Rakshit Agarwal, *Addressing Ableism: The Abortion of a Differently-Abled Foetus,* 9(2) NLUJ L. Rev. 115 (2023).

ADDRESSING ABLEISM: THE ABORTION OF A DIFFERENTLY-ABLED FOETUS

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ABSTRACT

The right to abortion is sacrosanct to a woman's bodily autonomy, reproductive autonomy, and privacy. While the Supreme Court of India has been proactive in granting women, irrespective of marital status, the right to abortion, there have been shortcomings on the part of the three branches of government in addressing the inherent ableism propagated in society in considering the abortion of a differently-abled foetus permissible. At the outset, this paper clarifies that it does not advocate for a pro-life approach. It merely recognises the need to eliminate a social wrong while retaining the pro-choice framework that has been laid down in India. This article addresses this issue by highlighting that disabilities are a social construct, and the continuance of such abortions propagates the ableism inherent in society. It also examines whether restricting such abortions from taking place would stand the well-established test of proportionality laid down by the Supreme Court. In conclusion, it lays down a framework that balances the rights of a woman and the benefit received from the larger social goal of substantive equality.

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I. INTRODUCTION

Although the right to abortion has been constitutionally recognised in the judgment of *Suchita Srivastava v. Chandigarh Administration*,[1] it is prudent to note that it is not absolute. As held in *Z v. State of Bihar*,[2] the state has a compelling interest in protecting the life of the unborn foetus. In furtherance of this interest and the state's desire to eradicate stigma against groups that have been subject to discrimination, both foreign,[3] and Indian legislatures have denied sex-selective abortions,[4] and race-selective abortions,[5] as they propagate a social wrong.

However, abortions on the grounds of differential abilities ("**DA**") have been normalized by society.[6] While it has been banned in a few states in the United States[7] and in countries such as Poland,[8] the practice of aborting a foetus with DA has gained wide legal acceptance in the world. As a matter of fact, the very term "*disabled foetus*" is a misnomer and

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[1]Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.
[2]Z v. State of Bihar, (2018) 11 SCC 572.
[3]Emma Green, *Should Women Be Able to Abort a Foetus Just Because It's Female,* The Atlantic,(May 16, 2016), https://www.theatlantic.com/politics/archive/2016/05/should-women-be-able-to-abort-a-fetus-just-because-its-female-contd/623996/.
[4]The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, § 5(2), No. 57, Acts of Parliament, 1994 (India).
[5]Emma Green, *supra* note 3.
[6]Sally Sheldon and Stephen Wilkinson, *Termination of Pregnancy for reason of foetal disability: Are there grounds for a special exception in Law?*, 9 MED LAW REV. 85-86, 85-109 (2001).
[7] Tori Gooder, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 UNIV CINCINNATI LAW REV 545 (2018).
[8]Amnesty International, *Poland: Regression on abortion access harms women*, (Jan. 26, 2022), https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women.

highlights the stigma associated with differential abilities. This is because the presence of DA or deviations from the socially-accepted normal are considered as "*disabilities*". There is little to no analysis or thought on the manner in which such stigma contributes to the further stigmatization of the community. Drawing from the ban on the abortion of differently-abled foetuses such as in the United States, this article examines the legality of the grounds for abortion prevalent under the Medical Termination of Pregnancy Act 1971 ("**MTP Act**") that allows for the same. The ultimate goal is to determine whether a ban on the abortion of a differently-abled foetus will be constitutionally permissible in India.

This paper will be divided into two sections. The first section will analyse the current position of the law on this issue in India before delving into a comparative analysis of different foreign jurisdictions on this issue. The second section will then test the constitutionality of prohibiting the abortion of a differentially-abled foetus through the proportionality test. It will argue that amending the act to restrict abortions carried out on the sole ground of the DA will stand constitutional scrutiny.

