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THE STERILIZATION OF WOMEN WITH MENTAL DISABILITY UNDER INTERNATIONAL LAW

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Declaration

I, Bethelhem Daniel hereby declare that the study on sterilization of women with mental disability under International Law ‘is my own work and the sources used are duly acknowledged.

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Dedication

This thesis is dedicated to the memory of all women with mental disability who have been victims of force sterilization in all corners of the globe.

Abstract

The fast growing population number in the world insists the government of each country to adopt family planning program that aimed at balancing the country's birth rate and their economy. To this effect the government emphasizes the importance of making available different kinds birth controlling methods that ranges from daily administered oral contraceptives up to permanently existing sterilization. In parallel the international human right laws provide the individual's right to reproductive health that extends to the right to choose a birth controlling mechanism that fits oneself. Thus for many women sterilization is often the contraceptive method of their own free choice. However for some others, specially for women with mental disability, sterilization is the consequence of decisions of other's and this is negatively implicating on their enjoyment of certain fundamental human rights. Albeit this fact, International Human Rights Law and Jurisprudences, as they now stand, are not adequate to protect women with mental disability from forced sterilization. This is mainly the case because the requirement of free and fully informed consent is provided as a guarantee for protection against forced sterilization. But, Women with mental disability are not mentally competent enough to give free and fully informed consent and this leads to substituted decision making system. This paves way for the guardians to give consent for sterilization of women with mental disability. This inevitably results in human right violation due to the existence of conflicts of interest between the guardian and women with mental disability. Aimed at making such persons' sterilization compatible with fundamental human rights, this study argues for avoiding the requirement of free and informed consent and adoption of specific prohibition of sterilization of such persons. However due to deference in the degree of severity of mental disability between women with absolute and relative mental disability, in addition to the case of serious threat to life, protection of human right necessitates the sterilization of women with absolute mental disability in very narrow exceptional circumstances up on the fulfillment some substantive and procedural requirements.

Key words: women with mental disability, sterilization, human right, international human right laws, free and fully informed consent, forced sterilization, less intrusive alternatives, legitimate aim, proportionality.

Acronyms

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ECHR	European Convention on Human Rights
CMW	International Convention on the Protection of the Rights of the all Migrant Workers and Members of their Families
CRC	Convention on the Rights of Child
ECtHR	European Court of Human Rights
HRW	Human Rights Watch
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
UDHR	Universal Declaration of Human Rights
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Committee

CHAPTER ONE: INTRODUCTION

1.1 Background of the study

Across the globe women uses different kinds of contraceptive methods including sterilization. Sterilization is a medical procedure, process or act that renders a person unable to procreate children permanently.[1] The legitimate way of undergoing sterilization presupposes the fulfillment of the requirement of giving free and informed consent.[2] In line with this requirement, for many women sterilization is often the contraceptive method of choice.[3] However for some others, sterilization is the consequence of decisions of other's and it has been stated that thousands of women have been subjected to forced or coerced sterilization on ground of poverty, HIV status, ethnicity, and disability.[4]

Even within the group of individuals with disabilities, women and girls with mental disability are at particular risk of forced sterilization because they cannot always appreciate the consequences of this type of procedure and sometimes they are not able to express their will.[5] The practice of forced sterilization of women with mental disability is not only confined to the eugenic policies of World War II, but also continued to take place in modern democracies throughout the world.[6] It is based on the reasoning that a mentally incompetent individual has diminished autonomy and

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[1] Mosby's Medical Dictionary, 8th edition, 2009

[2] Committee on the Elimination of Discrimination Against Women Committee, Concluding Observations: Australia, Para 42, U.N. Doc. CEDAW/C/AUS/CO/7 (2010), Human Rights Committee on International Covenant on Civil and Political Rights , General Comment No. 28: Equality of rights between men and women, at para.11& 20 CCPR/C/21/Rev.1/Add.10, (2000), Committee on the Rights of the Child, General comment No. 13: The right of the child to freedom from all forms of violence, para 22-23, U.N. Doc. CRC/C/GC/13 (2011), Committee on Economic, Social, and Cultural Rights, General Comment No. 5: Persons with disabilities, para 31, U.N. Doc. E/1995/22 (1994)

[3] Open Society Foundation, 'briefing paper: Sterilization of Women and Girls with Disabilities' 10 November 2011 at 1 available at http://www.opensocietyfoundations.org/publications/sterilization-women-and-girls-disabilities-0, accessed on 21 march 2018.

[4] Ibid at 6 Open Society Foundation, 'Against Her Will: Forced and Coerced Sterilization of Women Worldwide' 4 October 2011, at 4 available at http://opensocietyfoundations.org/publications/against-her-will-forced-and-coercedsterilization-women-worldwide, accessed on 21 March 2018.

[5] Annelies Despallier, 'cutting the ties: sterilisation of persons with disabilities new perspectives after the introduction of the CRPD' 9

[6] European Court of Human Rights, Joelle Gauer and Others against France written comments, Center for Reproductive Rights, European Disability Forum, International Center for the Legal Protection of Human Rights (Interights), International Disability Alliance and Mental Disability Advocacy Center, (2011) Para 4

is accordingly unable to provide informed consent to medical procedures.[7] The decision to sterilize on her behalf is usually on the ground of menstrual management and personal care, pregnancy prevention as well as taking into account the individual's ability in terms of motherhood and parenting.[8]

Given the fact that women with mental disability lack mental capacity to give valid consent, their forced sterilization takes place in three forms. The first is the sterilization made based on the substituted consent given by the judicially authorized guardian and without the need for the court to specifically authorize the act of sterilization.[9] The second is the sterilization made based on the substituted consent given by the third parties (like guardians, parents) and up on the authorization of the act of sterilization of by court.[10] The third form, deals with the exceptional circumstances under which sterilization of mentally disable women is performed without the need to give consent by her or the guardian and without the need for court authorization at all, this is in case of the serious threat to her life.[11] The above two bases are known to be non-therapeutic sterilization and the third one is therapeutic sterilization. These kinds of substituted decision making imposed on persons with mental disabilities result in legally removing their decision making ability and have them substituted by a guardian.[12] The presumption is that a guardian is better placed to make choices in the best interest of the mentally incompetent individual and these persons will never get back their mental competence to give consent. Mental incapacity in this context is considered to be a fixed (permanent) state, with no consideration given to the possibility of capacity evolving over time especially with regard to women with relative mental disability. Generally, all these acts lead to forced sterilization of women with mental disability and exclude them from the enjoyment and exercise of their fundamental human rights provided under number of international and regional human right law.

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[7] Open Society Foundation, supra note 3

[8] Ibid

[9] The Committee on the Elimination of Discrimination Against Women (CEDAW) Concluding Observations: Colombia, Para 2, U.N. Doc. CEDAW/C/COL/CH/1201 (2013)

[10] Linda Steele, 'Court Authorized Sterilization and Human Rights : Inequality, Discrimination and Violence against Women and Girls with Disability' (2016) 39 UNSW law journal 1003.

[11] Ibid

[12] Mental Disability Advocacy Centre, Guardianship and Human Rights in Hungary: Analysis of Law, Policy and Practice (2007), available at http://mdac.info/sites/mdac.info/files/English_Guardianship%20and%20Human%20Rights%20in%20Hungary.pdf;

These includes their right to private life,[13] family life,[14] personal autonomy,[15] freedom from torture inhuman and degrading treatment,[16] non-discrimination,[17]equality,[18]and human dignity.[19]

The convention on the rights of persons with disability is a specific instrument which is considered necessary because individuals with disabilities had remained largely invisible under previous, universal human rights instruments. It aimed at rendering the human rights more specific and thus more readily applicable to disability.[20] Albeit its aim this convention still doesn't grantee adequate provision to protect women with mental disability from forced sterilization. Likewise, international and regional human right bodies and courts don't adequately provide guarantee to protect women with mental disability from forced sterilization (This will be discussed in brief in statement of the problem).

This thesis will then explore the gaps that exist in international human right law and jurisprudence towards ensuring the protection of women with mental disability from forced sterilization and suggest solution to fill the gaps.

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[13] Universal Declaration of Human Rights, General Assembly Resolution 217 A (III),1948 art 12(here in after called UDHR), International covenant on civil and political rights, 999 UNTS 171, 1976 art 17(1), (here in after called ICCPR) Convention on the Rights of the Child, 1577 UNTS 3, 1990, art 16 (here in after called CRC), ECHR art 8, American Convention on Human Rights, 1144 UNTS 123, 1969, art 11(2) (here in after called ACHR), Convention on the Rights of Persons with Disabilities, , U.N. Doc. A/RES/61/106 2008 art 10, 12, 15, 16, 25 (here in after called CRPD)

[14] UDHR supra note 16 art 16, ICCPR supra note 16 art 23, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 1976, art 10 (here in after called ICESCR) CRC supra note 16 preamble, ECHR supra note 16 art 8, African (Banjul) Charter on Human & Peoples' Rights, 21 ILM 58, 1981, art 18 (here in after called ACHPR), CRPD supra note 16 art 23, Convention on the Elimination of All Forms of Discrimination against Women, U.N.Doc. A/RES/34/180, 1979, art 16 (1) (b) (here in after called CEDAW)

[15] CRPD supra note 13 art 3

[16] ICCPR supra note 13 art 7, 10, ACHPR supra note 14 art 5, CAT art CRC supra note 13 art 37, CRPD supra note 13 art 15(1)

[17] UDHR supra note 13, art 2, ICCPR supra note 13, art 2, 20 ICESCR supra note 14, art 2, CRC supra note 13,art 2, CEDAW supra note 14, art 1, ACHPR supra note 14 art 2, ACHR supra note 13, art 1, ECHR supra note 13, art 14, protocol 12 of ECHR art 1, CRPD supra note 13, (5)(2)

[18] UDHR supra note 13 art 7, ICCPR supra note 13, art 14, 25, 26, ICESCR supra note 14, art 3, ACHPR supra note 14 preamble, art 5, ACHR supra note 14 art , CRPD supra note13, art, 3, 5(1)

[19] UDHR supra note13, preamble, art 1, ICCPR supra note13, preamble art 10, ICESCR supra note 14, preamble art 13 ,CRC supra note 13, preamble, art 28,37,40 ACHPR supra note 17, art 3, ACHR supra note 16 preamble, art 6, 11, CRPD supra note 13 art 3 European Convention for the protection of on Human Rights and dignity of human being with regard to application of biology and medicine and, Council of Europe, entered into force 1 Dec 1999, Treaty Series No. 164, art. 5, (here in after called Convention on Human Rights and Biomedicine or Oviedo Convention)

[20] Annelies D'Espallier , supra note 5 at 2

1.2 Statement of the problem

Given the fact that there is an increasing trend of forced sterilization of women with mental disability across the globe,[21] two crucial issues can be raised. The first is that, being used as permanent birth controlling and menstrual management mechanism, forced sterilization is violating fundamental human rights of women with mental disability.[22] The second is there is inadequacy in existing international human right laws and jurisprudences, in regulating forced sterilization of women with mental disability. This inadequacy can be expressed as follows.

In principle Forced sterilization is prohibited under international human right laws and jurisprudences.[23] This prohibition focuses on the procedural requirement of the need to give free and informed consent before undergoing the sterilization procedure.[24] However extracting this prohibition to women with mental disability is problematic on two bases. On one hand, as we understand from the definition of mentally incompetent person,[25] unlike other mentally competent persons, women with mental disability can't give valid consent to sterilization procedure due to their mental incompetence. On the other hand it remains unclear under international laws and jurisprudence how the requirement of consent applies to mentally incompetent persons who are unable to give consent to the sterilization procedure. For instances the European court of human right while dealing with cases of sterilization concluded that the "Where sterilization was carried out without the free and informed consent of a mentally competent adult, it was incompatible with the requirement of respect for human freedom and dignity".[26] The Court never dealt with the issue of informed and full consent to sterilization by people with mental disabilities, which remains unclear.[27] What remains explicit under this case is that, the requirement of consent applies to mentally competent women. So it remains unclear under international jurisprudences whether sterilization of women mental disability is totally

[21] Paul Hunt, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' E/CN.4/2005/51 para 9

[22] Open Society Foundation, supra note 4 at 1, 2

[23] Committee on CEDAW, ICCPR, CRC and ICESCR supra note 2

[24] Ibid

[25] A mentally incompetent person is someone whose mind is affected either from birth, disease, injury or by a disorder to such a degree that they require care, supervision, and control for their own protection, the protection of others, or the protection of their property. Public legal education and information service of New Brunswick, booklet; mental competence, (2015) p 3,

[26] *V.C v Slovakia*, European Court of Human Right ,(Application no. 18968/07), judgment, 2012, para 105-120

[27] Oana Georgiana Girlescu, 'sexuality and disability an assessment of the practices under the convention on rights of persons with disability' (2012) 49

prohibited, or they can give free and informed consent through their guardians. For instance, in practice, if the guardian consents to sterilization, the operation is not considered to be forced.[28]

Likewise, the UN human right committees through their communications and recommendations, apart, from stating the prohibition of forced sterilization of persons with disability in general they never have dealt with the issue of how sterilization can be voluntarily undergone by mentally incompetent women.[29]

The mechanism arranged by CRPD for those persons with disability, who face difficulty in decision making is the supported decision making system.[30] The nature and extent of the support vary from person to person and depending on the nature of the decision.[31] Thus the type and extent of support women with mental disability require to exercise her legal capacity varies from women with physical disability. When people are unable to achieve capacity under the scheme of supported decision making, substituted decision making arrangements can be made.[32]

The absence of provisions and jurisprudence that specifically prohibit sterilization of women with mental disability, together with the possibility of the supported decision making system to be changed in to substituted decision making system when capacity cannot be achieved with support and the decreased mental competence of women with mental disability to give consent cumulatively will inevitably result forced sterilization of women with mental disability. Undergoing a medical procedure to remove parts of her body which are essential to her ongoing health and well-being is violation of mentally disabled women's right to privacy, autonomy, family life, non-discrimination, human dignity, prohibition against torture, inhuman and degrading treatment and equality.

Besides, although, some studies were conducted in respect to sterilization of women with mental disability the present researcher found them inadequate to compressively justify the prohibition of sterilization of women with mental disability. This is because even though, the prior studies strongly insist the prohibition of forced sterilization of such persons they didn't compressively examine sterilization in light with all of specific human rights. Rather their examination was

[28] Oana Georgiana Girlescu, supra note 27 at 48
[29] Comments of Committee on CEDAW, ICCPR, CRC and ICESCR supra note 2
[30] CRPD supra note 13 art 12(3)
[31] Annelies D'Espallier supra note 5 at 5
[32] Ibid

restricted only to the violation of the right to non-discrimination, equality and human dignity. Sterilization of women with mental disability from the point of view of the right: to found and maintain family, privacy, prohibition against torture, marriage, and autonomy remain unexplored. Besides they failed to show the gaps of international human right laws and jurisprudences with regard to ensuring the protection of women with mental disability from forced sterilization.

Therefore, in order to protect the potential violation of the human rights of women with mental disability as a result of sterilization, it is essential that comprehensive research should be carried out that mitigate the existing gap under international law.

1.3 Objectives of the Research

1.3.1 General Objective of the Study

The general objective of this study is to show gaps existing in international human right laws and jurisprudences in ensuring the protection of women with mental disability from sterilization and to suggest solution.

1.3.2 Specific Objective of the Study

The study has the following specific objectives

1. To examine the status sterilization under international law and jurisprudence
2. To assess arguments for and against sterilization of women with mental disability.
3. To assess the conditions under which sterilization is allowed under international human right laws and jurisprudence.
4. To assess whether sterilization of women with mental disability is justified under international human right laws and jurisprudences.

1.4 Research Questions

Throughout conducting the thesis, the following main research questions will be answered

1. What is the position of international law and jurisprudence in relation to sterilization?
2. What are the arguments for and against sterilization of women with mental disability?
3. What are the conditions under which sterilization is allowed under international law and jurisprudence?
4. Can sterilization of women with mental disability be justified under international human

right law?

1.5 Scope of the research

The study is limited to examination of Sterilization of women with mental disability under international law. Any reference to sterilization of women with physical and other disability and women without disability will be to support the core arguments of the study. Besides, Sterilization of women with mental disability will be examined from point of view of international human right and medical laws and jurisprudences and international medical laws. So that national and criminal laws will be outside of the scope of the paper. However, this doesn't mean that they will not be dealt by any means; they will be discussed as found necessary to elaborate the international laws.

1.6 Significance of the study

Hence, this study is concerned in exploring the gaps existed in international laws and jurisprudences in ensuring the protection of women with mental disability from being subject to sterilization and suggesting solution. It has the importance to the member states of international human right laws to take in to account the inadequacy of the principle of prohibition of forced sterilization to protect mentally incompetent (disabled) women from being subject to forced sterilization and to amend the laws in way that prohibit the sterilization of such persons saving exception mention under this study. Likewise, it has significance to the international human right committees and regional human right courts to specifically deal with the question of how the requirement of consent applies to the sterilization of mentally incompetent women.

