04/2025

woman to continue with any unwanted pregnancy is deleterious to their mental health.

3.2 Reproductive Rights of Women with Disabilities in India

Policy formulates often create a hierarchy, knowingly or unknowingly between primary stakeholders and after them to marginal stakeholders. Only after the concerns of the primary stakeholders are satisfied, do they address the concern of the marginalized, thereby relating the needs of those in minority or those that are underrepresented. One such group whose demands are repeatedly made subservient to the demands of those in majority are women with disabilities who are disadvantaged due to their gender, disability and in majority are those living in disability or poverty.

Under Medical Termination of Pregnancy Act (MTP) Act although secures the right to abortion for all women, gives only a limited inclusion to those at the intersection of gender and disability. But the Act fails to address the specific barrier faced by the Women with Disabilities while accessing abortions and a structural framework for them to secure actual accessibility and exercise their consent freely. Similarly the Rights of Persons with Disabilities Act, 2016 fails to strike a balance between criminalisation of forcible abortions and bypassing the consent of woman who suffer from severe disability.⁴³ The Act fails to put in an effective system of checks and balances to ascertain if the woman is in fact able to consent.

The law relating to abortion in India fails to conclusively address the particularly disadvantage faced by Women with Disabilities (WwD) due to their gender and disability. It overlooks how they are perceived as vulnerable and easy victims and are thus in greater need of the right to reproductive self determination to deal with pregnancies that might result as a consequence of such violence.⁴⁴ The laws leave unnoticed the fact that WwDs are twice as prone to experiencing sexual abuse as compared to the nondisabled women for longer periods with greater injuries and instead exacerbate the existing barriers faced by them in accessing the already restrictive reproductive environments. MTP (Amendment) Act, 2021 came with the added caveat that for terminating pregnancies between 20 to 24 weeks the opinion of two registered medical practitioners would be required despite the amendment reducing their requirement down to that of one Registered Medical Practitioner for termination of pregnancy of an able bodied person when it done up to 20 weeks. The MTP amended with the intention of enhancing access to safe abortion, ultimately prolonged the time required by WwDs to seek

⁴³ Tanya Titchkosky, *The Question to Access Disability, Space Meaning*, University of Toronto Press, p 8-9 (2011)

⁴⁴ Women with Disabilities India Network, *Alternative a report on Art 6 submitted to the Committee on the Right to Persons with Disabilities, India 2019* (2019)

the opinion of the additional Registered Medical Practitioner thereto creating secondary bottle necks and institutional delays. Mandating this rigorous requirement is also in conflict with S.92 (f) RPWD Act that provides that only the opinion of one Registered Medical Practitioner is required to go ahead with the termination of pregnancy of a woman with disability. S.3 (4)(a) of the MTP Act, further states that the pregnancy of a woman who is above the age of majority and is mentally ill cannot be terminated without the consent of their guardian in writing. This allows abortion of women with psychosocial disabilities but gives the power to make that decision only to their guardians and Registered Medical Practitioner thereby.⁴⁵

By making the consent of the Guardian mandatory under S.3 (4) (a) the Act grants the guardians of WwDs the authority to effectively assume their legal agency. One more question who really has the right to choose, Is she is deemed to incapable of knowing what is, then for her only the outside authorities like parents, guardians, Registered Medical Practitioners and by extension the courts and media, who can understand her interests better than her. Another pertinent question is whether society would actually enable WwDs to exercise the right to choose anyways. Although the Amendment did not modify condition of bypassing the consent of the woman given in S.3(4)(a) it defeated the construction of legal capacity, choice and rationality that is built in S.3(4)(b). Legal capacity includes the right of a person to make effective decision about their life, finances, body, health, abortion and parenthood and encompasses within itself that right to be recognised as a person before the law and legal agency to have someone else make their decision on a person's behalf.⁴⁶

In *Suchita Srivastava v Chandigarh Administration*,⁴⁷ emphasized the distinction between mental retardation and mental illness as recognised by law, and opined that guardians of women with mental retardation cannot similarly make decisions for them as in the case of mentally ill person. As the Right of Persons with Disabilities Act, 2016 provides an unclear definition of the term 'mentally ill' and defines it as a person who is in need for treatment by reason of any mental disorder other than mental retardation.⁴⁸ The usage of vague terminologies has opened the door for a series of decisions which courts and doctors have misconstrued and broadened the scope of the words. This is done as the way to withhold legal capacity from a woman is