II. DIFFERENTIAL ABILITIES AS A GROUND FOR ABORTION

Before this paper begins the discussion on DA as a ground for abortions, it would like to highlight that the right to abortion in India is not absolute. It is allowed only when there are severe foetal anomalies or the

mother's life is at risk.[9] Further, the MTPA Act carves out exceptions where abortions may be allowed where there has been a contraceptive failure or pregnancy due to rape, thus ensuring that the mental health of the mother can be conserved.[10] It is thus concluded that abortions are the exception to the general rule in India. This conclusion can be similarly reached, considering that abortion is an offence under Section 312 of the Indian Penal Code 1860 even today, despite the fact that the MTP Act exists as a legislation recognizing and regulating abortions. Despite the introduction of a new amendment to the MTP Act that furthers the reproductive autonomy of a woman by extending the time limit for abortion from 20 to 24 weeks, the law on DA as a ground for abortion remains unchanged. It allows abortions to be carried out if "*there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormalities as to be seriously handicapped*".[11] The issue in this regard, however, is what constitutes a serious foetal anomaly.

While debating the amendment to the MTP Act in Parliament, the members were generally of the opinion that the extended time limit for aborting the foetus would serve a useful purpose in helping to detect foetal anomalies.[12] However, members such as Dr Rajashree Mallick, a member of the Lok Sabha from the state of Odisha, opined that the extension of

[9] Medical Termination of Pregnancy Act, 1971, § 3(2)(b), No. 34, Acts of Parliament, 1971 (India).
[10] *Id.*
[11] *Id.* at §3, §3(2)(b)(ii).
[12] *Lok Sabha Debates* (Seventeenth Series, Vol VIII, 17 March 2020).

the time for aborting the foetus will enable doctors to detect whether the foetus is suffering from "*Down Syndrome, congenital malformation or any other abnormalities*".[13] This highlights the intent of certain members to give the foetal anomalies clause a broad interpretation, including a large number of DA's within its ambit. The Supreme Court, however, has denied abortions pleaded for on the grounds such as Down Syndrome. In *Savita Sachin Patil*,[14] the Supreme Court forbade an abortion from taking place in the 26th week of pregnancy when a plea for the same was raised, even though the foetus was likely to have mental or physical challenges.[15] Considering that there was no risk to the mother's life and that the challenges to the foetus were not poised to be serious, the Court found no merit in permitting the abortion.

In the case of *Sheetal Shankar Salvi v. Union of India*,[16] the unborn foetus was poised to have "*severe physical anomalies*" at birth due to a cardiac anomaly he was suffering from. Although the baby would have to undergo either some surgeries before turning one year old and subsequent surgery after that, abortion was not granted in the 27th week of pregnancy. This was also because the pregnancy did not cause grave physical or mental injury to the mother in question. Furthermore, considering that the baby was likely to survive for a considerable time, the Court denied the abortion.[17]

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[13]*Id.* at 306.
[14]Savita Sachin Patil v Union of India, (2017) 13 SCC 436.
[15]*Id.* at 7.
[16]Sheetal Shankar Salvi v Union of India,(2018) 11 SCC 606.
[17]*Id.* at 6.

While the approach of the Court may be termed an attack on a woman's reproductive autonomy, this paper believes that denying abortions carried out solely for the child's DA will stand constitutional scrutiny.

The aforementioned cases highlight that the Supreme Court has generally looked at something more than a foetal anomaly when granting abortions. It has looked at related factors, such as the health of the mother. While the Indian courts may have adopted a restrictive approach to defining "*severe foetal anomalies*", the position of the law in foreign jurisdictions is not uniform. The principle governing law in England, namely the Abortion Act 1967, provides for abortion in this regard in the same manner as in India.[18] However, English law has given substantial foetal anomalies a wide and liberal interpretation when compared to India. Pre-natal tests showing that the foetus has Down Syndrome give a woman an opportunity to carry out an abortion in almost all cases.[19] Similarly, if a foetus is detected to have haemophilia, the mother can abort the child. Thus, English law permits abortions of those foetuses whose condition is perfectly compatible with a fruitful and complete life.[20]

Similarly, South African law provides for such abortions in its principal governing law, the Choice on Termination of Pregnancy Act 1996.[21] It similarly allows for abortions as in India. German law goes one step ahead of the other laws in presuming that DAs create a state of mental

[18] The Abortion Act 1967, c.87 §1(1)(d) (Eng.).
[19] Sally Sheldon, *supra* note 6 at 95.
[20] *Id.* at 95-96.
[21] Choice of Termination of Pregnancy Act 92 of 1996 § 2(1)(b)(ii) (S. Afr.).

anguish and agony for the mother, which is sufficient to constitute a ground for abortion.[22] Countries including Ireland however, allow abortions of a differently-abled foetus to take place where it is likely to die *in utero* or twenty-eight days after being born.[23] Such a qualified ground ensures that the mother does not have to suffer from the postpartum separation, which will be grave to her mental and physical health.[24] The suitability of such a condition will also be demonstrated in the next section of the paper.