Finally, since the study will be conducted in human right perspective (examine sterilization in light with specific human rights), it creates common understanding within the academics and generally within the community about the link between sterilization of women with mental disability and their certain fundamental human rights.

1.7 Methodology

The study employs doctrinal legal research since it is basically concerned in examining laws, legal documents and jurisprudences. Therefore, the researcher will make critical analysis of the international human right instruments, the concluding observation of the human right committees and other relevant legal documents and literatures and the case laws with aim of showing their gaps with regard to prohibiting sterilization of women with mental disability and recommending

amendments.

To this effect the data have been gathered from both primary and secondary sources. The primary sources include international human right treaties, the concluding observations of UN human right committees, international medical laws and guidelines and case laws of national and regional human right courts as to the extent they are necessary to support the study. As far as secondary sources are concerned books, journal articles, international human right declarations UN reports, Working Group documents, briefing papers and other relevant materials from libraries and from internet will be considered.

With regard to the method of data analysis all data and facts gathered through critical examination of the above mentioned primary and secondary sources will be analyzed qualitatively. Since qualitative method of data analysis is suitable for doctrinal legal research by which the study will be conducted.

1.8 Limitation of the study

There was a shortage of time in order to effectively deal on each and every aspect of the subject matter. Additionally, there was language barrier in exploring variety of cases from inter American Court of Human Right. Also absence of cases of sterilization in African Commission of Human Right leads to referring cases mainly from European Court of Human Right and UN Human Right committees.

1.9 Literature Review

There were some literatures written in respect to sterilization of women with mental disability. Although they strongly insist on the prohibition of forced sterilization of such persons they didn't compressively discussed from full context of human rights. Besides they failed to show the gaps of international human right laws and jurisprudences with regard to ensuring the protection of women with mental disability from sterilization. These prior studies are presented herein below along with their limitations that trigger the present researcher to conduct the present study.

Linda Steele, under the study titled as "Court Authorized Sterilization and Human Rights: Inequality, Discrimination and Violence against Women and Girls with Disability[33] has identified two legal bases under which non-consensual sterilization of women with mental

[33] Linda Steele, supra note 10 at 1002.

disability is performed. The first is sterilization made based on the substituted consent given by the third parties (like guardians, parents) up on the authorization of the court. The second legal base, deals with the exceptional circumstances under which sterilization of mentally disable women is performed without the need to give consent by her or the guardian at all, in case of the serious threat to her life.[34] Under her study she objected the first legal base claiming that court authorized sterilization is a discrimination made based on mental incapacity and also it is state sanctioned violence done on mentally disabled women.[35]

Although she objected to court authorized sterilization of disabled women, her ground of objections bases only on violation of right to equality and non-discrimination. The violation of the right to privacy, found and maintain family, autonomy, human dignity, and prohibition against torture remained unexamined under her study. She also failed to show the gaps under international human right laws and jurisprudences towards protecting women with mental disability and failed to argue for the abolition of the requirement of consent and prohibition of sterilization in respect to such persons. Thus, since the focus of my research is on the above mentioned failures, it is a new idea.

Roberta Cepko under the study titled as *"Involuntary Sterilization of Mentally Disabled Women*"[36] have reviewed the American statutory and case laws on sterilization of women with mental disability with the aim of identifying whether involuntary sterilization of such persons is impermissible intrusion to fundamental right to procreative choice or privacy. He found out that the courts followed four approaches to answer the question.[37] Besides he clearly showed how

[34] Ibid, 1003
[35] Ibid
[36] Roberta Cepko, 'Involuntary Sterilization of Mentally Disabled Women' (2013) 8 Berkeley journal of gender, law and justice 6, 125
[37] Ibid 131- 37, the first approach taken by courts is the idea that statutory prohibition of sterilization of women with mental disability is violence against their right to privacy and liberty. So that state should only invade such fundamental rights only when there is a compelling state interest. In this regard the court accepted that mentally disabled women are incapable of exercising her procreative choices since they lack mental capacity to make this decision. Although this is the fact, the court failed to prohibit grant of sterilization order of such persons stating that when it is necessary to exercise other fundamental rights. Also the court concluded that statutory prohibition of sterilization of mentally disable women is denial of such person's right to equal protection because this prohibition denied such person's right to exercise their procreative choice through third person that can give consent substituting mentally incapable women.
The second approach taken by the court is it recognizes "sterilization of women with mental disability violate their fundamental right to procreation, it also affects her health, her physical wellbeing and future offspring" but it ignored it later on. This is because the court permitted court authorized sterilization of mentally disable women although it is against their right to procreate child.

much sterilizing women with mental disability based on the consent given by third parties would affect their fundamental right to marriage, reproduction, equality and body integrity. However, he failed to examine from the perspective of the right to privacy, prohibition against torture, inhuman and degrading treatment, and autonomy. Also, since, the study is restricted only to the domestic statutory and case laws. Sterilization of women with mental disability from the perspective of international human right laws and jurisprudences remained unexplored under his study.

John Tobin and Elliot Luke under their study titled as "*the Involuntary, Non-Therapeutic Sterilization of Women and Girls with an Intellectual Disability – Can It Ever Be Justified?*"[38] They contested the absolute prohibition of the involuntary, non-therapeutic sterilization of women and girls with an intellectual disability by UN human right bodies. They argued for permitting forced sterilization of women and girls with an intellectual disability in justifiable circumstances that are reasonably necessary to achieve legitimate aim provided that the means employed are proportionate. They also tried to show those legitimate aims that necessitate the forced sterilization and argued for the justifiability of violating women and girls with an intellectual disability's right to privacy, non-discrimination and equality in such situation. Hence their study focus on identifying situation under which forced sterilization is justified, they failed to examine sterilization in light with specific human rights, and also they didn't argue for the prohibition of sterilization of women with mental disability.

Laura Elliott under her study titled as "*Victims of Violence: the Forced Sterilization of Women and Girls with Disabilities in Australia*"[39] considers the issue of forced sterilization of women

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The third approach taken by the court is it accepted that sterilizing mentally incapable women will be violence against her fundamental right and equal protection. But such interest of her will be outweighed by the compiling interest of the state as far as her procedural rights are protected, not imposed as sanction and it applies to all persons. This conclusion of the court has it base on the rational of sterilizing mentally disable girls and women that are eugenic and state burden rationale.

The fourth approach taken by the court is Fundamental Rights Upheld as a Basis for Non authorization of Sterilization. Since the court decided that "Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, . . . the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate." Also the court emphasized on the need to change the state's interest in authorizing sterilization to state interest in protecting mentally incapable women from being subject to sterilization based on the consent given by the third party (parents, guardians) who has a competing interest.

[38] John Tobin and Elliot Luke, 'the Involuntary, Non-Therapeutic Sterilization of Women and Girls with an Intellectual Disability – Can It Ever Be Justified?' (2013) 3 Victoria U. L. & Just. J. 27

[39] Laura Elliott, 'Victims of Violence: The Forced Sterilization of Women and Girls with Disabilities in Australia' 8

and girls with disabilities in the Australian context. She identified the two cumulative requirements that must be fulfilled in order for the court to authorize involuntary non-therapeutic sterilization of mentally incapable women. "First, if the tribunal is satisfied that the women is incapable of giving consent and is not likely to be capable, within a reasonable time, of giving consent that the sterilization is, and the second, the special procedure would be in the person's best interests. In determining a patient's best interests, the tribunal must take into account the person's wishes and the wishes of any relative.[40] She objected this kind of forced sterilization of women and girls with disabilities and insisted for its criminalization. Her ground of objection is, this act violates their right to equal recognition before the law, freedom from exploitation, violence and abuse, and non-discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships.[41]

However, she failed to discuss the violation from the full context of human rights. The right to privacy, autonomy, and human dignity remained unexamined in her study. More over this, she failed to reveal the gaps existed under international human right laws and jurisprudences in ensuring the protection of women with mental disability from subjection to sterilization. Also she failed to consider some exceptional circumstances where the involuntary sterilization of women with absolute mental disability justified protecting her human right.

Liz Tilley, Sarah Earle, Jan Walmsley and Dorothy Atkinson under their study titled as "*The Silence is roaring: Sterilization, reproductive rights and women with intellectual disabilities*"[42] They reviewed the prevalence of sterilization of women with intellectual disability throughout the world. They gathered oral evidence from sterilized women with intellectual disability about the effect of involuntary sterilization on the enjoyment of their human right and found that it has negative impact. Generally, their study totally concerned with empirical analysis of facts with regard to sterilization of mentally disabled women. Thus, it failed to discuss sterilization of women with intellectual disability from the perspective of international human right laws and jurisprudences and failed to argue for the prohibition of sterilization of women with mental disability.

(2017) 6 journal of laws 2Laura Elliott, supra note 3 at 2

[40] Laura Elliott, supra note 39 at 7

[41] Ibid 4-5

[42] Liz Tilley, Sarah Earle, Jan Walmsley and Dorothy Atkinson , 'The Silence is roaring: Sterilization, reproductive rights and women with intellectual disabilities' (2012) 27 Disability and Society journal 3, 9 at 3

Generally, all of the above mentioned gaps of prior literatures conducted with respect to sterilization of mentally disabled women triggered to conduct the researcher's study. That is aimed at filling their gaps and ensuring the specific prohibition of sterilization of women with mental disability.

1.10 The structure of the study

With the aim of achieving the objectives mentioned above, the study is organized into five chapters. Each chapter are linked one to other and then cumulatively meet the objective. As indicated before, the first chapter covers introductory matters that lay a foundation for the continuing chapters. It begins with the background of the study and covers issues like statement of the problem, general and specific objectives of the study, research questions, significance of the study, scope of the study, methodology, limitation of the study, and literature review.

Then will follow chapter two, which examines the concept of sterilization and its status under international law. Under this chapter, definition of sterilization, purpose of sterilization of women with mental disability, conditions to allow sterilization, the requirement of free and fully informed consent with its three elements, and application free and fully informed consent with regard mentally incompetent persons like minors, women with mental disability will be discussed critically. The better appreciation of these matters helps in clear understanding of the reasons why the existing international human right laws and jurisprudences are inadequate to protect women with mental disability from forced sterilization.

The third chapter examines the link between sterilization of women with mental disability and certain fundamental human rights. By doing so the chapter reveals how sterilization is negativity implicating on the enjoyments of their rights like right to private and family life, personal autonomy, prohibition against torture, inhuman and degrading treatment, equality, non-discrimination and human dignity. The fourth chapter looks forward in making their sterilization in human right proof. The chapter sets conditions that justify sterilization of women with absolute mental disability in exceptional circumstances. The fifth chapter finalizes the study by a way of conclusion and recommendations.

CHAPTER TWO: STERILIZATION UNDER INTERNATIONAL LAW: A GENERAL OVER VIEW

2.1 Introduction

This chapter has two sections main sections. The first section is devoted to the discussion on the concept of sterilization. Under this section the definition of sterilization (both voluntary and forced), its advantage, disadvantage and the purpose of sterilization of women with mental disability, will be discussed. The second section is devoted to examine the status of sterilization under international laws and jurisprudences. Under this section issues like, whether sterilization is permitted under international laws or not, conditions to allow sterilization, when we call sterilization is forced, the requirement of free and informed consent along with its three elements, how consent is given by incompetent persons, who determines their incapacity, and limitation to the requirement of consent, (medical emergencies) will be discussed mainly.

The clear understanding of this issues helps in a better appreciation of the gaps existed under international laws and jurisprudences with regard to the protection of women with mental disability from forced sterilization. Therefore, a critical review will be made on international human right laws (both hard and soft law), international medical laws, regional human right court decisions and the communications, recommendations of human right bodies and literatures with the aim of discussion the above mentioned issues.

2.2 Concept of Sterilization

To get the clear picture of the concept of sterilization it is better, first to define sterilization, then to distinguish between voluntary and forced sterilization. The medical definition of Sterilization is the performance of medical procedure that renders the individual incapable of reproduction or procreation permanently and / or administration of medication to suppress menstruation.[43] Various kinds of procedures can be mentioned as constituting a sterilizing practice. These are hysterectomy (removal of the uterus and sometimes the cervix, fallopian tubes, ovaries or part of the vagina), tubal litigation (blocking or closing of the fallopian tubes) and endometrial ablation (laser technology used to destroy the uterine lining for purposes of stopping menstruation)".[44] There are two type of sterilization the first is Voluntary sterilization, it is sterilization performed

[43] Mosby's Medical Dictionary, supra note 1
[44] Laura Elliott, supra note 39 at 2

with the free and informed consent of the individual.[45] The second is Forced/involuntary, sterilization it refers to the performance of a procedure which results in sterilization in the absence of the free and informed consent of the individual who undergoes the procedure.[46]

2.3 Advantage and Disadvantage of Sterilization

Sterilization is a good option for women who want effective and permanent birth control. It's safe for almost all women and has an extremely low failure rate. Research indicates that parents and peers of individuals of people who are mentally disabled largely support sterilization as a contraceptive.[47] Sterilization is effective without leading to the same side effects as other methods, such as birth control pills, the implant, or even the intrauterine device (IUD). For example, the procedure does not affect your hormones, sexual desire. Some evidence also suggests that female sterilization may slightly reduce the risk of ovarian cancer. However, because of its permanent nature, sterilization is not a good option for women who may want to get pregnant in the future.[48] There are also some psychological effects that may come with sterilization. Particularly, sterilized women often see this process as a reduction, or degradation of status, such that they are deviant and unworthy of parental rights.[49]

2.4 Sterilization as Government Population Reduction Policy

In different countries of the world, governments include sterilization as population reduction policy. For instance, in 2010, it came to light that in Uzbekistan, women were being forced to undergo sterilization in order to secure employment as part of the government's family planning program.[50] The prerequisite for eligibility for employment was a so called "sterilization certificate"[51] also Recent events in India best illustrate coerced sterilization as the government

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[45] Carolyn Frohmader, 'Dehumanized: The Forced sterilization of Women and Girls with Disabilities in Australia' (2013), 8. See also D.S. Diekema, 'Involuntary Sterilization of Persons with Mental Retardation: An Ethical Analysis' 2003, 9 Mental Retardation and Developmental Disabilities Research Reviews 21-26.

[46] Juan. E, Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (2013) A/HRC/22/53 see also Grover A, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, (2009) UN GA, doc. a/64/272

[47] Feldman M, 'Attitudes towards sexuality, sterilization and parenting rights of persons with intellectual disabilities' (2002) 15 Journal of Applied Research in Intellectual Disabilities, 4, 285-296.

[48] World Health Organization, Medical Eligibility Criteria for Contraceptive Use, Third edition, 2004, p. 1, at http://www.who.int/reproductive-health/publications/mec/mec.pdf

[49] Brady S, 'Sterilization of girls and women with intellectual disabilities: Past and present justifications' (2001), Violence Against Women, 7, 432-461

[50] Open Society Foundation, supra note 4

[51] Ibid

family planning policy and the risks women face in undergoing the procedure in less than favorable conditions. In an attempt to make a success of its family planning program, the government began to offer financial incentives to women to encourage sterilization and sterilization targets were implemented.[52] Poor women are lured into sterilization camps where they are coerced into sterilization in exchange for as little as Rs 1400-00 (approximately 10 US Dollars)[53] On the 12 November 2014, after undergoing sterilization procedures, eleven women died and twenty remained in critical condition. It came to light that the deaths occurred in consequence of contaminated antibiotics that had been administered to the women who underwent sterilization at the sterilization camp in Bilaspur district of Chhattisgarh state.[54] The program had also been launched in Slovakia offering financial incentives for Roma women to be sterilized because of earlier unsuccessful government efforts "to control the highly unhealthy Roma population through family planning and contraception.[55] In all of the aforementioned instances, the determination to perform sterilization has been made by the medical practitioner in the absence of informed consent and without having due regard not only in respect of the risk of performing such a procedure but also in respect of the far reaching consequences of rendering a woman infertile.