⁴⁵ Aparna Chandran, Mrinal Satish and Centre for Reproductive Rights, 'Securing Reproductive Justice in India: A casebook', Centre for Reproductive Rights and Centre for Constitutional law, Policy and Governance, National Law University, Delhi (2019)

⁴⁶ International Disability Alliance, Legal Opinion on Art 12 of CRPD available at <https://www.internationaldisabilityalliance.org/resources/legal-opinion-article-12-cprd> accessed in 16/04/2025

⁴⁷ (2009)9SCC1

⁴⁸ Mentally retarded persons are those whose normal intellectual growth was arrested at some time before birth, during the birth process, or in the early years of development. Mental illness can be described as inappropriate, irrational or unrealistic behaviour.

able to consent to include even cases of borderline, mild and moderate mental illness and mental retardation within the ambit of the Act.

The Judgement in the above mention case predates the enactment of the Mental Health Care Act, 2017 and falls to acknowledge the persons with disability are not necessarily persons of unsound mind, a common myth that has been built up S.3(5) in the Mental Health Act,1987. Thus the degree of mental capacity and comprehension of a woman with psychosocial disabilities must always be determined on a case to case basis and in S.3(4)(a) as it stands today allowing the agency of all WwDs to be usurped must be struck down. Involuntary sterilization and abortion of WwDs have their basis in the eugenics theory that sees this practice as 'improving' stock. Their disability is seen as a genetic and social threat and the misconception regarding their inability to produce a healthy offspring reduce the importance of their health and their wombs even further.⁴⁹

WwDs constantly face discrimination about their capacity to carry and deliver their babies, their ability to raise family and inheritability of their disabilities.⁵⁰ Collectively all these factors advise persons with disabilities against parenthood.⁵¹ It was in the light of these problems that India ratified the Convention on the Rights of Persons with Disabilities (CPRD) on 1/10/2007 and brought forth the Right of Persons with Disabilities Act, 2010 and particularly S.92(f) of the Act to secure the bodily autonomy of WwDs. However the Act failed to recognise the vulnerability of WwDs to violence.⁵² S.92(f) RPWD Act criminalises performing, conducting or directing a medical procedure on a WwDs which leads to or is likely to lead to the termination of pregnancy of a WwD without their consent. The section exempts procedures where medical termination of pregnancy is carried out in severe cases of disability and with the consent of the guardian of the woman along with the opinion of a registered medical practitioner. On first view, this provision seeks to ensure that the reproductive capabilities of WwDs are protected and not removed unnecessarily without due process of law. The provision criminalises abortions without the consent of the WwDs and at the same time allows the guardians and Registered Medical Practitioners to give consent of their behalf if the woman suffers with severe disability.

⁴⁹ Barbara Faye Waxman, *Up Against Eugenics: Disabled Women's Challenge to Receive Reproductive Health Services* 12(2) *Sexuality and Disability* (1994)

⁵⁰ Elizabeth C.Scott, *Sterilization of Mentally Retarded Persons : Reproductive Rights and Family Privacy*, *Duke Law Journal* 806,865 (1986)

⁵¹ Susan Stefan, 'Whose egg is it anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women', 13 *Nova Law Review*, 405-456 (1989)

⁵² Swagata Raha and Shama Sengupta, 'Rights of Women with Disabilities In Indian Legislations, *Socio Legal Review* (2018)

The provision exempts those terminations that are carried out ‘in severe cases of disability’ without specifying which disabilities would be within its ambit. It fails to specify the names and degrees of disabilities that are covered and neither have they been identified on the Right of Persons with Disability Rules, 2017. This ambiguity arises as the new RPWD Act, 2016 exported the term ‘severe disability’ as was used in the erstwhile persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995. A person with severe disability, the term would mean a person with 80% or more of one or more disabilities mentioned in the same Act. Additionally, marriages of WwDs that are often incentivized by the sponsored schemes and exorbitant private dowries and place them in unequal, unsafe and sexually exploitative environments.⁵³ Post marriage too, WwDs face a much higher risk of desertion by their spouses as Divorce laws In India allow for the dissolution of marriage if the spouse is incurably of unsound mind or suffers continuous or intermittently from a mental disorder.⁵⁴