On the contrary, countries including Poland and certain states in the United States have a blanket ban in place on such abortions.[25]In Poland, the Constitutional Tribunal declared the relevant provision that allowed for abortions on the grounds of DA unconstitutional. The Court reasoned that outlawing such a provision would protect differently-abled babies from the disruptive use of eugenics.[26] It held that the provision correlated the child's state of health with its ability to live, thereby constituting direct discrimination.[27]

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[22] Mary Ann Case, *Abortion, the Disabilities of Pregnancy, and the Dignity of Risk,* UNIVERSITY OF CHICAGO LAW SCHOOL, (2019), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/797/#:~:text=German%20law%20presumes%20women%20carrying,effect%20on%20their%20mental%20health.

[23] Health (Regulation of Termination of Pregnancy) Act, 2018, §11(1), No. 31 of 2018 (India).

[24] Shashi Rai et al., '*Postpartum Psychiatric Disorders: Early Diagnosis and Management*', 57 Indian Journal of Psychiatry, 216 – 221 (2015).

[25] Amnesty International, *supra* note 8.

[26] The Life Institute, *Abortions in Poland drop 90% after disability abortions outlawed,* THE LIFE INSTITUTE, (Aug 25, 2022), https://thelifeinstitute.net/news/2022/abortions-in-poland-drop-90-after-disability-abortions-outlawed.

[27] *Id.*

This paper asserts that, *firstly,* the Irish law on this aspect should be adopted in the Indian context. This is because if a woman is denied the opportunity to abort a child that is likely to die *in utero* or immediately after its birth, the postpartum separation will be grave enough to cause her severe mental agony to her.[28] Thus, it should be a ground for abortion. This has been the interpretation of the Supreme Court in cases such as *Tapasya Umesh Pisal v Union of India*,[29] where the Court allowed the petitioner to abort the foetus because its congenital malformations were likely to cause its death a short while after being born.[30] In a similar case where a child suffering from cardiac disorders was supposed to undergo several surgeries after birth,[31] the Court observed that the risk of mortality was imminent in these surgeries. It thus permitted the abortions.[32] This paper believes that taking such a position balances the rights of the mother with the ultimate purpose it strives to achieve, the latter of which will be explained in the next section.

Secondly, beyond this exception, abortions carried out on the sole ground of the child's DA must be prohibited. It is prudent to note that this paper does not advocate for a blanket ban on abortions for DA in the fashion done by Poland. As argued above, there may be certain instances where aborting a differently-abled foetus should be permitted. Although the prohibition of abortions on the ground of DA is a normative

[28] Shashi Rai, *supra* note 24.
[29] Tapasya Umesh Pisal v. Union of India, (2018) 12 SCC 57.
[30] *Id.* at 8-9.
[31] Sarmishtha Chakrabortty v. Union of India, (2018) 13 SCC 339, ¶5.
[32] *Id.* at 13.

proposition that this paper puts forth, it goes a step further in establishing the constitutionality of doing so. The balance shown between the measure under consideration and the reproductive autonomy of the mother will be shown through the test of proportionality in the next section.

III. THE TEST OF PROPORTIONALITY

Having highlighted the legal position surrounding the abortion of a foetus with DA, this paper will use the test of proportionality to show that restricting abortions on the sole ground of DA will be constitutional.