2.5 Purpose of sterilization of women with mental disability

Several reasons have been given to justify the sterilization of women with mental disability; the first rational is genetic/eugenic base.[56] This argument is based on the fear that women with mental disability will reproduce children with genetic defects and the procreation of non-productive generation that would be burden on the society.[57]

The second rational is for the good of the state, community and family.[58] Arguments here center

[52] S. Venkatram, 'Indias sterilization camps must give way to proper family planning' available at: http://www.theguardian.com/global-development/poverty-matters/2014/nov/22/india-sterilization-camps-family planning-tragedy, accessed on the 12 June 2018.
[53] ibid
[54] K. Daigle, 'At least 11 women die after sterilization in India' available at: http://za.news.yahoo.com/2-indiawomen-die-27-ill-sterilization-061843655.html accessed on the 24 November 2014
[55] Commission of the European Communities, Regular Report on Slovakia's Progress Towards Accession (2002), p. 31
[56] L. Dowse, 'Moving Forward or Losing Ground? The Sterilization of Women and Girls with Disabilities in Australia' (2004), Women with Disabilities Australia, available at http://www.wwda.org.au/steril3.htm.
[57] Roberta Cepko, supra note 36 at 125-26
[58] ibid

on the burden those women with mental disability and their children who may be with mental disabilities place on the resources and services funded by the state and provided through the community. A related and very commonly used argument is the added burden of care that menstrual and contraceptive management places on families and careers.[59] Care givers also seek to prevent the onset of menstruation on the basis that menstrual flow, pain and discomfort that accompany menstruation may be quite disturbing to a young girl who does not have the capacity to comprehend that menstruation is a natural part of life.[60]

The third rational is the incapacity to parenthood. In these argument women with mental disabilities are typically seen as "child-like, asexual or over-sexed, dependent, incompetent, passive and genderless and therefore considered inadequate for the nurturing, reproductive roles considered appropriate for women."[61]

The fourth rational is prevention of sexual abuse and risk of conception. Since, women with mental disability lack mental capacity totally or partially to understand their environment, they would be exposed to sexual abuse and they may conceive. Therefore, in order to avoid such kind of sexual abuse and its consequences, it is assumed to be necessary to perform sterilization.[62]

2.6 The Status of Sterilization under International Law

2.6.1 Sterilization as Right to Reproductive Health

Sterilization is not specifically referred under international human right law and documents.[63] However the right to use sterilization as a contraceptive method can be impliedly inferred from human right instruments (both hard and soft laws), that grantee for reproductive choice in the context of family planning method. For instance, programs of action adopted at the international conferences on population and women, convened in Cairo in 1994 and Beijing in 1995, respectively, provided that the right to reproductive choice includes the right to access and use of safe, effective, affordable, and acceptable family planning methods of once choice. To this effect the declarations repeatedly emphasize the importance of making available a full and

[59] ibid
[60] A. Albanese, NW Hopper, 'Suppression of menstruation in adolescents with learning disabilities' (2007) 96 Arch Dis Child 629
[61] Laura Elliot supra note 39 at 9
[62] Ibid
[63] Fact book, Contraceptive Sterilization: Global Issues and Trends: the law and policy (2002) Engender Health, 98.

comprehensive range of contraceptive methods.[64]

Likewise Convention on Elimination of Discrimination Against Women obliged its member states to ensure, on the basis of equality of men and women, the "same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights"[65] The Convention also commits such countries to ensure access to information and advice on family planning and access to health care and services, including those related to family planning.[66] The same is provided under the convention on rights of persons with disabilities.[67] What we understand from these provisions is individuals (including women with mental disability) can chose sterilization as one of contraceptive methods.

2.7. Requirements to Allow Sterilization under International Law

Due to the fact that sterilization is an irreversible procedure with the effect of permanently incapacitating individual's ability to procreate, there are conditions that should be fulfilled before the procedure takes place. These are;

2.7.1 Consent

In order to legitimize the sterilization, the medical practitioners must in advance obtain the free and fully informed consent of the individual concerned. This has been provided by guide lines of the international medical bodies like the world health organization (WHO) and the international federation of Gynecology and Obstetrics (FIGO). WHO provided that in "general medical intervention need the prerequisite of obtaining the free and informed consent of the patient"[68] Specifically FIGO provided a guide line on the contraceptive sterilization and assured that "surgical sterilization should be based on the free and informed consent of the patient."[69]

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[64] UN Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5–13 September 1994, in Report of the International Conference on Population and Development. U.N. Doc. A/CONF.171/13/Rev.1, U.N. Sales No. 95.XIII.18 (1995).; UN, 1996 UN. 1996. The Beijing Declaration and The Platform of Action, Fourth World Conference on Women, Beijing, China, 4–15 September 1995. U.N. Doc. DPI/1766/Wom.).

[65] CEDAW supra note 14, art 16(1) (e)

[66] Ibid art 12

[67] CRPD supra 13 art 23(1) (b)

[68] World Health Organization (WHO), a Declaration on the Promotion of Patients' Rights in Europe, European Consultation on the Rights of Patients, Mar. 28-30, 1994, art. 3.1, WHO Doc. EUR/ICP/HLE 121 (1994) (here in after called WHO declaration)

[69] International Federation of Obstetrics and Gynecology, Guidelines on Female Contraceptive Sterilizations, Para.

In addition to these medical guide lines, the international human right bodies and regional human right courts affirmed the fulfillment of requirement of free and informed consent prior to undergoing sterilization. For instance, the CEDAW Committee explained in its general recommendation No. 24 on women and health that "Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity guarantees her confidentiality and is sensitive to her needs and perspectives"[70] The Committee further stated that "States parties should not permit forms of coercion, such as non-consensual sterilization … that violate women's rights to informed consent and dignity".[71] The Committee also recalls in its general recommendation No. 19 on violence against women in which it states that "Compulsory sterilization ... adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children".[72]

The Committee on Economic, Social and Cultural Rights also elaborate consent in stating that "the right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation."[73] In its Concluding Observations to Slovakia, the Human Rights Committee, after expressing concern at reports of forced or coerced sterilization of Roma women, urges Slovakia to "adopt all necessary measures to investigate all alleged cases of coerced or forced sterilization, publicize the findings, provide effective remedies to victims and prevent any instances of sterilization without full and informed consent."[74]

The Committee on the Elimination of Racial Discrimination, too, expresses concern about "reports of cases of sterilization of Roma women without their full and informed consent," and

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2, (2011) (here in after called FIGO guideline)

[70] UN Committee on Elimination of Discrimination against Women (CEDAW), General Recommendation No. 24: article 12 (women and health), 1999, A/5/38/Rev.1, chap.I para 22

[71] Ibid

[72] UN Committee on Elimination of Discrimination against Women (CEDAW), 11th sess, General Recommendation No.19: violence against Women, 1992, para 24(m) available at: http://WWW.refworld.org/docid/52d920c54.html(accessed 22 April 2018)

[73] UN Committee on Economic, Social and Cultural Rights,(CESCR) General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (22nd Sess., 2000), in Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies, at 90, para 8, U.N. Doc. HRI/GEN/1/Rev.5 (2001)

[74] UN Human Rights Committee ,Concluding Observations of the: Slovakia, 78th Sess., para 12, U.N. Doc.CCPR/CO/78/SVK (2003)

goes on to strongly recommend that Slovakia "take all necessary measures to put an end to this regrettable practice," including the adoption of a draft law on health care that "would address shortcomings in the system by specifying the requirement of free and informed consent for medical procedures."[75] The UN Special Rapporteur on Violence against Women communicates the gravity with which she perceives the nature of forced sterilization, "a method of medical control of a woman's fertility without the consent of a woman," by calling it "a severe violation of women's reproductive rights."[76] From the Rapporteur's perspective, forced sterilization involves "the battery of a woman" and is thus a form of "violence against women."[77]

This principle is also affirmed by the jurisprudences for instance European Court of Human Right in case of *V.C vs Slovakia* held that "in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity."[78] Once the researcher identified that free and informed consent is a precondition of sterilization. Know it is necessary to consider the meaning of free and informed consent. To get the clear understanding of the meaning of free and informed consent it is better to explore its essential elements

2.7.1.1 Essential Elements of Consent

As it has been well mentioned by Gloria S. Neuwirth and et al free and informed or proper consent has the following essential elements

> First, the consent must be voluntary. A voluntary act assumes an exercise of free will and clearly precludes the existence of coercion or force. Second, a proper consent entails a requirement that the individual have at his disposal the information necessary to make his decision. This requirement necessitates a full disclosure by the physician of the purpose and effects of the procedure. In the case of sterilization, for example, the irreversibility of the technique would have to be underscored. In addition, there must be a description of any hazards which may be encountered. Third, it is imperative that the person providing the consent have the mental competence to appreciate precisely what he is consenting to as well as the implications of such consent.[79]

These elements have also implicitly affirmed by The Inter American Court of Human Right in *I.V. v. Bolivia* while defining informed consent for the purpose of sterilization as:

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[75] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Slovakia, 65th Sess., para 14, U.N. Doc. CERD/C/65/CO/7 (2004).

[76] Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Commission on Human Rights, 55th Sess., Provisional Agenda Item 12 (a), para 51, U.N.Doc.E/CN.4/1999/68/Add.4 (1999).

[77] Ibid

[78] *V.C v Slovakia*, supra note 26 para 105

[79] Gloria S. Neuwirth; Phyllis A. Heisler; Kenneth S. Goldrich, 'Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded' (1974) 6 Colum. Hum. Rts. L. Rev. 448

> The positive decision to undergo a medical act, derived from a previous, free and informed decision or process that involves an interaction between the doctor and the patient, through which the patient actively participates in the decision making process.[80]

I. The Consent Must Free and Prior

Inter-American court of human right in I.V. v. Bolivia clearly explained that the consent must be granted prior to initiating any medical act and that it is provided freely, voluntarily, autonomously, without pressure of any kind, without using it as a condition for submission to other procedures or benefits, and without coercion, threats, or disinformation.[81] It also concluded that informed consent is an ethical and legal obligation of health professionals and States must ensure it is obtained prior to any medical procedure "since it is based principally in the autonomy and self-determination of the individual, as part of the duty to respect guarantee the dignity of every human being, as well as the right to liberty."[82]

Further, given that consent is derived from the concept of liberty and autonomy, it can be revoked at any time and for any reason.[83] Likewise the European court of human right in N.B v Slovakia considered that the consent obtained as the result of misinformation doesn't amount to voluntary stating that "by removing one of the important capacities of the applicant and making her formally agree to such a serious medical procedure while she was in labour, when her cognitive abilities were affected by medication, and then wrongfully indicating that the procedure was indispensable for preserving her life, violated the applicant's physical integrity and was grossly disrespectful of her human dignity."[84]

II. The Consent must be informed

The prior access to information is a base for giving free and informed consent. This is also affirmed by CEDAW that provides, States parties have an obligation to take "all appropriate measures," for the purpose of ensuring "the health and well-being of families, including information and advice on family planning.[85] Also The Committee on CEDAW, in its General Recommendation no 21 stresses the importance of access to information, specifically in the context of sterilization, in stating that "in order to make an informed decision about safe and

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[80] *I.V. v. Bolivia,* Inter-American court of human right , Preliminary Objections, Merits, Reparations and Costs Judgment of (2016) Series C No. 329, para 166 (as interpreted by international justice resource center)

[81] Ibid paras, 176, 181, 189.

[82] Ibid para, 164-65

[83] Ibid para, 184

[84] N.B. v. Slovakia, European Court of Human right , (Application no. 29518/10), judgment ,2012 ,para 77

[85] CEDAW supra note 14 art. 10 (h)

reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10 (h) of the Convention.[86]

This is also affirmed by the CEDAW committee in A.S v Hungary, the committee elaborated that informed consent and right to information are critical components of any sterilization procedure. Performing sterilization without the full and informed consent of the patient is a violation of art 10(h), 12 and 16(1) of CEDAW. The Committee explained under this case how it considers the meaning of free and informed consent, the necessity of prior access to information, the content of the information and the manner how the information should be given as follows:

> The Committee takes note of the author's description of the 17-minute timespan from her admission to the hospital up to the completion of two medical procedures. Medical records revealed that the author was in a very poor state of health upon arrival at the hospital; she was feeling dizzy, was bleeding more heavily than average and was in a state of shock. During those 17 minutes, she was prepared for surgery, signed the statements of consent for the caesarean section, the sterilization, a blood transfusion and anesthesia and underwent two medical procedures, namely, the caesarean section to remove the remains of the dead fetus and the sterilization. The Committee further takes note of the author's claim that she did not understand the Latin term for sterilization that was used on the barely legible consent note that had been hand written by the doctor attending to her, which she signed. The Committee also takes note of the averment of the State party to the effect that, during those 17 minutes, the author was given all appropriate information in a way in which she was able to understand it. The Committee finds that it is not plausible that during that period of time hospital personnel provided the author with thorough enough counseling and information about sterilization, as well as alternatives, risks and benefits, to ensure that the author could make a well-considered and voluntary decision to be sterilized"[87]

The European Court of Human Right in V.C v Slovakia also further explained that the consent given in the process of labour doesn't amounts to giving free and informed consent. Since it "clearly did not permit her to take a decision of her own free will, after consideration of all the relevant issues and, as she may have wished, after having reflected on the implications and discussed the matter with her partner." and is not compatible with the principles of respect for human dignity and human freedom"[88]

With regard to the content of information that should be provided to the persons who are to undergo the sterilization, The European Convention on Human Rights and Biomedicine obligates the medical provider to give each patient objective and comprehensive information about his or

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[86] UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 21: Equality in marriage and family relation, (1994), available at: http://WWW.refworld.org/docid/48abd52c0.html (accessed 20 April 2018) para 22

[87] A.S v Hungary, Committee on the Elimination of Discrimination against Women Communication No. 4/2004CEDAW/C/36/D/4/2004, 16-17 see also V.C vs Slovakia, supra note, 29 para 112, 117-120

[88] V.C v Slovakia, supra note, 23 para 111-112,117

her contemplated treatment, including its purpose, nature, consequences and risks, in order to enable the patient to make an informed decision.[89] Information on risks should include those inherent in the type of intervention as well as any risks related to the specific characteristics of the patient.[90] The patient should also receive information about alternatives to the proposed treatment, including the effect of non-treatment.[91]

FIGO also lays out information that must be conveyed during counseling, including that sterilization is intended to be "permanent; that life circumstances may change as a result of the procedure; and that the patient may later regret her state of sterility".[92] Similarly, the World Health Organization, in its "Medical Eligibility Criteria for Contraceptive Use" explains that "all clients should be carefully counseled about the intended permanence of sterilization and the availability of alternative, long-term, highly effective methods."[93]

III. The Consent must be full

It is to mean that the consent must be given without putting any reservation, or any condition. For instance, as it has been mentioned in part discussed about sterilization as government population reduction policy, (see above) government give incentives like money, employment opportunity for those who want to be sterilized. In such case women give consent to sterilization on condition of taking money or getting jobs. Thus it is not full consent since it is given on conditions.

IV. Capacity

The person giving consent need to have both legal and mental capacity, In this regard The European Court of Human Right in V.C vs. Slovakia has held that "the imposition of medical treatment without the consent of a **mentally competent adult** patient would interfere with his or her right to physical integrity".[94] What we understand from the court's decision is that the requirement of full consent presupposes an individual to have mental competence. In I.V v Bolivia IACtHR considers that "only the woman undergoing the medical procedure has the power to grant such consent no third party can make this decision, including medical staff or a

[89] Convention on Human Rights and Biomedicine or Oviedo Convention, supra note 19, art. 5
[90] European Convention on Human Rights and Biomedicine, art 5 Explanatory Report, para.35
[91] Ibid, see also WHO declaration, supra note 68, art 2(2)
[92] FIGO guide line, supra note 69, para 6
[93] World Health Organization, Medical Eligibility Criteria for Contraceptive Use, Third edition, 2004, p. 1, at http://www.who.int/reproductive-health/publications/mec/mec.pdf
[94] V.C. v Slovakia, supra note 26, para 105, 107

partner".[95] If she is not able to make this decision, then the procedure must wait until she is able to consent.[96]. Importantly, the Court noted that consent cannot be considered "informed consent" if it is granted or solicited while a woman has just given birth, or is under epidural anesthesia, surgical stress, or lying in an operating room.[97]. This is because in such situation she will not be capable to give informed consent. What we should bear in mind in this cases are the courts are dealing with those women who are mentally competent but unable to give consent for short period of time due to factors like labor pain, medication…that are not inherent to her mental state.

WHO also explains that "information must be communicated to the patient in a way appropriate to the latter's capacity for understanding, minimizing the use of unfamiliar technical terminology. If the patient does not speak the common language, some form of interpreting should be available."[98] The European Convention on Human Rights and Biomedicine reinforces this by obliging that "all information should be communicated to the patient using terminology the patient can understand; where there are language barriers, some form of interpreting should be available".[99] The FIGO Informed Consent Guidelines specifically note that the difficulty or time consuming nature of providing such information, for example, to patients who have had "little education," does not absolve medical providers from striving to fulfill these criteria for informed consent.[100] The Guidelines also emphasize that "informed consent is not a signature but a process of communication and interaction."[101] Likewise the jurisprudences, medical guidelines also failed to deal how mentally incompetent person can give consent to sterilization procedure.

The main issue that can be raised under this part is that how can mentally incompetent persons like, minors, women with mental disability etc. Can give free and informed consent for the sterilization procedure

2.7.2 The Requirement of Consent in the light of Sterilization of Minors

In this regard there is jurisprudential difference between UN human right bodies and regional

[95] I.V. v Bolivia, supra note 80, para 182
[96] Ibid, para, 182
[97] Ibid, para, 83
[98] WHO declaration supra note 68, art 2(4)
[99] Oviedo convention, art. 5, Explanatory Report, para. 36; see also WHO declaration, supra note 68, art 2.4 2.2
[100] FIGO, Recommendations on ethical issues in obstetrics and gynecology by the FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health, Guidelines Regarding Informed Consent, (2000) para. 3
[101] Ibid para 4

human right courts in relation to sterilization of minors. For instance, The CEDAW Committee has clarified that "except where there is a serious threat to life or health, the practice of sterilization of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and free consent, should be prohibited by law."[102] What we understand from this statement that is giving free and informed consent is not required as element to permit sterilization of minors due to their incapacity to do so. This shows not only forced sterilization but sterilization at all is prohibited in case of children.

