

# CHALLENGING ABLEIST BARRIERS TO REPRODUCTIVE JUSTICE FOR WOMEN WITH DISABILITIES

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## UNDERSTANDING SEXUALITY AS A HUMAN RIGHT

Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction.<sup>1</sup> To appreciate sexuality, it is necessary to confer people with reproductive and sexual rights. Sexual and reproductive rights constitute one of the most basic and essential human rights. They are a bundle of rights which includes right to have autonomy, independence, and complete authority over one's body and the consequent actions as well, right to make independent choices on matters revolving around sexual health, preferences, and rights over reproduction. In *Navtej Singh Johar v. Union of India*<sup>2</sup> and *Joseph Shine v. Union of India*<sup>3</sup>, Hon'ble Supreme Court recognized sexual autonomy as a facet of individual liberty, thus protected under Article 21 of the Constitution. The Court beautifully explained:

*“245. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and*

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<sup>1</sup> Anuradha Mohit et al. Rights of Disabled, NHRC.30-31, available at <https://nhrc.nic.in/sites/default/files/DisabledRights.pdf>, last visited July 26, 2025.

<sup>2</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>3</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

*living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.”<sup>4</sup>*

## **INTERSECTIONAL DISCRIMINATION AGAINST WOMEN WITH DISABILITIES**

Women with disabilities witness some of the worst forms of discrimination with respect to their reproductive and sexual autonomy. The reason behind this can be explained with the concept of "Intersectionality" devised Prof Crenshaw, who studied various political and social identities of a person and how such identities manifest into systems of discrimination that the said person may be exposed to. While on hand, people with disabilities are prejudiced against and do not enjoy equal access to opportunities, the female population on the other hand, due to systemic oppression and prevailing patriarchal structure, assumes a greater risk due to multiplied identities leading to flaring of inequalities, violence, ignorance and predisposition. When the gender and physical identity of women with disabilities become apparent in a mutually exclusive manner, it hinders them access to their rights and opportunities. In fact, The "United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), Article 6(1) recognizes that women and girls with disabilities are subject to multiple discrimination. There has been a widespread assumption through the centuries and across cultures that people with disabilities are either non-sexual or have an exceptionally high and unhealthy libido.<sup>5</sup> It is a clear manifestation of ableist prejudice and assumption that only able persons can fully enjoy their sexual and reproductive rights.

### **(A) FORCED AND COERCED STERILIZATION**

Women with Disabilities are subjected to forced and coerced sterilization. It is the gravest form of human right violation and can also be regarded as a form of social control. The eugenics theory which conceptualizes that mental defects are likely to be passed on to the next generation, is used as a justification for performing such forced and coerced sterilization on women with disabilities.<sup>6</sup> Article 6 of UNCRPD ensures full and equal enjoyment of all human rights and fundamental

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<sup>4</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>5</sup> *Supra*, note 1

<sup>6</sup> Elizabeth C. Scott, "Sterilization of Mentally Retarded Persons : Reproductive Rights and Family Privacy", *Duke Law Journal* 806-65 (November 1986).

freedoms by Women with Disabilities. Further, Section 10 of Right of Persons with Disabilities Act (RPwD), 2016 confers reproductive rights upon persons with disabilities. Sub-Section 2 prohibits any medical procedure which leads to infertility of person with disabilities without his or her free and informed consent. Though Section 89 of the Act punishes any contravention of this Act or any rule made thereunder with fine which may extend to Rs. 10,000 and for subsequent contravention with fine which shall not be less than Rs. 50,000 but which may extent to Rs. 5 lakhs, but the punishment provided is not proportional to grave violation of bodily autonomy and dignity.

### **(B) DENYING PARENTAL RIGHTS**

Apart from the aforesaid Eugenics Theory, the ableist presumption that such Women with Disabilities is not capable to assume the responsibilities of a mother, is usually invoked as a defense for not allowing Women with Disabilities to bear and raise a child. It is very sad to witness that merely on the basis of disability, Women with Disabilities are deprived from having a child thereby not only losing control over their bodily autonomy but also losing their invaluable Right to Life and personal liberty, a guaranteed fundamental right under Article 21 of the Constitution. In *Justice K.S. Puttaswamy and Ors. v. Union of India*, privacy was held to be a constitutionally protected right which emerged primarily from the guarantee of life and personal liberty in Article 21 Privacy includes at its core choices with respect to personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation and are all integral to dignity of individual.<sup>7</sup> Further according to Section 3(2) of RPwD Act, 2016 states 'No person shall be deprived of his or her personal liberty only on the ground of disability.' In India, legally, the "Medical Termination of Pregnancy (MTP) Act, 1971" does not deal with access to abortion of women with mental retardation and it inaccurately differentiates women with mental retardation and mental illness, excluding the former completely.<sup>8</sup> In spite of having such progressive judgments and legislations, our lawmakers haven't even attempted to amend the MTP Act so as to be inclusive for Women with Disabilities.