The doctrine of proportionality has been adopted by Indian courts to examine whether a measure that infringes on an individual's constitutional rights is proportionate to the aim sought to be achieved by the measure in question. The four-pronged structured test was first adopted in the case of *Modern Dental College*[33] and has now been adopted in subsequent cases such as *Justice K.S. Puttaswamy v. Union of India*[34] and *Anuradha Bhasin v. Union of India*[35] to assess state action for the violation of fundamental rights. Under the test of proportionality, once the *prima facie* infringement of a fundamental right has been established, the burden of proof shifts to the state to justify why the measure is proportionate to the goal sought to be achieved by it.[36] If the same is not shown, the measure is

[33] Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353.
[34] Justice K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.
[35] Anuradha Bhasin v. Union of India,(2020) 3 SCC 637.
[36] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS Chapter 16 (Cambridge University Press 2012).

struck down. As highlighted in the case of *Anuradha Bhasin*, "*a decision which curtails fundamental rights without appropriate justification will be classified as disproportionate*."[37]

The Indian Supreme Court has adopted a structured test of proportionality that entails the satisfaction of four prongs.[38]*Firstly*, there must be a 'legitimate purpose' that the restriction seeks to achieve. This purpose is such that it can override a constitutionally guaranteed fundamental right. *Secondly*, there must be a 'rational nexus' between the limitation imposed and the ultimate object. More importantly, the restriction in question should further the purpose. *Thirdly*, there should not be a 'less restrictive alternative' that substantially achieves the same goal. *Lastly*, there should be a 'proper balance' between the harm caused and the benefits of the purpose.[39] The fourth prong, known as the balancing prong, ensures that the rights-restricting measure does not disproportionately impact the right holder. It ensures that the benefits outweigh the costs. Ultimately, a failure to satisfy even a single prong of the test shows that the rights-restricting measure is unconstitutional.

The test of proportionality can be used when it is shown that a constitutionally-guaranteed right has been infringed by the law in question. Furthermore, the right infringed must be one that can be tested under the proportionality test. The first step in establishing this is bringing in a law

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[37] Anuradha Bhasin v. Union of India,(2020) 3 SCC 637.
[38] Justice K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.
[39]Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?,* 3 U OXHRH J 55, 75-76 (2020).

that violates a right. While this paper recognises that the mother's interests trump those of the foetus,[40] it does not push for a framework that reverses the hierarchy. This is because recognition of the same would go beyond the scope of the paper by arguing that all foetuses have an inherent right to life. It would mean arguing that the MTP Act violates a foetus's rights. Keeping in mind the reproductive autonomy of a mother, this paper tests a hypothetical amendment to the law that nullifies the current position of the law. The paper ultimately seeks to test whether this amendment to the law would stand constitutional scrutiny.

Having established that there exists a law; the next step is proving that a right would be violated by the law. The restriction in question infringes on the right to reproductive autonomy granted to a woman as a facet of her right to life and personal liberty enshrined under Article 21 of the Constitution of India.[41] As observed in *Suchita Srivastava*, the reproductive autonomy of a woman is a facet of the right to life and personal liberty enshrined under Article 21. This is because a woman would be forced to give birth to such a child despite her objections and personal choices. It violates her right to health, dignity, privacy, and bodily autonomy enshrined under Article 21.[42]

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[40]High Court on its Own Motion v. State of Maharashtra, 2017 Cri LJ 218.

[41] See Suchita Srivastava, *supra* note 1.

[42] Krishnadas Rajagopal, *SC allows Kolkata woman to abort her over 20-week-old foetus with abnormalities*, THE HINDU, (Jul 3, 2007), https://www.thehindu.com/news/national/sc-allows-kolkata-woman-to-abort-her-over-20-week-old-abnormal-foetus/article19203268.ece.

As established in *Justice KS Puttaswamy v. Union of India*, proportionality can be applied in an Article 21 inquiry.[43] In this case, the court tested the provisions of the Aadhar Act 2016 under the anvil of proportionality to assess whether an individual's right to privacy protected under Article 21 was violated or not.[44] In addition, the case of *Maneka Gandhi v. Union of India* has held that restrictions can be imposed on Article 21 if they are just, fair, and reasonable.[45] Several Article 19 inquiries, such as that in *Modern Dental College* have used the word reasonable as a qualifier to apply the test of proportionality.[46] Since an Article 21 restriction needs to be reasonable, as evident from the decision in *Maneka*, the same justification used in *Modern Dental College* can be used to include Article 21 within the ambit of the test.

Considering that an Article 21 inquiry has to be tested under proportionality and that reasonable restrictions on the right are permissible, the test can be used to assess the constitutionality of the law in question. Having laid down the four prongs of the test and establishing that the test has to be applied, this paper will now proceed to assess the constitutionality of the Amendment so proposed before concluding that the Amendment satisfies all four prongs of the test and is thus constitutional.