However regional human right courts approach is different. For instance, the European Court of Human Right dealt with the sterilization cases of underage persons. In N.B. v. Slovakia, the Court found that the sterilization of the applicant, then below the age of majority,…without the informed consent of the applicant and/or her representative is incompatible with the requirement of respect for the applicant's human freedom and dignity.[103] The court also affirmed this decision in I.G and others v. Slovakia concluding that her (minor) sterilization….to which neither the applicant's nor her legal guardians' informed consent had been obtained prior to it is incompatible with the requirement of respect for her human freedom and dignity.[104] These cases infer that, in case of sterilization of minors, free and informed can be given either by the minor or by legal guardian or by both.

2.7.3 The Requirement of Consent in Light with Sterilization of Women with Mental Disability

Unlike the case of minors, as mentioned above the Courts never dealt with the issue of free and informed consent in regard to sterilization by people with mental disabilities, which remains unclear. It only dealt with what it considered to be a "mentally competent adult," a specificity which was found to be relevant in cases.[105]

Likewise, the UN human right committees through their communications and recommendations, apart, from stating the prohibition of forced sterilization of persons with disability in general they never have dealt with the issue of how sterilization can be voluntarily undergone by mentally

[102] CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination Against Women: Australia.CEDAW Forty-sixth session, 12 – 30 July 2010. CEDAW/C/AUS/CO/7 (2010) Seehttp://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm

[103] N.B v Slovakia, supra note 84, para 74-81

[104] I.G and others v. Slovakia, European Court Human Right, (Application no. 15966/04), judgment (2013) Para 121, 123

[105] Oana Georgiana Girlescu , supra note 30, at 49

incompetent women.[106]

Thus it is necessary to discuss the general legal capacity exercising mechanisms provided under the convention on the rights of persons with disability. The convention affirms the right of persons with disabilities to recognition everywhere as persons before the law and to enjoy legal capacity on an equal basis with others.[107] This is based on the legal presumption that all persons with disability have legal capacity to give consent. In case of incapability to exercise this right they are entitled to get support.[108] The nature and extent of the support vary from person to person and depending on the nature of the decision.[109] Thus the type and extent of support women with mental disability require to exercise her legal capacity varies from women with physical disability. There could exist also a number of individuals with disabilities who would not be able to function even with support and who would therefore need others to make decisions on their behalf.[110] Thus when persons with disabilities are unable to achieve the required capacity under the scheme of supported decision making, substituted decision making arrangements can be made.[111]

Direct application of these provisions of the convention in cases of sterilization of women with mental disability suggest that they can give free and informed consent with supported decision making scheme. However, it is difficult to conclude that, with supported scheme, women with mental disability achieve the required capacity to give free and informed consent to sterilization. This is due to the fact that mentally incompetent or disabled persons are those whose mind is affected either from birth, disease, and injury or by a disorder[112] and characterized as having an intelligence Quotient (IQ) of approximately or below 70, (below average intelligence).[113] Especially those women with profound mental disability (IQ less than 25) by no means give free and informed consent.[114] See chapter four for brief discussion on this issue. In such conditions

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[106] General comments of UN Committee on CEDAW, ICCPR, CRC and ICESCR supra note 2
[107] CRPD supra note 16 art 12(1) (2)
[108] Ibid art 12(3)
[109] Annelies Despallier, supra note 8 at 5
[110] Ibid at 6
[111] Ibid
[112] Public legal education and information service of New Brunswick, booklet; mental competence, (2015) p 3
[113] OI Paransky, RK Zurawin , 'Management of Menstrual problems and contraception in adolescents with Mental Retardation: A medical, Legal and Ethical Review with new suggested Guidelines' (2003) 16 J Pedatr Adolesc Gynecol, 223
[114] Ibid

the arrangement of substituted decision making scheme is mandatory and this directly leads to violation of fundamental human rights of women with mental disability. See chapter three for brief discussion on their human right violations.

Also the central and cross-cutting nature of Article 12 of the CRPD and its clear focus on supported decision making appears to be challenging, with a number of State Parties making formal declarations on the issue upon ratification.[115] Thus practice concerning legal capacity of individuals with disabilities varied greatly between the states.[116] During the ratification process, some countries made declarations and reservations on this article. For instance, Canada declared its understanding of the provision permits both supported and substituted decision-making arrangements in appropriate circumstances and in accordance with the law.[117] Also the Republic of Estonia interprets article 12 of the Convention as it does not forbid restricting a person's active legal capacity, when such need arises from the person's ability to understand and direct his or her actions. In restricting the rights of the persons with restricted active legal capacity the Republic of Estonia acts according to its domestic laws."[118] similarly The Republic of Poland declares that it will interpret article 12 of the Convention in a way allowing the application of incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12(4), when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct."[119]

Likewise, the case-law of the European Court Human Right revealed the possibility of restriction of legal capacity or even the deprivation of legal capacity in case of mental disability. For instance, in Lashin v. Russia,[120] the court ruled that states can refer to a number of legitimate aims in justifying the deprivation of legal capacity.[121] According to the Court some form of denial or restriction of legal capacity, such as partial guardianship, may be necessary for "mentally ill persons".

2.7.4 Exception to Requirement of Consent

[115] FRA, European Union Agency for Fundamental Rights, report, Legal capacity of persons with intellectual disabilities and persons with mental health problems , 2013, p 14
[116] Annelies Despallier, supra note 5 at 5
[117] UN Enable declarations and reservations, Canada, http://treaties.un.org
[118] UN, CRPD, supra note 13, Declarations, Estonia
[119] UN, CRPD, , supra note 13, Interpretative Declaration made upon ratification, Poland
[120] Lashin v. Russia, European Court of Human Right, (application no. 33117/02), judgment, 2013
[121] Ibid para 80

As it has been discussed above forced sterilization (sterilization without giving the free and informed consent) is prohibited under international medical and human right laws and jurisprudences. However, there is exceptional circumstance under which sterilization is performed without the need to give consent. The European Convention on Human Rights and Biomedicine provides "When because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned."[122] The Inter -American Court of Human Right also recognized this stating that "exceptions to the requirement of free and informed consent may apply in cases where there is urgency or where there is an emergency situation given that a patient's life is in immediate danger."[123] European Court of Human Rights also affirmed the legitimacy of performing sterilization without the need to give consent for "therapeutic purposes (life-saving medical intervention) where the medical necessity has been convincingly established".[124]

The court also emphasis on the narrow interpretation of life saving medical intervention thus, held that "sterilization is not generally considered as life-saving surgery and the possible pregnancy entailed serious risks to her life and that of her child doesn't amount to emergency involving imminent risk of irreparable damage to her life or health,[125] as it was likely to materialize only in the event of a future. It could also have been prevented by means of alternative, less intrusive methods.[126] The court also affirmed this in IG and others v. Slovakia and N.B. v. Slovakia stating that "the fact that the doctors had considered the procedure necessary because the applicant's life and health would be seriously threatened in the event of a further pregnancy cannot affect the position.[127] This is also affirmed by the Inter-American court of human right which specifically stated that the risk of preventing a future pregnancy cannot be characterized as an urgent situation or an emergency. Thus, the exception was not applicable in this case.[128]

What we should bear in mind in this regard is that, this is main area where the issue of the

[122] Oviedo convention, supra note 19, art 8
[123] I.V v Bolivia, supra note 80, para 177
[124] V.C. v. Slovakia, supra note 26, paras 76-77,105-106 see also N.B v Slovakia, supra note 78, para 74
[125] V.C.v Slovakia, supra note 26, paras 109-110,117
[126] Ibid para 113
[127] I.G and others v Slovakia, supra note 98, para 122, see also N.B. v. SLOVAKIA, supra note 78 para 74
[128] I.V v Bolivia, supra note 74, paras. 177-78.

rationales of sterilization comes to the picture. In case when the sterilization is undergone with the free and informed consent, the issues of the rational of sterilization doesn't matter. This is clear from European Court Human Right decision which, states that "the two ways through which sterilization is may be legitimately performed the first is at the request of the person concerned, for example as a method of contraception, the second is for therapeutic purposes where the medical necessity has been convincingly established. In this statement of the court the phrase that says "for example as a method of contraception," implies the illustration of a method of contraception as one rational and possibility of adding other rationales. However, when the sterilization is to undergo without the free and informed consent of the concerned persons, its legitimacy only emanates from its rational, life-saving (therapeutic purpose). Therefore, the purposes of sterilization of women with mental disability mentioned above (eugenic purpose, prevention of sexual abuse and pregnancy, easing burden of state, family, and incapacity to motherhood) are not justified.

2. 8 Conclusion

Sterilization is a medical procedure that renders individuals incapable of procreation. The main purposes of sterilizing women with mental disability found its base on prevention of sexual abuse and resulting pregnancy, easing burden of state, family in relation to menstrual hygiene and child rearing, incapacity to motherhood and eugenic bases. Under international medical and human right laws and jurisprudences, saving the exceptional circumstance of medical emergencies, performing sterilization without obtaining the free and informed consent of the individual concerned, (forced sterilization) for whatever purpose is prohibited. The requirement of giving free and informed consent presupposes the fulfillment of three essential elements. These are the consent must be given: voluntarily (the consent must be free) and in advance to the medical intervention, based on prior access to information (the consent must be informed) and the consent be given by mentally competent persons (the consent must be full). Application these essential elements leads to the question how mentally incompetent persons like minors, women with mental disabilities… give free and informed consent to sterilization procedure. In this regard there is jurisprudential difference between UN human right bodies and regional human right courts especially in relation to sterilization of minors.

For instance, the jurisprudences the European Court of Human Right provided three options. These are; free and informed consent is given by minor if she is fully able to understand the

nature of the act, in case of partial incapability, the consent is given by both of the guardian and minor and in case of total loss of capacity the consent is given by the guardian. Although, such kinds of jurisprudences are not developed with regard to the application free and informed consent in case of sterilization of women with mental disability, supported decision making mechanism is provided by the convention on the rights of persons with disability, in case of incapability to give consent. When persons with disabilities are unable to achieve the required capacity under the scheme of supported decision making, substituted decision making arrangements can be made. Therefore, supported decision making scheme is not adequate to protect women with mental disability from forced sterilization due to its broader possibility to be changed in to substituted decision making in its applicability to women with mental disability. This is affirmed by states practice and European Court of Human Right. This leads to the violation of their fundamental human rights which is going to be discussed in the next chapter.

CHAPTER THREE: STERILIZATION OF WOMEN WITH MENTAL DISABILITY IN THE LIGHT OF CERTAIN FUNDAMENTAL HUMAN RIGHTS

3.1. Introduction

This chapter is devoted to discuss the sterilization of women with mental disability in light with their human right and inter alia the obligations of the state towards realization of these rights. The discussion doesn't encompass all rights of women with mental disability, rather it points out certain fundamental human rights that are directly linked with the sterilization of women with mental disability. These are the right to private life, family life, autonomy, prohibition against torture, inhuman and degrading treatment, non-discrimination, equality and human dignity. These rights of women with mental disability are found both under general human rights laws which have applicability for all individuals and specific human right law that applies for persons with disability.

The significance of this chapter is to give a clear picture how sterilization would implicate on enjoyment of the human rights by women with mental disability. The discussion focuses on identifying the scope of each right together with their corresponding limitation then showing how sterilization of women with mental disability fall within the scope of each rights.

3.2 The Right to Private Life

Like any other persons' women with mental disability have the right to private life. This right is provided under number of international and regional human right laws. For instance the Universal Declaration on Human Rights provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence."[129] A similar provision is found under the International Covenant on Civil and Political Rights,[130] Convention on the Rights of the Child,[131] International Convention on the Protection of Migrant Workers and Members of their Families,[132] Convention on the Rights of Persons with Disabilities,[133] European

[129] UDHR supra note 13 art 12
[130] ICCPR supra note 13 art 17(1)
[131] CRC supra note 13 art 16
[132] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2220 UNTS 3, (1990) art 14
[133] CRPD supra note 13 art 22(1)

convention on human right,[134] and American Convention on Human Right.[135]

3.2.1 The content of the Right

The concept of private life is a broad term not susceptible to exhaustive definition. It covers aspects of an individual's physical and social identity for example, gender identification, name, sexual orientation and sexual life.[136] It also extends to the personal information which individuals can legitimately expect to not be exposed to the public without their consent.[137] Moreover, the right to respect for private life encompasses the physical and moral integrity of the person,[138] since a person's body is the most intimate aspect of private life, and medical intervention, even if it is of minor importance, constitutes an interference with this right.[139] It also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[140] It also incorporates the right to respect for both the decisions to become and not to become a parent or decisions to have and not to have a child in genetic sense[141] and, more specifically, the right of choosing the circumstances of becoming a parent.[142]

The European Court of Human Right Court also recalls that although the object of Article 8 (private life) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[143]. the positive obligation of the state to protect the right to respect to private life is also extended "to have in place regulations compelling both public and

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[134] ECHR supra note 13 art 8

[135] ACHR supra note 13 art 11(2)

[136] Dudgeon v. the United Kingdom, European Court of Human Right (Application no. 7525/76) judgment of 22 October 1981, Series A no. 45, pp. 18-19, para 41;

[137] Konovalova v. Russia, European court of human right (Application no. 37873/04) judgment 2014 Para 39

[138] X and Y v. the Netherlands, European court of human right (Application no. 8978/80) judgment, 1985, p. 11,para 22

[139] Konovalova v. Russia, supra note 124 para 40

[140] Pretty v UK, European court of human right (Application no. 2346/02) judgment, 2002 para 61, see also vc v Slovakia supra note 29 para,138

[141] Evans v. the United Kingdom, European Court of Human Right [GC],(Application no. 6339/05) judgment 2007 para 71,

[142] Konovalova v. Russia supra note 139 Para 39

[143] X and Y v. the Netherlands, supra note 138, para 23

private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage"[144] Thus the state's responsibility to protect the right to private life include both negative and positive obligation

3.2.2 Limitation to the right to private life

The right to private life is not an absolute right; it is subject to some limitations. In order to justify the interference on the right to privacy, the limitation must be to further the legitimate aims that are prescribed by law and are necessary in a democratic society.[145]

3.2.2.1 Legitimate aims

In order to justify the interference to the right to private life, it must be to further a legitimate aims that are set out in paragraph 2 of Article 8 of ECHR, namely in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Court recently observed that its practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention[146]

3.2.2.2 Prescribed by law

This expression does not only necessitate compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. The national law must be clear, foreseeable, and adequately accessible.[147] With regard to foreseeability, the phrase "in accordance with the law" thus implies, inter alia, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention[148] Foreseeability need not be certain, rather the court states In Slivenko v. Latvia [GC], the applicants must have been able to foresee to a reasonable degree, at

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[144] Vasileva v. Bulgaria, para 63.

[145] Pretty v uk supra note 127, para 68, see also VC v Slovakia supra note 129, para 139

[146] S.A.S. v. France, European Court of Human Right (Grand Chamber), (Application no. 43835/11),Jugdment, 2014 para 114

[147] Konovalova v. Russia supra note 137 para 42

[148] Fernández Martínez v. Spain, European Court of Human Right, (Grand Chamber),Application no.56030/07) judgment 2014, para117.

least with the advice of legal experts, that they would be regarded as covered by the law. Absolute certainty in this matter could not be expected.[149]

Clarity requires the law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society.[150] Lawfulness also requires that there be adequate safeguards to ensure that an individual's right to private life is respected. In the context of medical treatment, the domestic law must provide some protection for the individual against arbitrary interference with his or her rights[151]

3.2.2.3 Necessary in democratic society

In the assessment of the test of necessity in a democratic society, the Court often needs to balance the applicant's interests protected by the right to private life and a third party's interests protected by other provisions of the Convention and its Protocols.[152] the Court clarified the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake.[153]

3.2.3 Implication on sterilization of women with mental disability

As mentioned above like any other person women with mental disability have the right to respect for their private life. However, the right to private life of women with mental disability is interfered with act of sterilization. This is because, as it has been explained under chapter two, sterilization is medical act or process that renders individuals incapable of procreating child

[149] Slivenko v. Latvia European Court of Human Right (Grand Chamber) (Application no. 48321/99), judgment 2003, para 107

[150] Piechowicz v. Poland, European Court of Human Right (Application no. 2007/07),judgment, 2012 para 212

[151] Konovalova v. Russia supra note 124, para 42

[152] Ursula kilkelly, 'the right to respect for private and family life; a guide to implementation of article 8 of the European convention on human right' 2001, para 19

[153] Pretty v Uk supra note 145 para 70

permanently,[154] Thus once women with mental disability are sterilized they will not be able to give birth. On the other hand, as it has been made explicit from case laws mentioned above, the decision to give or not to give birth is one aspect private life.[155] Due to the mental incapacity of women with mental disability to give free and informed consent whenever they are subjected to sterilization it would be based on the decision of others (see chapter four for brief discussion on this issue) Therefore they are restricted their ability to procreate a child by act of others and this is a clear interference with their right to respect for private life. The other aspect of private life that is directly implicated by sterilization of women with mental disability is physical and moral integrity of the person.[156] Since sterilization of women with mental disability involves removal of the uterus, and sometimes the cervix, fallopian tubes, ovaries or part of the vagina, blocking or closing of the fallopian tubes and destroying the uterine lining for purposes of stopping menstruation,[157] it result direct interference in the physical integrity and through time this will lead to mental suffering .[158]

In this regard one may argue that the right to private life is not an absolute right thus the interference can be justified. However when we see the purposes of sterilization of women with mental disability, the purpose like prevention of procreation of child with similar disability, sexual abuse, prevention of pregnancy, burden on state and family, and incapacity to mother hood(see chapter two) are not directly related with the legitimate aims mentioned under article 8(2) of ECHR that are protection of national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or for the protection of the rights and freedoms of others.