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<sup>7</sup>*Justice K.S. Puttaswamy and Ors. v. Union of India* MANU/SC/1044/2017.

<sup>8</sup> Srinivas Kosgi et al. Women's reproductive Rights in India: prospective future, 10. ONLINE JOURNAL OF HEALTH AND ALLIED SCIENCES, 1-5 (2011).

*Suchita Srivastava and Ors. v. Chandigarh Administration*<sup>9</sup> is a classic example wherein a woman suffering with intellectual disabilities was denied to raise a child solely on the basis of her disability. In this case the victim had become pregnant due to an alleged rape that took place while she was in a government-run welfare institution. The ossification test revealed the age of the victim to be around 19-20 years. A medical board assessing the mental position concluded that the victim's mental state was that of a "mild mental retardation." Having no explicit premise in law for moving further with the medical termination, the Chandigarh Administration approached the Punjab and Haryana High Court for getting approval for medical termination of the pregnancy under Section 3(4)(a) of Medical Termination of Pregnancy (MTP) Act, 1971. It provides that when the pregnant woman is below 18 years of age or is a "mentally ill" person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The Administration contended that keeping in mind that the victim was "mentally retarded", "an orphan", and "did not have a parent or guardian who could support and look after her and her child", it is the guardian of victim and hence it is in her "best interest" that pregnancy must be proceeded with. Though the victim was eager to bear the child, she also had enough physical ability to deliver the child, but her mental retardation and absence of adequate social support and supervision proved to be a hindrance for her. Thus, keeping in view the future consequences of having maternal responsibilities and through a comprehensive and thorough evaluation of physical, psychological and social parameters, the High Court invoked the doctrine of *parens patriae* and directed the termination of the pregnancy. The Supreme Court, while reversing the decision of High Court, held that State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. Even though the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy. The Court observed that it is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent.<sup>10</sup> The Court noted that traditionally doctrine of *parens patriae*, has evolved in common law and is applied in cases involving the rights of minors and those persons

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<sup>9</sup> *Suchita Srivastava and Ors. v. Chandigarh Administration* MANU/SC/1580/2009.

<sup>10</sup> *Suchita Srivastava and Ors. v. Chandigarh Administration* MANU/SC/1580/2009.

who have been found to be mentally incapable of making informed decisions for themselves. The Court laid down the standards while exercising *parens patriae* jurisdiction:

- (i) **Best interests Test:** It requires the Court to ascertain the course of action which would serve the best interests of the person in question. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general.
- (ii) **Substituted Test:** requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

The Court rightly held that it is the “best interests” test alone which should govern the inquiry in the present case and not the “substituted judgment” test. Further the Punjab and Haryana High Court wrongly invoked the *parens patriae* doctrine. It concluded that there is a need to look beyond social prejudices in order to objectively decide whether a person suffering with mild mental retardation can perform parental responsibilities. Further in *Surow Omar Alale v. Republic*<sup>11</sup>, Hon’ble Kenya High Court has held being mentally retarded is not a bar to the ability to give consent as mental retardation is of many types and of varying degree of seriousness. It is pertinent to note that women with intellectual and developmental disabilities are held to a higher consent standard than nondisabled women.<sup>12</sup> Further, there is clear consensus among experts in the field of mental retardation that mentally retarded individuals experience sexual desire and can meaningfully consent to sex in some situations.<sup>13</sup>

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<sup>11</sup> *Surow Omar Alale v. Republic*, 2015 SCC OnLine Ken 4440.

<sup>12</sup> Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. ILL. L. REV. 315, 349.

<sup>13</sup> K.R. Held, Ethical Aspects of Sexuality of Persons with Mental Retardation, 10 SEXUALITY & DISABILITY 237, 237-55 (1992).

## CONCLUSION

From the above discussion, it is evident that women with disabilities are standing at the worst intersecting pedestal of ableism and patriarchy, both of whose societal influence deny them to exercise their bodily autonomy and subject them to social control. Although, Supreme Court in cases like *Suchita Srivastava*, *KS Puttaswamy*, *Josphine Shine and Nvatej Johar*, has taken bold and progressive outlook wherein it has affirmed woman's sexual and personal autonomy as facet of Article 21 and having legislations like RPwD Act which ensures persons with disabilities the right to equality, life with dignity and respect for his or her integrity equally with others, a more has to be done. It's high time that MTP must be amended and must be inclusive in nature for Women with Disabilities. Further it is equally important to punish transgressors of RPwD Act with enhanced punishment which should be proportionate with the transgression committed, especially in the case where there is forced and coerced sterilization. It is important for us to realize that Women for Disabilities are too our fellow member for our human race and we have to develop empathy for them since it is the empathy which makes humans as humans.