A. LEGITIMATE PURPOSE:

[43] Justice K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.
[44] *Id.*
[45] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[46] Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353.

The purpose of this prong is to ascertain whether the MTPA Act limiting the fundamental right has a rationale or purpose behind it.[47] Its purpose is to merely examine whether it is significantly legitimate to restrict a constitutionally-guaranteed fundamental right. At this stage, the court is not concerned with the practicality of the goal or whether it is achieved by the restriction in question.[48]

The primary purpose behind preventing abortions solely for DA is to remedy a social wrong. It seeks to achieve the goal of ending discrimination against a section of society. The attitude towards differently-abled individuals reinforces negative stereotypes about their capabilities and negates their accomplishments.[49] Furthermore, the reason for such abortions can be attributed to pregnant women wishing to have an able-bodied child.[50] It thus becomes imperative to ensure that such negative outlooks on a certain class of individuals can be transformed, thus ensuring that differently-abled individuals can also be seen as contributing members of society.[51] It is prudent to deviate from an ableist notion of society to one that accommodates everyone, irrespective of differences.

While it may be argued that a parent's desire to abort such a child stems from their desire to not subject it to the unavoidable pain and

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[47] Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Mordechai Kremnitzer and others (eds) *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 505.
[48] Barak , *supra* note 36, at 246-247.
[49] Marsha Saxton, 'Disability Rights and Selective Abortion' in Lennard Davis (eds) *The Disability Studies Reader* (4th edn., Routledge 2013) 87.
[50] *Id.* at 93.
[51] Tori Gooder, *supra* note 7 at 562.

hardships brought out by the DAs, it is prudent to note that it is society portrays these differences as disabilities. This is also known as the social model of disabilities, wherein DAs are primarily frowned upon by society due to its own biases.[52] While it may be argued that a differently-abled person faces additional hindrances in some situations, parental experience has highlighted that there are unconscionable burdens, direct or indirect, created by a society on the conducive well-being and sustenance of differently-abled individuals.[53] The majority ableist society has created a world suited to its needs without any consideration for those with differences.[54] For instance, escalators, and other inventions such as stairs are premised on the assumption that an individual can walk. The society has only selectively accommodated those with differential abilities as in the case of those wearing glasses. Even the access to ramps and elevators is not as widespread as it ought to be. Most others with DA's have been left behind.

The pessimistic attitude of society normalizes looking at death as a suitable alternative to DA.[55] The advent of Pre-natal testing and the manner in which it permits DAs to be discovered before birth also contribute to the stigma. It imposes a responsibility on parents to avoid the birth of

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[52] Andreas Petasis, 'Discrepancies of the Medical, Social and Biopsychosocial Models of Disability; A Comprehensive Theoretical Framework' (2019) 3(4) International Journal of Business Management and Technology 42, 44-48.
[53] SMITHA NIZAR, THE CONTRADICTION IN DISABILITY LAW, 99-100 (Oxford University Press 2016).
[54] Kavana Ramaswamy, Addressing Ableism: Lessons from the Problem of Female Feticide in India, 27 TRANSNAT'L L. & CONTEMP. PROBS. 1, 10 (2017).
[55] Nizar, *supra* note 53.

unborn children with DA.[56] Medical professionals and health officials also promote the abortion of such individuals to end their tragedy and suffering.[57] The assumed inferiority of the differentially-abled is *prima facie* a social construct. Jurist John Finnis has laid down seven basic goods of life that, according to him, contribute to a fulfilling life. It is pertinent to note that the differently-abled can reap the benefits of all seven goods, namely, life, knowledge, friendship and sociability, recreation and enjoyment, aesthetic experiences, practical reasonableness, which includes the ability to make decisions and solve problems, and religion.[58] While society may not have been the most conducive in ensuring that the differently-abled could avail of some of these goods, an effective legal intervention that brings forth a transformation in outlook is the first step in addressing this societal stigma.