3.3 Mental Health Laws and its implementation

Mental Health Care Bill, 2013 was introduced in the Rajyasabha on August 2013 and passed in 2016. Properly Implemented, mental health legislation such as this plays a key role in protecting the rights of a mentally ill, ensuring access to care and promoting social justice for the mentally ill, their family and careers. United Nations Convention on the Rights of Persons with Disabilities (CPRD) present a real opportunity to improve the position of people with disabilities and those disabled by long term mental illness. The CRPD also presents many challenges to mental health legislators and service providers, especially in relation to involuntary care, mental incapacity and substitute decision making. While mental illness was not mentioned explicitly in the list of factors which were not to form the basis of discrimination, it undoubtedly belongs under the term ‘other status’. In 1991, UN made this more explicit in its Principles for the Protection of persons with mental illness and the improvement of mental health care.⁵⁵

⁵³ Poulami Banerjee, ‘Disabled Person not thought to be wife material by many’ Hindustan Times (Jan 8,2017) available at <https://www.hindustantimes.com/india-news/disabled-woen-not-thought-to-be-wife-material-by-many/story-> accessed on 17/04/2025

⁵⁴ Soumitra Pathare, et.al. Gender, Mental illness and the Health Marriage Act, 1955, Indian Journal of Medical Ethics (2015)

⁵⁵ ‘Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the UDHR, the ICESCR, the ICCPR and in other relevant documents such as the Declaration on the Rights of the Disabled Persons and the Body of Principles for the protection of all persons under any form of detention or imprisonment

According to Mental Health Act, 2016 it appeared that the person has mental illness of such severity that the person: -

1. Who has recently threatened or attempted or is threatening or attempting to cause bodily harm to himself
2. Who has recently behaved or is behaving violently toward another person or has caused or is causing another person to fear bodily harm to him
3. Has recently shown or is showing inability to care for him to a degree that the individual is at risk of harm to himself or to others

According to World Health Report (2001), Mental health Policy and Programmes should promote the following rights- equality and non-discrimination, right to privacy, individual autonomy, physical integrity, the right to information and participation and freedom of religion, assembly and movement. At the International Community move toward a more robust recognition of the human rights of the disabled person and the reproductive rights of women, the intersection comprising the right of disabled women to reproductive freedom must be given full attention. Women with disabilities comprise 10% of all women worldwide and yet their reproductive health and rights are all too often neglected. It is clear that under Medical Termination of Pregnancy Act, 1971, Maternity Benefit Act, 1961 and Pre Conception and Pre Natal Diagnostic Techniques Act, 1994 little importance is given to the right of women with disabilities with regard to their reproductive health.

In India, the legal framework consists of the Persons with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act 1995, National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Mental Disability Act, 1999, Rehabilitation Council of India Act, 1992 and the Mental Health Act 1987. However, the Legal framework on disability makes no provision for women with disabilities. The Acts are gender neutral and did not address the specific concern of women with disabilities in the areas of health, education and employment. There should be no doubt that the foetus or a child in mother's womb is not a natural person. But there should be equally no doubt that it is 'juristic' or 'juridical' person. In all jurisprudential jurisdictions, a child en entre sa mere⁵⁶ is recognized as a legal person capable of inheriting or otherwise acquiring and holding property and also other legal rights. And there should be no doubt that only a person, whether natural or juristic is capable of acquiring those rights.

The first comprehensive statement of right of person with mental illness was UN Principle for the Protection of Persons with Mental Illness and improvement of Health Care 1991, Under this it clearly specifies that everyone with mental illness has the right to work, right to live, receive treatment in the community as far as possible.