But fertility of women with mental disability may indirectly relate with economic well-being of the country and prevention of the rights and freedoms of others. This is because women with mental disability and their child may live in government institution or with their families. Even if they may be burden on others their sterilization can't be justified since it doesn't fulfill the requirement of necessary in democratic societies. Since the measure taken (sterilization) is not proportionate to the legitimate aim pursued due to the availability of other less intrusive

[154] Mosby medical dictionary supra note 1
[155] Evans v. the United Kingdom supra note 141
[156] X and Y v. the Netherlands supra note 138
[157] Laura Elliot supra note 39 2
[158] Brady, supra note 49

measures (discussed briefly under chapter four). Thus what is implicit from this argument is that, sterilization of women with mental disability is not pressing social need. Therefore, sterilization of women with mental disability except in situation of serious a threat to life and exceptions mentioned under chapter four, is interference with their right to private life.

This is also affirmed by European Court of Human Right. The court held that "sterilization is not generally considered as life-saving surgery and the possible pregnancy entailed serious risks to her life and that of her child doesn't amount to emergency involving imminent risk of irreparable damage to her life or health, as it was likely to materialize only in the event of a future.[159] It could also have been prevented by means of alternative, less intrusive methods.[160] The court also affirmed this in IG and others v. Slovakia and N.B. v. Slovakia stating that "the fact that the doctors had considered the procedure necessary because the applicant's life and health would be seriously threatened in the event of a further pregnancy cannot affect the position[161]

This is also affirmed by the Inter-American court of human right which specifically stated that the risk of preventing a future pregnancy cannot be characterized as an urgent situation or an emergency. Thus, the exception was not applicable in this case.[162]

3.3 The Right to Family Life

International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group or unit of society and is entitled to protection by society and the State.[163] It also establishes a prohibition on arbitrary or unlawful interference with the family.[164] Other human rights instruments that reaffirm this recognition in similar terms, are Universal Declaration on Human Rights,[165] International Covenant in Economic, Social and Cultural Rights,[166] Convention on the Rights of the Child,[167] the Convention on the Rights of Persons with Disabilities[168] the Convention on the Elimination of All Forms of Discrimination against

[159] *V.C.v Slovakia*, supra note 26, paras 109-110,117
[160] Ibid para 113
[161] *I.G and others v Slovakia*, supra note 104, para 122, see also N.B. v. Slovakia, supra note 84 para 74
[162] I.V v Bolivia, supra note 80, paras. 177-78.
[163] ICCPR supra note 13 art, 23.
[164] Ibid art 14
[165] UDHR supra note 13 art 16
[166] ICESCR supra note 14art 10
[167] CRC supra note 13 preamble, para. 5
[168] CRPD supra note 13 preamble, art 23

Women,[169] African charter on human and people's right,[170] European convention on human right[171] and American convention on human right.[172] The UN human right committee also stated that ensuring the protection of right to family life requires that States parties not only refrain from interfering into family life but also should adopt legislative, administrative or other measures.[173]

3.3.1 Content of the right

There is no definition of the family under international human rights law. The Committee on Economic, Social and Cultural Rights has stated that the concept of family must be understood in a wide sense and in accordance with appropriate local usage.[174] Despite the absence of consensus on the definition of family at international level, Human Rights Committee stated that "the right to found a family implies, in principle, the possibility to procreate and live together".[175] In similar vein the European court of human right also refrain from defining family and stick into mentioning the essential ingredient of family life that "is the right to live together so that family relationships may develop normally."[176] Consequently, whether or not "family life" exists is essentially a question of fact depending upon the real existence in practice of close personal ties[177] The Court will therefore look at de facto family ties, such as applicants living together, in the absence of any legal recognition of family life.[178] Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together.[179]

What we understand from the above mentioned decision of the court is the notion of family is not only confined solely to marriage based relationships and may encompass other de facto

[169] CEDAW supra note 14art 16(1)(b
[170] ACHPR supra note 14 art 18
[171] ECHR supra note 13 art 8
[172] ACHR supra note 13 art 17
[173] Human Rights Committee, ICCPR General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, Thirty-ninth session, 1990 para 3
[174] Committee on Economic, Social and Cultural, General comment No. 4, para. 6; General comment No. 5, para. 30
[175] Human Rights Committee supra note 173 para 5.
[176] *Marckx v. Belgium*, European Court of Human Rights, (Application no. 00006833/74) judgment, 1979, para 31
[177] *Paradiso and Campanelli v. Italy*, European Court of Human Rights, (Grand Chamber), (Application no.25358/12) judgment, 2014 para, 140
[178] *Johnston and Others v.* Ireland, European Court of Human Rights, (Application no.9697/82) judgment,1986 para 56
[179] *X, Y and Z v.* the United Kingdom, supra note 138 para 36

family ties where the parties are living together outside marriage.[180] In addition to this notion family life, like the notion of private life, the notion of family life incorporates the right to respect for decisions to become a parent in the genetic sense.[181]

This right also imposes both negative and positive obligation on state. The negative obligation restricts the state from interfering into the family matters. The positive obligation involves the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for family life.[182] Whatever measures adopted by States in implementation of their international obligations, they should adopt a human rights-based approach, grounded in international standards as described above. In this regard, family policies should be guided by basic human rights principles, including equality and non-discrimination, and by the protection of the rights of individual family members, notably those that might find themselves in a situation of vulnerability. A rights based approach provides also substantive guidance on priority areas for States intervention in support of families as required by international human rights, such as ensuring universal access to sexual and reproductive health, including family planning, or promoting work-family balance.[183]

3.3.2 Limitation to the right to family life

Like the right to private life, the right to family life is not an absolute right. Art 8(2) of ECHR provided limitation to right to family life to pursue legitimate aim that are protection of national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or for the protection of the rights and freedoms of others. They have to be prescribed by law and should be necessary in democratic society.

3.3.3 Implication on sterilization of women with mental disability

Like any other person women with mental disability have also the right to respect for their family life. Among others, one aspect of right to respect for family life includes the right to found family through procreation and living together. However, as it has been mentioned above sterilization of with mental disability would impair their ability to procreate a child in genetic sense and they would not be able to found a family in genetic sense, thus, it is interference with

[180] Ursula kilkelly, supra note 139, para 197
[181] *Dickson v.* the United Kingdom, European Court of Human Rights, Grand Chamber, (Application no. 44362/04) judgment 2007, Para 66; Evans v. the United Kingdom supra note 139, para 72
[182] *X,Y v* Netherlands, supra 138 para 23
[183] Ursula kilkelly, supra note 152, Para 50

their right to family life. Like the right to respect for private life, the right to respect for family life is not an absolute right subject to limitation. However, for the same reasons mentioned in the part discussed about private life the sterilization of women with mental disability is not justified under the limitation of the right to family life saving exceptional circumstances mentioned under chapter four.

3.4 The Right to Autonomy

The convention on rights of persons with disability under its general principle part provided for respect to individual autonomy.[184] likewise the committee on Convention on Elimination of Discrimination Against Women also impose obligation on its States parties in particular:(e) Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice. [185] The ECtHR's jurisprudence can now be said to provide a legal entitlement to personal freedom in the sense of allowing individuals to choose how to live their own lives. This includes a positive obligation on the State to make sure that enabling social conditions are accessible and available.[186]

3.4.1 The content of the right

Personal autonomy can be defined both in broader and narrower sense. For instance, the broader definition of personal autonomy is adopted by the European court of human right in case of pretty v United Kingdom. In this case Personal autonomy is defined as the ability to conduct life in a manner of one's own choosing. This has been deduced from the courts conclusion which reads as "the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned."[187] This broader definition also encompasses a right to decline to consent to medical treatment which might have the effect of prolonging life.[188] the Court has also recognized a right to respect for the decision to become a genetic parent or not, and more recently even a right to conceive a child ensue from the broader definition of the ability to live life in a manner of one's choosing (personal autonomy).

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[184] CRPD supra note 13 art 3
[185] Committee CEDAW, General Recommendation 24 supra note 70, para31
[186] N.R. Koffeman, 'The right to personal autonomy in the case law of the European Court of Human Rights' (2010) 60
[187] *Pretty v. United Kingdom*, supra note 145, para. 62
[188] Ibid para 63

Personal autonomy can also be defined in narrower sense in which it perceived as bodily integrity. This narrower approach is adopted by the European court of human in abortion cases. For instance in the case of Tysiąc v. Poland, The Court found that, "apart from balancing the individual's rights against the general interest in case of a therapeutic abortion the national regulations on abortion also had to be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be."[189] This implying, that the woman must have the right to control her own body and thus to stop an unwanted pregnancy, especially if it poses a risk to her health.[190] Thus right to make choices about one's own body, forms an integral part of the notion of personal autonomy.[191]

The Court also recognized that "the sphere of personal autonomy includes the right of everyone to freely pursue the development and fulfillment of his or her personality and to establish and develop relationships with other persons and the outside world."[192] The other aspect of Personal autonomy is self-determination or self-creation: becoming the person you want to be, evolving and changing in line with your choices, being self-constituting.[193] The principle of autonomy requires that a patient is free to make decisions on her own free will in the absence of any form of coercion. Simply put, the patient's right to self-determination must be upheld or in instances where a patient is deprived of the ability to make her own decisions, such a patient is to be afforded protection.[194] In an attempt to promote the best interests of the patient, decisions taken by the patient and not the healthcare practitioner must be given effect to.[195] In other words, respecting a patient's autonomy demands that the patient's informed consent to medical procedures and treatment is obtained.

3.4.2 Limitation to right to autonomy

Like the right to respect for private and family life, the right to autonomy is also not an absolute right. The exercise of this right finds its limitations in the undertaking of activities that are harmful or dangerous to others; thus, the vulnerability of others may legitimately restrict the

[189] Tysiąc v. Poland, European Court of Human right, (Application no. 5410/03), judgment, 2007 paras. 107-108.
[190] N.R. Koffeman, supra note 186 para 36
[191] Ibid 31
[192] Jehova's witnesses of Moscow v. Russia, European Court of Human Right, (application no. 302/02), judgment 2010, para. 117
[193] N.R. Koffeman supra note 186, at 23
[194] ACOG Committee Opinion Number 371, 'Sterilization of women, including those with mental disabilities'(2007) 110, Obstet Gynecol, 1, 217
[195] Moodley K (ed.) Medical Ethics, Law and Human Rights A South African Perspective (2011) 42.

exercise of an individual's personal autonomy.[196] This has been clearly reflected in the case of K.A. and A.D. v. Belgium, that is concerned with the group sex, in this case the court found the harm inflicted to others to be a decisive limitation to the exercise of the personal autonomy of the applicants since there was clear evidence that one of the three participants in the violent group sex had not consented to the harm inflicted.[197] In this regard Pedain concluded that 'we actively exercise our personal autonomy not only in what we do in conjunction with others, but also in what we allow others to do to us.[198]

In case of Conflict of interest in exercising the right to autonomy, the remedy depends on circumstance of the case. For instance the European court of human right in its procreation (abortion) case of Boso v. Italy concluded that if the bodily integrity or more narrowly defined as the health of the mother is involved, it may serve as decisive factor that will always prevail over the interests of the father-to-be, as she is the person primarily concerned by the pregnancy and its continuation or termination.[199] Thus physical or bodily integrity serve as an extra argument for the prevalence of her autonomy rights.

3.4.3 Implication on Sterilization of women with mental disability

As it has been mentioned above women with mental disability have the right to autonomy. This right encompasses the right of individuals to conduct their life in once choosing. Thus, among others the decision to spend once remaining life as a mother for genetically born child would fall within this broader definition of the right to autonomy. However the act of sterilization deprives women with mental disability enjoying this right, since it makes them unable to procreate permanently based on the consent of others.

Besides, the narrow definition of personal autonomy deals with protection of body integrity. As it has been mentioned above in case of Tysiąc v. Poland,[200] when the court permits the abortion of unwanted pregnancy it reasoned that women have the right to respect for bodily integrity implying that the woman must have the right to control her own body and thus to stop an unwanted pregnancy, especially if it poses a risk to her health. The same argument holds true

[196] Pretty v. United Kingdom, supra note 145, para. 62.
[197] K.A. and A.D. v. Belgium, European Court of Human Right (application nos. 42758/98 and 45558/99), judgment, 2005 para. 85
[198] A. Pedain, 'The human rights dimension of the Diane Pretty case' (2003) 62, Cambridge Law Journal, 1, 183
[199] Boso v. Italy, European Court of Human Right (application. no. 50490/99) decision of 5 September 2002
[200] Tysiąc v. Poland, supra note 189, paras, 107-108

with regard to sterilization of women with mental disability. This is because as it has been mentioned in definitional part sterilization involves removal of the uterus, and sometimes the cervix, fallopian tubes, ovaries or part of the vagina, blocking or closing of the fallopian tubes and destroying the uterine lining for purposes of stopping menstruation.[201] This acts directly interferes her body integrity and as far as this acts are done with the consent of third parties she will not be able to control her body. Therefore, sterilization is against her right to personal autonomy.

Like other rights mentioned above the right to personal autonomy is not an absolute right. Thus one may argue that the interference on autonomy right of woman with mental disability is justified. However, it not, because as it has been explained on case laws mentioned in limitation part, right to autonomy is restricted when exercise of this right inflict harm on others. But when we see the purpose of sterilizing women with mental disability (mentioned under chapter two) it is not to prevent harm inflicted on others. Also as it has been mentioned under the part discussed about sterilization of women with mental disability in light with the right to private life, any burden the fertility of women with mental disability pose on others wouldn't justify their sterilization based on protection of right of others. This is due to the presence of less intrusive alternatives to sterilization. Therefore except the situations mentioned under chapter four it is not justified under the limitation part.