The stigma associated with the DA community has been normalized by law as well. A chilling example of the same is the cases filed by the parents of such a child claiming compensation for their wrongful birth.[59] While not common in India, the same can be found in countries such as the United States.[60] In these cases, a parent of a DA individual files a case for damages from the doctor alleging negligence, in that he permitted

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[56] *Id.*
[57] *Id.*
[58] John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman & Scott Shapiro (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 1-45.
[59] Sofia Yakren, *"Wrongful Birth" Claims and the Paradox of Parenting a Child with a Disability*, 87 FORDHAM LAW REV. 583, 583 (2018).
[60] *Id.*

the birth of the DA individual and the birth defects he was born with.[61] The primary argument in this regard is that the doctor could have informed the parents of the child about the same to prevent its birth. Such claims have unfortunately succeeded as well, as evinced by cases such as *Smith v. Cote*,[62] where the state recognised a parent's cause of action for a wrongful birth.

The controversial aspect of this lawsuit is that it places the cause of action on the child's existence.[63] The presence of such lawsuits highlights the deplorable way in which DAs are thought about and imagined. It impacts the psychological well-being and acceptance of the differently-abled community at large by imposing a survival of the fittest mindset.[64] It puts forth the image that a person's impairment determines their life and value. There needs to be a transformation in the attitude towards the DA community which is possible only when abortions that perpetuate ableism are legally prohibited.

While a potential argument may be that a measure cannot be introduced in favour of an unborn entity, it is pertinent to note that the state has already adopted such an approach in sex-selective abortions. In a country with a dark past of female infanticide, the legislature took a progressive decision by prohibiting sex identification before birth.[65] The

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[61] *Id.*
[62] Smith v. Cote 128 N.H. 231, 513 A.2d 341 (1986).
[63] Wendy Fritzen Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40(1) HARV. CIV. RIGHTS-CIV. LIB. LAW REV. 141, 143 (2005).
[64] *Id.*
[65] *See* the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994.

main goal of such a measure was to put forth the message that a girl child was not less desirable.[66] This decision has also been upheld in the case of *Vijay Sharma v. Union of India*.[67] Thus, it prevented these abortions in a country that promoted essentialism by looking at the girl child as weak and burdensome.[68] Consequently, the state possesses the power to enact legislation that protects the rights of those with DA's. Additionally, it is prudent to emphasize that this proposal aims to safeguard the constitutional rights to life and dignity of individuals with DA's, currently alive and a core component of society. These rights encompass the assurance of a life devoid of prejudice and unfair treatment. The mere fact that the law is designed for a foetus does not detract from its overall purpose of ending socially-sanctioned discrimination. Considering that the purpose is legitimate, the first prong of the test is satisfied.

B. SUITABILITY:

The second prong examines whether the restriction in question is capable of effectively advancing the object aimed to be achieved.[69] The nexus needs to be direct and proximate. The burden is thus to establish that these restrictions on abortions can advance the social welfare of the differently-abled.

The presence of such a law permitting abortions for differential abilities reflects a pessimistic attitude that acts to the detriment of the

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[66] Nizar, *supra* note 53.
[67] Vijay Sharma v. Union of India AIR 2008 Bom 29.
[68] Nizar, *supra* note 53.
[69] Chandra, 'Proportionality: A Bridge to Nowhere?', *supra* note 39.

differently-abled community. The task undertaken by the state in limiting the scope of the clause surrounding abortions on DA changes the notion surrounding differences. It moves away from an ableist society that inadvertently discriminates against these individuals to one which facilitates inclusion and accommodation. It will further the underlying interest of the state in preventing discrimination against a particular community. This change in legislative standing goes a long way in instilling in the people the need to be accommodating to those with differences.

A similar rationale was applied by the legislature in banning sex-selective abortions. In an attempt to end the stigmatization and negative outlook towards the female sex, the legislature imposed a legitimate restriction on the reproductive autonomy of women to achieve a larger societal good. The larger benefits of the same can be seen in the current age. It is now estimated that the measure would protect 6.8 million girls from being aborted until 2030.[70] A similar goal can be achieved by eliminating such abortions in the case of the DA community.

It is prudent to note that at this stage, the concern is merely whether there exists a rational nexus and not whether it is the least restrictive measure. The burden is thus to establish that the law can help achieve such a goal. According to Roscoe Pound, the purpose of the law is to reconcile conflicting interests in an attempt to bolster cohesion and bring about

[70] S*elective abortion in India may lead to 6.8 million fewer girls being born by 2030: Study*, THE INDIAN EXPRESS (Aug. 31, 2020), https://indianexpress.com/article/india/selective-abortion-in-india-may-lead-to-6-8-million-fewer-girls-being-born-by-2030-study-6577395/.

much-needed change in society.[71]A law prohibiting abortions is thus a suitable means to achieve the outcome, considering the role it plays in effecting social change. There thus exists a rational nexus between the amendment to the law that prohibits the abortions of the differently-abled and the overarching goal of ending discrimination.