⁵⁶ it is a French phrase refers to a foetus in utero

In *William L. Webster et al. v. Reproductive Health Services* at el⁵⁷ the Supreme Court upheld a Missouri Statute which declared that ‘the life of each human being begins at conception’ and that ‘unborn children have protectable interest in life, health and well-being. In the law of Succession, both in India and in England, a child in the mother’s womb is considered to be in existence and Section 99(1) of the Indian Succession Act 1925, clearly provides that ‘all words expressive of relationship apply to a child in the womb who is afterwards born alive’. The balance approach is immaculately discussed in an American case *Roe v Wade*⁵⁸ wherein US Supreme Court held that an expecting woman has absolute right to privacy in her body till the first 12 weeks of her pregnancy, between 12 to 20 weeks the state may place limited restrictions to permit abortion if the baby is malfunctioned or if it affects the maternal health. A child which is still en entre sa mere is accepted to be a minor, provided it is subsequently born alive.

In *Mr. Vijay Sharma and Mrs. Kirti Sharna v Union of India*⁵⁹ through the Ministry of Law and Justice and Ministry of Health and Family Welfare, the court says that foeticide of girl child is a sin; such tendency offends dignity of women. It undermines their importance. It violates woman’s right to life. It violates Art 39(e) of the Constitution which states that principle of state policy that the health and strength of women is not to be abused. It ignores Art 51A(e) of the Constitution of India which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The architects of MTP Act 1971 have not taken into consideration on the fundamental rights of the foetus to be born. It is submitted that ‘life’ exists in the foetus while in the womb of the mother and in this context Art 21 of the Constitution of India is applicable to unborn person as well. Thus, it can be considered as the greatest argument for validating the MTP act as unconstitutional. Foetus is a separate and distinct legal entity existing in the womb of the pregnant mother and its destruction without following the provisions of Art 21 under a law like MTP Act 1971 would tend to make such law unconstitutional, invalid, illegal and null and void. The MTP Act 1971 provides the substantive aspect for the deprivation of life which exists in foetus, but it fails to provide procedural aspect required under Art 21 for such deprivation of life. Therefore the state is under obligation under Art 21 not only to protect the life of the unborn child from arbitrary and unjust destruction but also not to deny it equal protection under Art 14 of the Indian Constitution. Art 21 of the Indian Constitution may be interpreted to mean that the word ‘person’ applies to all human beings including the unborn off spring at every state of gestation.

⁵⁷ 492 US 490 (1989)

⁵⁸ 410 US 113 (1973)

⁵⁹ AIR 2000 Bom 29

Right to personal liberty is another sphere where a web of interrelationships of rights influenced its content and development. In *Kharak Singh v State of Uttar Pradesh*⁶⁰ the Supreme Court held that it was comprehensive enough to include within itself all the varieties of rights which go to make up the personal liberty of man other than those dealt within the several clauses of Art 19(1).

4. Conclusion and Suggestions

There exists sufficient prejudice towards the women with disability. From position in family, to education, employment and health facilities everywhere there is a story of discrimination. In addition, victimization and sexual assault is also common. The human rights of women with disabilities need special concern. The United Nations Convention on the Rights of Persons with Disabilities Act, recognized the rights of women with disabilities. It is a disheartening truth even after the legislations and protection under Constitution, many women with disabilities face social stigma from the society and most of them go unnoticed. Due to their disability, many of them are unable to approach the court and even the law and law enforcement agencies turn a blind eye towards their need. This further leads to the deterioration of their condition in the society. Here are certain suggestions to uplift the condition of the vulnerable section:

1. To amend legislative provisions, particularly the Persons with Disabilities (Equal Opportunities, Protection and full Participation) Act, 1995 to protect disabled women's right in accordance with the provisions encompassed in the Disability Convention 2006.
2. Rights of disabled women should feature in the mainstream women's movement. Government should frame policies entering specifically for women with disabilities.
3. To direct training for women with disabilities towards recognizing that they too are contributing and responsible members of the society. The Rehabilitation Council of India Act, 1992 must also be amended accordingly to include a specific class of professionals dealing with the sexual and reproductive aspect of women with disability.
4. To establish the sexual and reproductive rights of women with disabilities to contraception, abortion, safe motherhood and to acceptance of their sexuality.

The reproductive right of women with disability are to be given prime attention by the law providers through sufficient implementation of the existing legislation and through news policies and programs for the welfare and protection of women who were not able to come forefront to the society due to their disability. Most of them are unaware of their rights and

⁶⁰ AIR 1963 SC 1295

sexual autonomy and reproductive autonomy are rights guaranteed to a woman and that right is to be recognized.