3.5 Prohibition against Torture and Inhuman or Degrading Treatment

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment (ill treatment) is enshrined under number of international and regional human right treaties. These include the International Covenant on Civil and Political Rights[202] African Charter on Human and Peoples' Rights[203] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Convention on the Rights of the Child.[204] This applies to all individuals (both disabled and non-disabled). Specifically, Convention on Rights of Persons with Disability provided that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her

[201] Laura Elliot supra note 39, at 2
[202] ICCPR supra note 13, art, 7, 10
[203] ACHPR supra note 14, art 5
[204] CRC supra note 13 art, 37

free consent to medical or scientific experimentation."[205]

3.5.1Content of the right

As regards the types of treatment which fall within the scope of prohibition against torture and other cruel, inhuman or degrading treatment or punishment, the European court of human right in in pretty v Uk refers to ill-treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering.[206] In Ig v Slovakia the court also mentioned the type of treatment that amounts to inhuman or degrading treatment stating that "a person's treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance; it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.[207] To fall within the scope of right to prohibition against torture and other cruel, inhuman or degrading treatment or punishment such treatment must attain a minimum level of severity. The assessment of such a minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[208] The suffering which flows from naturally occurring illness, physical or mental, may be fall within the scope where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.[209]

The Human Rights Committee has also noted that the purpose of the right is to protect both dignity and the physical and mental integrity of the individual from acts that cause not only physical but also mental suffering. It has further noted that the right protects individuals from cruel, inhuman, or degrading treatment in medical institutions.[210]

This right imposes both negative and positive obligation on the government. The negative obligation inferred from the application of the prohibition against torture and other cruel,

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[205] CRPD supra note 13, art 15(1)
[206] Pretty v Uk supra note 145 para 52.
[207] IG v Slovakia supra note, 104, para 121
[208] Ibid para 121
[209] Pretty v Uk supra note 145 Para 52
[210] Human Rights Committee, General comment no 20: Article 7 (prohibition of torture, or other cruel, inhuman or degrading treatment or punishment). 1992. Available at: http://www.refworld.org/docid/453883fb0.html. Accessed 30 march, 2018.

inhuman or degrading treatment or punishment in contexts in which the risk to the individual of being subjected to any of the above proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities. Thus States has to refrain from inflicting serious harm on persons within their jurisdiction.[211] the Court has also held that the obligation of the state to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with prohibition against torture and other cruel, inhuman or degrading treatment, impose positive obligation on States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals.[212]

3.5.2 Limitation

There is no need for striking a balance between right to be protected from torture, degrading and in human treatment and any competing interest of the community, because the balance struck was disproportionate as the right is an absolute one.[213]

3.5.3 Implication on Sterilization of women with mental disability

As mentioned above women with mental disability have the right to prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This right prohibits ill-treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering.[214] As it has been mentioned in definitional part, sterilization of women with mental disability involves removal of the uterus, and sometimes the cervix, fallopian tubes, ovaries or part of the vagina, blocking or closing of the fallopian tubes and destroying the uterine lining for purposes of stopping menstruation(see chapter two). These acts cause actual bodily injury and cause mental and physical suffering. This has also been affirmed by the court ECtHR in V.C vs Slovakia stating that sterilization concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life."[215]

Besides as mentioned above person's treatment is considered to be degrading when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity

[211] Pretty v uk supra note 145 para 50
[212] Ibid para 51, see also CRPD supra note 13 art 15(2)
[213] Pretty v Uk supra note 145 para 49
[214] Ibid para 52
[215] V.C v Slovakia supra note 26 para 106

among others. Also when we sterilize women with mental disability (who are always subject to this act with consent of others) for purposes other than medical emergencies and exception mentioned under chapter four, we are objectifying, disrespecting them and also disregarding their human dignity because of their mental disability. Additionally, when women with relative mental disabilities get back their mental competence and learned that they have sterilized without their consent. They will feel debased and humiliated and considered as unworthy persons both in the eyes of themselves and communities. This suffices the minimum threshold of severity to consider their sterilization as in human or degrading treatment.

This has also been affirmed by European Court of Human Right in Ig v Slovakia when the Court accepts that the first applicant was susceptible to feeling debased and humiliated when she learned that she had been sterilized without her or her legal guardians' prior informed consent. Taking into account the nature of the intervention, its circumstances, the age of the applicant and also the fact that she belongs to a vulnerable population group considered the act of sterilization as degrading within the meaning of Article 3 of ECHR.[216]

Therefore sterilization of women with mental disability is an interference with their right to prohibition against torture and other cruel, inhuman or degrading treatment or punishment saving the exceptional circumstance of serious threat to life and that mentioned under chapter four.

Unlike, the above mentioned other rights of women with mental disability, right to prohibition against torture and other cruel, inhuman or degrading treatment or punishment is an absolute right. Thus sterilization of women with mental disability would not be justified in any ground.

3.6 The Right to Non-Discrimination

According to article 2 of Universal Declaration on Human Right: "Everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Although there is no explicit reference to prohibition of discrimination based on disability, it is important to note that the grounds enumerated in these provisions are merely illustrative and not exhaustive. The term 'other status' has an open-ended meaning; some grounds not explicitly mentioned, such as age, gender, disability, nationality and sexual orientation could

[216] IG v Slovakia supra note 104 para 123

also be considered prohibited grounds.[217] This right is also provided under other instruments like International Covenant on Civil and Political Right[218] International Covenant on Economic Social and Cultural Rights[219] Convention on the Rights of Child[220] Convention on the Elimination of all forms of Discrimination against Women[221] African Charter on Human and People's Right[222] American Convention on Human Right[223] European Convention on Human Right[224] Protocol No. 12 of ECHR[225] Unlike other general human right treaties Convention on the Right of Child made explicit reference to the term "disability" to the grounds on which no discrimination is allowed.[226] particularly the Convention on Rights of Persons with Disability impose obligation on states parties to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.[227]

3.6.1 Content of the right

The right to prohibition against discrimination extends to "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[228] A difference in treatment between persons in analogous or relevantly similar positions is discriminatory. Likewise Discrimination also arises where States fail to treat differently persons whose situations are significantly different.[229] This must have the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedom

3.6.2 Limitation to prohibition against discrimination

[217] Committee on Economic, Social and Cultural Rights, General comment No. 6, The economic, social and cultural rights of older persons (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996) para 12
[218] ICCPR supra note 13 art 2, 20,
[219] ICESCR supra note 14 art 2
[220] CRC supra note 13 art 2
[221] CEDAW supra note 14 art 1
[222] ACHPR supra note 14 art 2,
[223] ACHR supra note 13 art 1,
[224] ECHR supra note 13 art 14,
[225] Protocol No. 12 of ECHR supra note 19 art 1
[226] CRC supra note 13 art 2,
[227] CRPD supra note 13, art 5(2)
[228] General Comment No. 18, in United Nations Compilation of General Comments, p. 134, para. 1
[229] Pretty v Uk supra note 145, para 87

Despite what seems to be suggested by the above mentioned provisions and statement of human right committee, not all distinctions between persons and groups of persons can be regarded as discrimination in the true sense of this term.[230]

This follows from the consistent case law of the international monitoring bodies, For instance The European court of human right under the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment held that:

"For the purposes of Article 14 (prohibition of discrimination) a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[231] What we understand from this case is that In general international law, a violation of the principle of non-discrimination not arises if equal cases are treated in a different manner provided that such a difference in treatment have an objective and reasonable justification and there is proportionality between the aim sought and the means employed. However, the Contracting States "enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law".[232]

3.6.3 Implication on Sterilization of Women with Mental Disability

As it has been mentioned above discrimination can emanate from two angels. The first is a difference in treatment between persons in analogous or relevantly similar positions and the second is failure to treat differently persons whose situations are significantly different. And when such treatments nullify or impair the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. Also in similar vein the principle of forced sterilization that is adopted by the UN human right bodies,[233] regional human right courts[234] and the convention on rights of persons with disability by itself is discriminatory against women with mental disability. This is because as it has been mentioned above this principle, on one hand, provided general requirement of free and informed consent as a condition to permit sterilization

[230] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers; the Right to Equality and Non-Discrimination in the Administration of Justice 651

[231] Abdulaziz, Cabales and Balkandali v. the United Kingdom, European Court of Human Right, Application no. judgment 1985, p. 35, paras.72,

[232] Ibid

[233] AS v Hungary supra note 87

[234] IV v Bolivia supra note, 80

procedure. On the other hand international and regional human right laws and jurisprudences fail to arrange special mechanisms to mentally incompetent women who can't give consent. Also as it has been mentioned under chapter two the general legal capacity exercising mechanism provided under convention on the rights of persons with disability leads to substituted decision making in situation of absolute incapacity to give consent. Even in partial incapacity to give consent the supported decision making mechanism will lead to coercion and deceive (see chapter four) this paves way to sterilization of women with mental disability based on the consent given by guardians. Thus, considering mentally incompetent women in similar way to those of mentally competent women and providing similar requirement of giving free and informed consent to protect both from informed sterilization is discrimination based on mental disability. This is because in such case persons who are in different situation are treated similarly. Also as it has mentioned above this treatment impair women with mental disability from enjoying their right to private and family life, personal autonomy, and prohibition against torture, inhuman and degrading treatment. Therefore sterilization of women with mental disability saving the circumstances of serious threat to life and exception mentioned under chapter four, is discrimination based on mental disability.

3.7 The Right to Equality

The Universal Declaration on human right affirming that "all human beings are born free and equal in dignity and rights"[235] provided that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[236] This has also been affirmed by other international and regional human right instruments like International Covenant on Civil and Political Rights[237] International Covenant on Economic Social and Cultural Rights[238] African Charter on Human People's Right[239] American Convention Human Right.[240] Apart from these general human right instruments, the right to equality has also been provided under the specific convention of persons with disability. The Convention on the Rights of Persons with Disability provides that all persons are equal

[235] UDHR supra note 13, art 1
[236] Ibid, art 7
[237] ICCPR supra note 13, art 14, 25, 26,
[238] ICESCR supra note 14, art 3,
[239] ACHPR supra note 14, art 3,
[240] ACHR supra note 13, art 24

before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.[241]

3.7.1 Content of the Right

What we understand from the above mentioned provisions, the right to equality protects three different but related rights. The first is the right to recognition as a person before the law. The essence of this right is equality of legal capacity. The second is the right to enjoy other human rights without 'distinction or discrimination of any kind'. Everyone has the same rights and deserves the same level of respect. This means that laws, policies and programs should not be discriminatory and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory way. It includes some examples of discrimination. These include discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status. The third right provides that everyone is entitled to equal protection of the law without discrimination. This right refers to the enforcement and administration of the law.[242] However, as noted by the human right Committee, "the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance". In support of its statement, it points out that certain provisions of the Covenant itself contain distinctions between people.[243] Moreover, "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[244]

3.7.2 The limitations

Like the right to non-discrimination, the right to equality is not an absolute right. It can be limited up on the fulfillment of some conditions. The human right Committee mentioned these conditions when dealing with the case of Broeks v. the Netherlands. In this case committee has confirmed that "the right to equality before the law and equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based

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[241] CRPD supra note 13, art 3, 5(1)

[242] Inter-American Court of Human Right, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4, p. 104, para. 56

[243] General Comment No. 18, in United Nations Compilation of General Comments, pp. 135-136, para. 8

[244] Ibid p. 136, para. 10

on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of right to equality (article 26).”[245] For the discriminatory treatment to be legitimate, first, there has to have justification second the justification has to be objective and reasonable. As stated by the inter-American court of human right, this is, because there may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position.[246]

Inter-American Court of Human Rights in its advisory opinion on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, expressed the limitations in brief way than the human right committee. Accordingly, the court states that “no discrimination (within the meaning of equality) exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows, that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”[247]

The court further asserted that “the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.[248]

According to the authors Currie and De Waal, the requirements that the law must be reasonable and justifiable means that the reason for restricting a right embodied in the bill of rights must be “acceptable to an open and democratic society based on human dignity, equality and freedom.”[249] Reasonableness requires that the limitation must achieve a particular purpose and

[245] S. W. M. Broeks v. the Netherlands, Communication No. 172/1984, (Views adopted on 9 April 1987), in UN doc. GAOR, A/42/40, p. 150, para. 13;
[246] Inter-American Court of Human Right, supra note 242 p. 104, para. 56
[247] ibid para 57
[248] Ibid
[249] I. Currie & J De Waal, The Bill of Rights Handbook, (5 ed) 2005, 176

not infringe upon any other fundamental right.[250] Further, not only must the law be applied in order to achieve a goal that is constitutionally acceptable, in addition, the harm or infringement of the right enshrined in the bill of rights must be balanced against the purpose that the law aims to achieve.[251]

3.7.3 Implication on Sterilization of Women with Mental Disability

As it has been mentioned above one aspect of the right to equality is the prohibition against unreasonable and unjustifiable direct or indirect discrimination on any ground. When we also consider, the purpose of the sterilization of women with mental disability (mentioned under chapter two, eugenic purpose, prevention of sexual abuse and resulting conception and incapacity of motherhood) are unreasonable and unjustifiable discrimination based on their mental disability.[252] This is due to the reason that, for instance eugenic purpose has no scientific base that assured all women with mental disability give a birth to a child with similar disability. Similarly sterilization of women with mental disability for the purpose of prevention of sexual abuse is not scientifically supported. There is no evidence to suggest that sterilization will reduce the incidence of sexual abuse.[253] The American Academy of Pediatrics notes that "sterilization will not guard against sexually transmitted diseases and will be less effective safeguard against abuse than the creation of a safe environment which minimizes the scope for abuse to occur."[254] In such case the first requirements of proportionality is missed because there is no connection between the measures taken (sterilization) and the aim pursued (prevention of sexual abuse). This is also unjustified from human right perspective. Women with mental disability need special support, care and protection against sexual abuse due to their double vulnerability status. This is also affirmed by the committee on international covenant on economic social and cultural rights stating "even in times of severe resource constraints, States parties have the duty to protect the vulnerable members of society"[255]

Also sterilization of women with mental disability for purpose of easing the burden of the state,

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[250] ibid
[251] ibid
[252] Oana Georgiana Girlescu, supra note 27, at 49
[253] American Academy of Pediatrics Committee on Bioethics, 'Sterilization of Minors' (1999) 107 Pediatuics, 339.
[254] Ibid
[255] Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), para. 12) referred in Committee on Economic, Social and Cultural Rights, General comment No. 6, The economic, social and cultural rights of older persons (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996) para 17

community and family that is related with conception, child rearing and menstrual hygiene of the former is also unjustified. Indeed Sterilization will clearly prevent pregnancy and control a woman or girl's menstrual cycle and in doing so, will also address her carer's concerns. There is connection between the measure taken (sterilization) and the aim pursued (prevention of conception). Thus the real question becomes, is there another reasonably available measure to prevent pregnancy and control the menstrual cycle of women with mental disability, which involves less interference with their rights? The answer is yes (see chapter four for discussion on alternatives to sterilization). So that proportionality test is not fulfilled.

In addition, the convention on the right of persons with disability provided that "States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities."[256] Where the immediate family is unable to care for a child with disabilities, States Parties shall undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.[257] Also the regional human right courts concluded that sterilization without giving free and informed consent is justified only in case of life saving medical interventions (see the discussion part on sterilization of women with mental disability in light with the right to private life). Therefore sterilization of women with mental disability is against the right to equality saving exceptional situations mentioned under chapter four.

3.8 The right to respect for Human dignity

Universal Declaration of Human Right under its Preamble stated "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Article 1 also takes up this theme and provides "that all human beings are born free and equal in dignity and rights".[258] Also Both International Covenant Civil and Political Rights and International Covenant on Economic Social and Cultural Right state that all human rights derive from the inherent dignity of the human person.[259] Human dignity is also reflected in the Preambles and specific provisions of the International Conventions on elimination of discrimination against women and the Prevention of

[256] CRPD supra note 13 art 23(2)
[257] CRPD supra note 13 art 23(5)
[258] UDHR supra note 13 art 1, 22, 23
[259] ICCPR supra note 13, preamble, art 10 and ICESCR supra note 17 preamble, art 13

Torture and Convention on the Rights of Child.[260] The convention on rights of persons with disability has also provided for the need to respect the human dignity of persons with disability.[261] The same is provided by the regional human right instruments like the African Charter on Human and People's Right,[262] European Convention on Human Rights and Biomedicine Preamble,[263] The aim of this Convention is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.[264] American Convention Human Right[265]

3.8.1 The content of the right to respect for human dignity

The basic minimum content of human dignity has at least three elements.[266] The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and the third is some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.[267] third element regarding the relationship between the state and the individual. This is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa (the limited-state claim).[268]

The second and the third elements are explained by Andrew Clapham. He has suggested that: concern for human dignity has at least four aspects: (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another.[269] Dignity has figured prominently in decisions concerning the meaning and scope of prohibitions on torture and cognate terms, such as inhuman or degrading treatment. In his separate opinion in Ireland v. United Kingdom Judge Sir Gerald Fitzmaurice identified the concept of human dignity as "central to the idea of what constituted degrading treatment under Article 3 ECHR": stating that

[260] CRC supra note 13, preamble 28, 37, 40
[261] CRPD supra note 13, art 3(a) 8, 16, 24, and 25
[262] ACHPR supra note 14, preamble, art 5
[263] European Convention on Human Rights and Biomedicine supra note, 19 Preamble, art 1
[264] Ibid preamble
[265] ACHR supra note 13, Preamble, arts 6 and 11
[266] Christopher Mccrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law, 4, 679
[267] Ibid
[268] Ibid
[269] A. Clapham, Human Rights Obligations of Non-State Actors (2006) 545 - 546

"in the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt…[270] also the ECtHR has increasingly resorted to regard human dignity as central notion that is protected by prohibitions on inhuman and degrading treatment. (See above discussion on prohibition against torture, inhuman and degrading treatment)

(2) the assurance of the possibility for individual choice and the conditions for each individual's self-fulfillment autonomy, or self-realization;[271] this aspect of human dignity is closely related with the Kantian conception of dignity as autonomy; that is, the idea that to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.[272] Human Dignity has been central to the approach jurisdictions take to the woman's autonomy interest in deciding whether to have an abortion and her dignity required state abstention.[273]

(3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity;[274] Some have argued, indeed, that the concept of dignity is the most appropriate normative basis for viewing anti-discrimination law generally. For instance Réaume argues that unless equality or a prohibition on discrimination means that everyone must be treated the same all of the time, judges need some basis for deciding which distinctions are permissible and which is not.[275]

Also the Inter-American Court of Human Rights has held that "the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual."[276] Because of this, the Court explained "it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves

[270] Ireland v. United Kingdom, European Court of Human Right (Application no. 5310/71) judgment, 1978, dissenting Opinion of Judge Fitzmaurice, para. 27
[271] A. Clapham,supra note, 269
[272] Christopher Mccrudden, supra note 266 at 659-60
[273] A, B and C v. Ireland, European Court of Human Right, (Grand Chamber), (Application no.) judgment, paras 214 and 245.
[274] A. Clapham supra note, 269
[275] Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana L Rev, 645.
[276] Inter-American Court of Human Rights, Advisory opinion, supra note 242, paras 55-56.

offensive to human dignity."[277] "Accordingly, no discrimination existed if the difference in treatment had a legitimate purpose."[278]

(4) The creation of the necessary conditions for each individual to have their essential needs satisfied.[279] More generally, the scope of human dignity is wide enough to encompass all human rights. This is because all of the human rights come to be seen as best interpreted through the lens of dignity. For instance, in pretty v Uk the ECtHR stated that the very essence of the Convention is respect for human dignity and human freedom.[280]

3.8.2 Limitation

The rights to life and dignity were the most important of all human rights, and the source of all other personal rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.[281] What we understand from this saying is that limitation to right to human dignity is not justified.

3.8.3 Implication on Sterilization of women with mental disability

As has been mentioned above the scope of right to the human dignity encompass freedom from torture, inhuman and degrading treatment, respect for once personal autonomy, respect for the equality of all human beings and avoiding unreasonable and unjustifiable discrimination based on any ground including mental disability. Thus all rights discussed above forms an integral part of right to human dignity. I have also discussed above the link between these rights and sterilization of women with mental disability and found that sterilization of such persons is against them. Therefore, sterilization of women with mental disability also violates their right to respect for human dignity. Besides there is also clear reference by human right jurisprudences that sterilization undergone without giving free and informed consent to be disrespecting their dignity. For instance, the European court of human right in NB v Slovakia held that "the present applicant's sterilization was not a life-saving medical intervention and that it was carried out without the informed consent of the applicant and/or her representative is incompatible with the requirement of respect for the applicant's human freedom and dignity."[282] Therefore sterilization

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[277] Ibid
[278] Ibid
[279] A. Clapham, supra note 269, at 545 - 546
[280] Pretty v Uk supra note,145, para 65
[281] Christopher Mccrudden, supra note 266 at 688
[282] NB v Slovakia supra note 78, para 74

of women with mental disability against the right to human dignity except in case of serious to threat to life and situation mentioned under chapter four.

3.9 Conclusion

Like any other human beings, women with mental disability have the right to private life, family life, personal autonomy, prohibition against torture, inhuman and degrading treatment, non-discrimination, equality and human dignity. These rights of them are violating through the act of sterilization which is undergoing based on the consent given by third parties. This is due to the reason that sterilization makes women with mental disability incapable of procreating a child permanently, interferes with their body integrity (both physical and mental integrity), objectify and degrade them, disregard their equality and discriminate them based on their mental disability. Generally, sterilization of women with mental disability for the purposes other than medical emergencies and situations mentioned under chapter four is denying their intrinsic worth of being a human there by disrespect their dignity. All these necessitate making of their sterilization in line with human right safeguards. This will be the issue which we turn in next chapter.

CHAPTER FOUR: MAKING STERILIZATION OF WOMEN WITH MENTAL DISABILITY COMPATIBLE WITH FUNDAMENTAL HUMAN RIGHTS

4.1 Introduction

Under chapter three the discussion has been made on the link between sterilization of women with mental disability and their certain fundamental human rights. It is revealed from that discussion; the act of sterilization is violating fundamental human rights of women with mental disability. Thus this chapter (chapter four) is aimed at making sterilization of women with mental disability compatible with fundamental human right (making sterilization of women with mental disability not to violate their human rights). The achievement of this aim necessitates providing specific substantive and procedural requirement that fit with degree of severity of the women's mental disability.

Thus the discussion under this chapter begins with categorization of women with mental disability based on their level of understanding or the degree of severity of their mental disability. Then discuss specific condition and procedure that should be fulfilled to allow sterilization of women with mental disability in exceptional circumstance and finally ends up with conclusion.

4.2 Degree of Mental Disability

Before making the categorization it is better first to define persons with mental disability. Mentally incompetent person is someone whose mind is affected either from birth, disease, injury or by a disorder to such a degree that she requires care, supervision, and control for their own protection, the protection of others, or the protection of their property.[283] They are characterized scientifically as such by virtue of the individual having an intelligence Quotient (IQ) of approximately or below 70, in other words, below average intelligence and are incompetent in a minimum of two of the following areas: communicating on a meaningful level; caring for one's self; interacting at a social level "functional academic skills; work; leisure, health and safety".[284] Over time, many people experience subtle changes in their mental capacity

[283] Public legal education and information service of New Brunswick, booklet supra note 112, p 3

[284] American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, (4th ed.). Washington, DC, American Psychiatric Association, 1994

and yet they continue to manage their affairs or some aspects of their affairs. Such changes could be achieved when the mental disability is temporary or relative.[285] For example, a stroke may only impair someone for a few months. However achieving such change would be impossible when the mental disability is permanent or absolute for example memory loss due to dementia.[286]

4.2.1 Women with Relative Mental Disability

This category included two types of mentally incompetent individuals. These are a mildly retarded individual and a moderately retarded individual. A mildly retarded individual is a person with an intelligence quotient (IQ) of between 50 and 55 to 70.[287] Such an individual is competent to perform semi-skilled labour and Contraception is Advisable in instances where such a person expresses interest in sexual activity.[288]

A moderately retarded individual is one who has an intelligence quotient of between 35 and 40 to 50 and 55.[289] Such individuals historically lived in environments where caregivers watched over them with a high degree of vigilance however, these individuals now form part of society and are thus exposed to far greater risks than in the sheltered environment of an institution.[290] Although such persons are able to do semi-skilled labour they are not able to give free and fully informed consent to sterilization. This is because in order to determine whether women are mentally capable to give the required consent to sterilization, there are three components that must be taken into account.[291] Firstly, whether sufficient information has been placed before the patient in order to enable her to make an informed decision; secondly, whether the patient has the requisite mental capacity to make decisions and also to understand the consequences of her choices and finally, whether the patient is making the decision on a voluntary basis, in the absence of coercion which needs total mental capacity.[292] The problem encountered by women with relative mental disability in respect to applying these components is a way how they understand the information communicated to them. This is because the legal capacity exercising

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[285] Public legal education and information service of New Brunswick, booklet, supra note 112 at 4
[286] Ibid
[287] Serisha Bhajan, 'The Ethical and Legal Implications of Performing Involuntary Sterilization On Mentally Incompetent Adolescent Women' (2015) 38
[288] OI Paransky, RK Zurawin, supra note 113 at 234
[289] Ibid at 235
[290] Ibid
[291] R. Howard, S. Hendy, 'The sterilization of women with learning disabilities – some points for consideration' (2004) 50 The British Journal of Developmental Disabilities, 2, 133-134
[292] Ibid

scheme available to Women with relative mental disability under the convention on rights persons with disability is supported decision making.[293] Thus such persons are going to understand all information (regarding sterilization, its risks, benefits, available alternatives) available to them with the help of physicians, families and others who are around them. However all of these persons on one or other way have interest on sterilization of women with relative mental disability (families and guardians to ease the burden imposed on them, pubic hospital physicians to realize the government's population reduction policy). so it will be difficult to certain that the information provided are true and the way she understand the information and the way she give consent is free from coercion, induce, and the like.

For instance in five of the sterilization cases brought before the CEDAW committee and regional human right courts,[294] the women who were subject of sterilization were lost their capacity to give consent temporally and information provided by the physician was false (their sterilization is necessary to save their lives which was proved to be false by evidences), not adequate (physicians failed to inform the available alternatives) and the way they are given the information was coercive since the women were in labour pain on that time. What can be concluded from these fact is that although women with relative mental disability assumed to be able to give consent through supported decision making scheme, it will be difficult to consider the consent as free or voluntary and given after fully understanding the nature of sterilization (irreversibility), and its risk. Therefore women with relative mental disability can't give consent to level required for performing sterilization. However due to the temporary nature of their mental disability they can give free and informed in near future albeit they can't do so in present.

4.2.2 Women with absolute mental disability

This category also contains two types of mentally incompetent individuals. These are a severely retarded person and a profoundly retarded individual. A severely retarded person is an individual with an intelligence quotient of between 20 and 25 to 30 and 35.[295] A profoundly retarded individual is a person with an intelligence quotient that is below 20 or 25.[296] Personal hygiene is an issue as these individuals are quite often, unable to care for themselves and often express no

[293] CRPD supra note 13 art 12(3)
[294] See AS v Hungry supra note 87 IV v Bolivia supra note 80 IG v Slovakia supra note 104 NB v Slovakia supra note 84 VC v Slovakia supra note 26
[295] Serisha Bhajan, supra note 287
[296] Ibid

interest in sexual activity.[297] Severely retarded patients are not capable of communicating the discomfort being experienced.[298] Generally women with absolute mental disability are characterized by very low level of understanding. Due to this reasons application of the above mentioned requirement that is a women must be able to understand the information communicated to them in order to give free and informed consent, wouldn't be realized. If women do not have the capacity to understand, they will not be able to appreciate the nature and consequences of the proposed procedure or treatment.[299] Kluge submits that in the absence of the capacity to understand and reason, the patient's decision will be random with no motivation for the elected procedure or treatment. The author therefore states that cognitive competence is essential in order for a patient to provide informed consent.[300] In instances where the patient is rendered incompetent to make decisions on account of mental incompetence the healthcare practitioner must make disclosure to the patient's surrogate decision maker and look to the surrogate for the ultimate decision.[301] Therefore women with absolute mental disability can't give free and informed consent. Also due to the severity of their mental disability they will not have chance to recover and get their mental capacity to give consent in near future.

It should now be clear that, consistent with the principle of equality and non-discrimination, and other rights mentioned under chapter three women with mental disability are prima facie entitled to enjoy their sexual and reproductive rights without interference. Thus, where their capacity will improve sufficiently over time,(case of relative mental disability) she has a right to refuse sterilization and just as importantly, a right to consent to this procedure in near future. Therefore, sterilization of women with relative mental disability should be specifically prohibited saving the exceptional circumstance of serious threat to life. The real issue arises where a woman with absolute mental disability as was mentioned above lacks capacity to consent to or refuse sterilization, and there is no reasonable prospect that she will ever develop this capacity. In such circumstances, in addition to situation of serious threat to life, other health condition of women with absolute mental disability necessitates their sterilization. Therefore, in principle sterilization of women with absolute mental disability should be specifically prohibited saving the

[297] OI Paransky, RK Zurawin supra note 113 at 239
[298] Serisha Bhajan, supra note 287
[299] EHW Kluge, 'Incompetent Patients, Substitute Decision Making, and Quality of Life: some Ethical Considerations' Medscape J Med 2008; 10 (10):237
[300] Ibid
[301] Moodley K , supra note 195 at 42

exceptional circumstance mentioned below up on fulfillment of substantive and procedural requirements.

4.3 Substantive Requirement

4.3.1 Permanent mental disability

Before sterilization of women with mental disability is performed she has to undergo a mental competency assessment to determine whether her mental disability is absolute or relative. Mental competency assessment is tests designed to find out if the person being assessed has the specific abilities needed to make decisions about his or her well-being. The assessment tries to determine which abilities a person still has, and which abilities a person may have lost.[302] The exceptional permission of sterilization should apply only to women with absolute mental disability. Thus, those of women with relative mental disability should be excluded. This is due to the nature of their disability. As it has been mentioned above women with relative mental disabilities has a chance of recovery and are able to get their mental competence after a given period of time. So they can give free and informed consent in near future.[303] Thus sterilization of such persons wouldn't be justified by any means (saving exceptional circumstances of medical emergencies). Similarly, for instance where the CEDAW committee prohibits sterilization of girls (minor), its base was minors can get their ability to give free and informed consent when they attain majority.[304]

However women with absolute mental disability have no chance of recovery and are not able to get their mental competence back due to the permanent nature of their disability. They will never be able to give free and informed consent to sterilization. Besides although both women with absolute mental disability and women with relative mental disability have fundamental human rights mentioned under chapter three, their present and future ability to exercise those rights in a meaningful way is different. For example both have the right to private and family life, so that they can procreate, however due their low level of understanding, women with profound mental disability, even may not understand that they have a child or family.

Also For care givers of mentally incompetent adolescent women, menstrual hygiene is

[302] Public legal education and information service of New Brunswick, booklet, supra note 112 at 4.
[303] Ibid at 11-12
[304] CEDAW Committee(2010) Concluding observations of the Committee on the Elimination of Discrimination Against Women: Australia.CEDAW Forty-sixth session, 12 – 30 July 2010. CEDAW/C/AUS/CO/7. Seehttp://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm

particularly problematic as the needs of the women have to be balanced against the ability of the care giver to keep up with the demands of caring for such a patient.[305] In this regard it has been submitted that women who fall within the category of mildly or moderately (relative mental disability) retarded can be taught to use sanitary pads during menstruation, however, this is not always possible in profoundly retarded women.[306] Here what should be bear in mind this regard is that the researcher is not arguing that the low level of understanding in exercising their human right and difficulty on menstrual management are sufficient reasons to justify sterilization of women with absolute mental disability. Rather other cumulative requirements mentioned below should be fulfilled

4.3.2 To Secure the Right to Health

Before sterilization of women with absolute mental disability is decided it is necessary to assess whether interference with human rights of women with mental disability can be justified as being reasonable.[307] The reasonableness of sterilization will depend on the extent to which it was necessary to achieve a legitimate aim and if so, whether the measures undertaken in furtherance of that aim were proportionate.[308] Primary reasons given to justify involuntary sterilization of women with mental disability are eugenic bases, protection against sexual abuse; protection against unwarranted pregnancies; to easy the burdens imposed on families, state and community, and incapacity to motherhood[309] (see chapter two on part discussed the purpose of sterilization of women with mental disability). The assumption underlying each of these is that a woman or girl with an intellectual disability lacks the autonomy and capacity to care for her or any children that she might conceive.[310] Thus, those responsible for her welfare must take measures to secure her best interest. Thus most of the time when the care givers or guardians request for the sterilization of women with mental disability their primary justification is that it is in letters best interests.[311]

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[305] OI Paransky, RK Zurawin, supra note, 113 at 224

[306] Ibid at 225

[307] John Tobin, The Right to Health in International Law (Oxford University Press, 2012), 180-184

[308] John Tobin and Elliot Luke, supra note 38 at 9

[309] Carolyn Frohmader, 'Dehumanized: The Forced sterilization of Women and Girls With Disabilities in Australia' (2013) WWDA Submission to the Senate Inquiry into the involuntary or coerced sterilization of people with disabilities in Australia 35-45

[310] HH Pham, BH Lerner, 'In the Patient's Best interests? Revisiting Sexual Autonomy and Sterilization of the Developmentally Disabled" (2001) 175 West J Med, 280-282

[311] Open society, briefing paper, supra note at 3

However, as it has been discussed under chapter three such purposes are not justifiable legitimate aims. Also in practice the principle of best interest often operated as a proxy for the interests of parents and guardians or others persons rather than women with mental disability.[312] This is because in determining a patient's best interests, the court takes into account the person's wishes and the wishes of any relative.[313] By requiring the tribunal to consider the views of relatives, legislation that adopt the best interest principle, explicitly incorporates the opinions and needs of persons other than the individual concerned in the determination of their best interests.[314] This paves way more specifically, parents, and guardians invariably determined that it would be in the best interests of woman with an absolute mental disability to have the burdens caused by her reproductive system removed by way of sterilization.[315] So that, the best interest approach has in effect been used to perpetuate discriminatory attitudes against women and girls with mental disabilities, and has only served to facilitate the practice of forced sterilization. In this regard, for instance, it has been submitted by the authors Jones and Marks that, when the care giver is requesting sterilization as a matter of convenience or to easy burdens related with menstrual hygiene, it is not for protection of the health of women with mental disability.[316]

Thus caution must be taken that the only justifiable purpose of sterilization of women with absolute mental disability should be to protect their right to health. So the legislations that permits sterilization of women with absolute mental disability must specifically provide the purpose thereof (protection of her health) Ruther than providing in crude term like to protect her best interest.

The main question that can be raised in this part is sterilization without the need to give free and informed consent is permitted under international laws in case of serious threat to life. For instance the Committee on the Elimination of Discrimination against Women has considered forced sterilization a violation of a woman's right to informed consent, infringing on her right to human dignity and physical and mental integrity.[317] The Committee has clarified that except

[312] John Tobin and Elliot Luke, supra note 38 at 5
[313] Laura Elliot, supra note 39 at 7
[314] Ibid
[315] John Tobin and Elliot Luke, supra note 38 at 5
[316] Jones, M & LAB Marks, 'Female and Disabled: A Human Rights Perspective on Law and Medicine'(1997) In (Ed.) K, Petersen, Intersections: Women on Law Medicine and Technology Dartmouth: Ashgate extracts accessed at wwda.org.au/issues/legal/legal1995/steril2/ on the 4 may 2018.
[317] Committee on the Elimination of Discrimination against Women (CEDAW Committee) (1999), General

where there is a serious threat to life, the practice of sterilization of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and free consent, should be prohibited by law.[318] Similarly the regional human right courts permit sterilization without giving free and informed consent in case serious threat to life or medical emergencies.[319] However my argument here is, in addition to the situation of serious threat to life, there are other health conditions that necessitate the sterilization of women with permanent mental disability

The committee's and Court's reference to the presence of malfunction or disease as a prerequisite for therapeutic sterilization arguably places the bar too high for two reasons. First, its emphasis on the threat to the physical health of a woman or girl with mental disability does not recognize -the potential for psychological harm to stem from her inability to control her menstrual cycle. Second, it does not offer a methodology by which to resolve situations which may not be life threatening, but for which sterilization may offer the only viable remedy to address the physical or mental harm being experienced.[320]

Jones and Marks point out the situation when sterilization can further their right to health but that may not amount to serious threat to life. This is when sterilization is chosen for gynecological reasons like, where there is severe menstrual bleeding that cannot be remedied by hormonal therapy (alternatives to sterilization).[321] For instance in one of the Australian case the court decided the sterilizations of Angela, who was unable to talk and lacked the intellectual or physical capacity to use sign language. Her behavior and cognitive capacity were equivalent to that of a three month-old baby and there was no prospect that this would improve. She also experienced epileptic seizures during heavy menstruation that left her anemic. Medical experts testified that for 'some years' attempts had been made to improve her quality of life, and reversible forms of contraception such Implanon, Depo Provera and the pill had been tried, without success. The Court therefore authorized sterilization on the basis that it was necessary to

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recommendation No. 24: Article 12 of the Convention (women and health),A/54/38/Rev.1, chap. I;[para.22]

[318] Concluding observations of the Committee on the Elimination of Discrimination Against Women: CEDAW Committee (2010) Australia. CEDAW Forty-sixth session, 12 – 30 July 2010. CEDAW/C/AUS/CO/7. Seehttp://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm

[319] NB v Slovakia supra note 84, para 74

[320] John Tobin and Elliot Luke, supra note 38 at 16

[321] Jones, M & LAB Marks supra note 316

improve the pain and suffering associated with menstruation.[322]

In such situation prohibiting her sterilization would affect her health. However Women with absolute mental disability like any other persons have the right to the highest attainable standard of health,[323] The Committee on Economic, Social and Cultural Rights (CESCR), has noted that the right to health includes the "right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation."[324] Similarly denying the chance of sterilization or letting women with absolute mental disability to suffer from such severe bleeding knowing that her mental disability is permanent and she will never be able to give free and informed consent in future amounts to degrading treatment that disregard her human dignity. And also taking in to account her double vulnerability status and the physical and psychological suffering she incur due to severe menstrual bleeding prohibiting them the access to sterilization would amount to torture and thereby violate their right to health. It therefore follows that

Involuntary sterilization of a woman with absolute mental disability should be legitimate when it is authorized as a measure of last resort in order to:

a) Save the life of a women or girl with an intellectual disability; and/or

b) To alleviate the serious health burden, whether physical or psychological, associated with menstruation experienced by a woman with absolute mental disability.

With respect to the second scenario, the question may arise that at what point does the physical pain, psychological distress or other health condition triggered by the menstrual cycle (such as epileptic fits) justify sterilization of women with absolute mental disability? Or in other word a question remains as to what test is appropriate to determine when her general right to physical and mental health should take precedence over her specific right to fertility. The answer must be that when her right to physical and mental health is seriously or severely compromised by her menstrual cycle then in the absence of reasonably available less invasive measures, sterilization will be justified as measure of last resort to secure her general right to health at the expense of

[322] (2010) 43 Iam LR 98.

[323] ICESCR supra note 14 art 12, CRPD supra note 13 art 25, CRC supra note 13 art 24

[324] UN Committee on Economic, Social and Cultural Rights,(CESCR) General comment No. 14: the right to the highest attainable standard of health (Art. 12) 2000, E/C.12/2000/4 para 8

her fertility.[325] This will be the issue we turn next.

4.3.3 Inapplicability of Less Intrusive Alternatives to Sterilization

Once it has been settled above sterilization of women with absolute mental disability is necessary to easy physical and psychological suffering resulted from heavy menstrual flow. An assessment of proportionality, in turn, requires consideration of whether there was a rational connection between the aim and the measure undertaken and whether an alternative, less intrusive measure was reasonably available (the minimal impairment test).[326]

In instances, where women with absolute mental disability suffer harm due to their inability to regulate their menstrual flow and require sterilization to suppress excessive menstrual flow, there is direct connection between the measure taken (sterilization) and the legitimate aim pursed (suppression of menstrual flow).[327] Thus the first element of proportionality is full filled. The second element of proportionality will be fulfilled in exceptional circumstances Sterilization would become the only workable means, in order to achieve the goal of menstrual management and to ensure that women with absolute mental disability do not suffer any harm any more. This is only when alternatives to sterilization don't work. To get the clear picture of the situation when alternative may not work, it is better first to know what kinds of alternatives are available. The alternatives available to mentally incompetent women are counseling, oral contraceptives, the contraceptive patch/injectable, Depot-Medroxyprogesterone Acetate and the Progestin Intrauterine Device.[328] The risks and benefits of each will be looked at in turn.

DMPA (Depo-Provera), it used as a contraceptive as well as a means of suppressing menstruation that is frequently used by females who have learning disabilities by administering an injection every twelve weeks.[329] Whilst the drug DMPA achieves suppression of menstruation (although bleeding can still occur), one of the drawbacks of administering the drug, according to the authors is the link between DMPA use and decreased bone mineral density in girls."[330] The implication being that the drug has the potential to increase the user's risk of obtaining

[325] John Tobin and Elliot Luke, supra note 38 at 19
[326] Ibid
[327] OI Paransky and RK Zurawin supra note 113, 225
[328] OI Paransky and RK Zurawin supra note 113, at 225- 227
[329] A. Albanese and NW Hopper supra note 60 at 629
[330] Ibid

osteoporosis at a later stage.[331] Another concern with the use of DMPA is weight gain which is a disadvantage particularly in patients that are immobile.[332]

Paransky and Zurawin have submitted that the risk associated with the prolonged use of DMPA is that like oral contraceptives, there is the risk of the development of cardiovascular disease and breast cancer.[333] In determining whether DMPA is the best method of contraception and menstrual suppression for the absolutely mentally incompetent adolescent, what needs to be determined is whether the risks outweigh the benefits of an injectable contraceptive that is administered to the patient four times per annum.[334] Because of the risk associated with the use of DMPA, it has been submitted by the FDA (Food and Drug Association) and the United Kingdom's Committee on Safety of Medicines (CSM) that DMPA should only be used in adolescents when all other alternatives prove to be inappropriate or inadequate.[335]

Counseling, it requires that the physician must interview the parents, caregivers, educators and other family members in order to narrow down the family's concern.[336] For each concern expressed by the family, behavioral training relating to socialization, menstrual hygiene, how to avoid sexual abuse as well as sexual education and family counseling, should be provided.[337] As has previously been stated, mildly mentally incompetent adolescents can be taught to use sanitary pads however; this is not always possible with regard to women with absolute mental disability.[338]

The contraceptive patch**,** it is applied on a weekly basis thereby eliminating the problem of the daily administration of oral contraceptives.[339] The alternative to the contraceptive patch is a contraceptive injection which is administered on a monthly basis.[340] However, problems may be encountered in administering the injection to women with absolute mental disability.[341]

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[331] ibid at 629 -630
[332] Ibid at 630
[333] Paransky and Zurawin supra note 113 at 225
[334] Ibid
[335] A. Albanese and NW Hopper supra note 60 at 630.
[336] Kreutner AK, 'Sexuality, fertility, and the problems of menstruation in mentally retarded adolescents (1981) Pediatr Clin North Am, 28, 475
[337] Ibid
[338] Ibid
[339] Paransky and Zurawin supra note 113 at 225
[340] Ibid
[341] Ibid

The Progestin Intrauterine Device (IUD) is a non-hormonal method of contraception. However, the difficulty that arises is that the IUD can cause an increase in menstrual bleeding and if the patient engages in sexual activity, there is a risk of infection.[342] In addition, a mentally incompetent patient may have to be sedated in order for the IUD to be inserted as she may offer resistance.[343]

The representative bodies for medical professionals have embraced the language of rights and emphasized the availability of the above mentioned alternative, less invasive methods to address concerns associated with unwanted pregnancies and a woman's menstrual cycle. Yet they still entertain the possibility that in some, albeit, extremely limited circumstances, sterilization may be justified as a measure of last resort. For example, the Royal Australian and New Zealand College of Obstetricians and Gynecologists have stressed that:

"The availability of safe and effective long-acting reversible contraceptives (LARCs), contraceptives that have the added benefit of reducing or eliminating menstrual flow, has greatly reduced the need for surgical sterilization or hysterectomy of younger women in the last decade. However, no method of menstrual regulation or sterilization is perfect, and a small number of disabled girls or women may still have their best interests served by hysterectomy or sterilization."[344]

The American Academy of Pediatrics has conceded that "the appropriateness of alternatives will depend on the functional abilities of the person with mental disability and the reactions of the patient ... to nonsurgical methods to prevent pregnancy".[345]

The position of medical bodies is therefore inclined to support the regulation, rather than absolute prohibition, of the involuntary non-therapeutic sterilization of women and girls with intellectual disabilities. They accept the possibility that these alternative measures, though available, may not always be effective. For example, the medical treatment being received by a woman or a girl for a separate medical condition may be incompatible with medication required

[342] Luukkainen T, 'the levonorgestrel intrauterine system: therapeutic aspects' (2000), Steroids, 65:699
[343] Paransky and Zurawin, supra note 107 at 227
[344] Royal Australian and New Zealand College of Obstetricians and Gynecologists, Submission to the Inquire into the Involuntary or Coerced Sterilization of People with Disabilities in Australia(20 February 2013) at 1
[345] American Academy of Pediatrics Committee on Bioethics, 'Sterilization of Minors' (1999) 107 Pediatuics337, 339

to control and regulate her reproductive health.[346] As such, the risk of side effects from some forms of long acting reversible contraception may preclude their use.[347] In such circumstances, the only measure reasonably available to address the legitimate concerns with respect to the reproductive health of a woman with mental disability may be sterilization. Importantly, this position, which is evidence-based, is consistent with a substantive analysis of the legitimacy of this practice under international law.

Generally, resort to sterilization will be proportionate only after exhaustion of the above mentioned alternatives and with clear medical evidence that shows such alternatives don't work.

4.3.4 Procedural requirements

Before sterilization of women with absolute mental disability is undergo, medical board that consists of psychiatrist, gynecologist, surgeon, medical doctor, and nurse should decide the sterilization of women with absolute mental disability. in order to reach to such a decision the board has to critically examine that the patient concerned is mentally incompetent to the extent that she is not able to make decisions regarding contraception or sterilization, and has no prospect that she will develop mentally in order to gain the requisite mental competence to make decisions regarding contraception or sterilization in the future, her right to physical and mental health is seriously or severely compromised by her menstrual cycle and the existing available less invasive alternatives to sterilization are exhausted and medically proved to be nonfunctional to alleviate the suffering encountered by women with absolute mental. Such decision of the medical board should be reviewed by the competent court and the sterilization will undergo only after the court affirmed the decision of the medical board. The court has to make thorough examination with the aim of ascertaining the reliability of medical evidences brought before it. The request for the review of the decision of the medical board can be brought to the court by any person like civil societies, families, guardians, medical professionals.

4.4 Conclusion

The discussion under this chapter shows that women with mental disability are broad term which encompasses two different categories of women. The first category deals with women with absolute mental disability whose mental disability is medically proved to be permanent with no

[346] Malcolm Parker email to John Tobin, 15 May 2013 .
[347] Royal Australian and New Zealand College of Obstetricians and Gynecologists, supra note 344 at 2

chance of recovery. The second category deals with women with relative mental disability whose mental disability is medically proved to be temporary and has chance of recovery. As it has been discussed under chapter three Sterilization of women mental disability in general is violation of their certain fundamental human rights. It found to be necessary to adopt specific law that prohibits sterilization of women with mental disability.

However, in some exceptional circumstances the absolute prohibition of sterilization of women with mental disability by itself will cause violation of their human right. Thus it is found necessary to adopt exceptional circumstances to permit sterilization provided that there is justifiable reason and the measure taken is proportional to the interest protected. Specifically, this exceptional circumstance applies with regard to women with absolute mental disability, in exhaustion of alternatives to sterilization and to protect the right to health of women with absolute mental disability.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 Conclusion

Across the globe women with mental disability are subject to forced sterilization. The decision to sterilize them is usually on the ground of menstrual management and personal care, pregnancy prevention as well as taking into account the individual's ability in terms of motherhood and parenting. Sterilization of women with mental disability for the purposes mentioned above is violation of their fundamental human rights like the right to private life, family life, autonomy, prohibition against torture, inhuman and degrading treatment, equality, non-discrimination and human dignity. The international human right laws and jurisprudences as they stand know is inadequate to protect women with mental disability from forced sterilization.

The prohibition of forced sterilization is not strong enough to restrain guardians from giving consent for the sterilization of women with mental disability. This is due to four facts. The first is the international human right laws and jurisprudences provide giving free and fully informed consent as requirement to prohibit forced sterilization in general. The second is the mental incapacity of women with mental disability to give free and fully informed consent. The third is apart from concluding that sterilization made without obtaining the free and informed consent of mentally competent persons is against their human rights, the UN human rights committees and regional human right courts failed to specifically deal how mentally incompetent women can give free and informed consent to sterilization. The fourth is the possibility of general legal capacity exercising scheme provided under the convention on the rights of persons with disability (supported decision making) changed in to substituted decision making in situation when the required capacity is not achieved within the supported decision making scheme. These facts cumulatively will inevitably result in sterilization of women with mental disability based on the consent given by guardians which by itself amounts to forced sterilization. These make them to be out of the protection provided by international human right laws and jurisprudences.

Taking into account the human right violations of women with mental disability through the act of sterilization (which always by default is forced), and the inadequacy of the existing laws to regulate the matter, it is necessary to adopt a law that specifically prohibit the sterilization of women with mental disability. However, given the difference that exists between women with

absolute mental disability and women with relative mental disability and given the necessity to secure the right to health of women with mental disability, it is also necessary to adopt very narrow exception to the prohibition of sterilization of women with mental disability. The exception should be applied up on fulfillment of some conditions. These are after mental competence assessment reveals that the mental incompetence of women with mental disability is permanent or absolute, sterilization is needed to secure their right to health and it is only after exhaustion of less intrusive alternative to sterilization and with the medical evidence that support these alternative don't work.

5.2 Recommendation

Having regard to the conclusion arrived at in this study, the author recommends the following:

- The convention on the rights of persons with disabilities, as specific legal framework for the promotion and protection of human rights of persons with disabilities, should be amended to specifically provide the prohibition of sterilization of women with mental disability. However, it should also put very narrow exception to allow sterilization of women with absolute mental disability provided that, it secure their right to health and less intrusive alternatives to sterilization don't work to that effect.
- The committee on rights of persons with disabilities, as a monitoring organ of convention on the rights of persons with disabilities, taking in to account the special situation of women with mental disability (mental incompetence to give free and informed consent and impossibility to totally abolish substituted decision making scheme with regard to such persons) unlike other persons with disability, should avoid the requirement of free and informed consent and specifically prohibit sterilization of women with mental disability in away suggested above.
- Medical practitioners, as primary body performing sterilization, should take into account that, saving exceptional circumstance of medical emergencies, the sterilization of women with mental disability is violation of their fundamental human rights and should refrain from doing so. In case when the health conditions of women with mental disability (situation other than medical emergencies) necessitate their sterilization, Medical practitioners, before undergoing the sterilization, should make sure that, their mental disability is permanent, it is to secure their right to health and other alternatives don't

work.

- Regional human right courts, as interpreter of regional human right convention and as institution protecting human rights, should specifically deal with the issue of sterilization of women with mental disability. They should avoid the requirement of free and informed consent which is provided as guarantee against forced sterilization all persons with disability. Ruther they should specifically prohibit sterilization of women with mental disability as suggested in the first recommendation.
- Member states of the convention on the rights of persons with disabilities, as obligation bearer for realization of the rights provided under the condition, should initiate the amendment of the convention to specifically prohibit sterilization of women with mental disability. so that their right to private life, family life, autonomy, prohibition against torture, inhuman and degrading treatment, equality, non-discrimination and human dignity (provided under the convention) should be realized.
- Families, guardians and institution of women with mental disability, as primary responsible body to women with mental disability, should strive for the protection of fundamental human rights of the letter. In order to ease the burden imposed on them, due to the fertility of women with mental disability, they should primarily focus on the alternatives rather than resorting to sterilization.

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