C. NECESSITY:

The third prong of the proportionality test examines whether there is a less restrictive alternative that substantially achieves the goal in question. This test seeks to examine the availability of possible alternatives to the restriction in question that substantially achieve the same goal without compromising on the rights of the citizens.[72]Furthermore, the restriction ought to be narrowly tailored.[73] This implies that the rights-restricting measure should place as few restrictions as possible on fundamental rights.

A less restrictive alternative that preserves the rights of women would entail spreading awareness and facilitating the inclusion of individuals while permitting abortions. These will not achieve the goal of reducing stigma in society, at least in the short to medium term. The argument used is that absence of facilities, "*it is better if they never get born in this world*".[74] It is, however, pertinent to note that there would be a slower development of facilities supporting the differently-abled if there are no

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[71] ROGER COTTERRELL, THE SOCIOLOGY OF LAW 74 (OUP, 2nd ed. 2007).
[72] Chandra, 'Proportionality: A Bridge to Nowhere?', *supra* note 39.
[73] Chandra, 'Limitation Analysis', *supra* note 47 at 524-529.
[74] Nizar, *supra* note 53 at 190.

differently-abled individuals in the world. [75]It is problematic and unfeasible to accept this argument because it propounds a view that the life of a differently-abled individual is not worth living. It also highlights the disruptive manner in which eugenics can be used to create a perfect society.

This amendment to the law seeks to stop the discrimination against the differently-abled community right at childbirth. While it may be argued that accommodating such individuals within society will sufficiently achieve the purpose laid down, permitting such abortion sends forward a chilling message of the wrong nature – that the entire life of an individual is dependent on one single trait.[76] It establishes a threshold that a foetus needs to reach before being born. The purpose behind restricting such abortions is striking at the base of the problem – the entrenchment of an ableist society. In the absence of efforts to transform the hostile structure within society, it is highly improbable that the welfare of the differently-abled can be looked after. Permitting such abortions fundamentally discriminates against the community, its dignity, and its status in society.[77]

In the case of sex-selective abortions, discriminating against a female foetus was held to be discriminatory against women and their dignity.[78] Drawing from this analogy, the discrimination against a particular class of foetuses discriminates against the community by reinforcing their

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[75] *Id.* at 190.
[76] *Id.* at 96.
[77] Vijay Sharma v. Union of India AIR 2008 Bom 29, ¶25.
[78] *Id.* at 25.

hardships and inferiority.[79] Legislations,[80] international covenants such as the International Convention on the Rights of Persons with Disabilities,[81] and constitutional obligations of non-discrimination[82] cast a positive obligation on the state to look after their welfare. For instance, the permissibility of such abortions infringes Article 41 of the Constitution which imposes a duty on the state to look after the welfare of those with DA. Retaining such abortions is paradoxical to the betterment of the differently-abled. It is thus imperative to end abortions based on DA considering that the social stigma against the same is so deeply entrenched in society.

The discourse surrounding this issue focuses on getting rid of those who are undesirable to society. However, the complete elimination of disabilities within society is not scientifically possible. The current framework merely eliminates a small fraction of the total disability that can be detected *in utero*.[83] Moreover, such actions raise pressing and important questions regarding the harmful use of genetics. Currently, science focuses on creating a society with perfect bodies and perfect minds.[84] The law could use pre-natal tests to focus on accommodating and providing families with

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[79] Nizar, *supra* note 53 at 94.
[80] The Rights of Persons with Disabilities Act, 2016, Act No. 49 of Parliament, 2016 (India).
[81] UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, https://www.refworld.org/docid/45f973632.html.
[82] INDIA CONST. Art.15, 41, *amended* by The Constitution (Eightieth Amendment) Act.
[83] Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUBLIC HEALTH, 1649, 1652 (1999).
[84] Nizar,*supra* note 53 at 138.

necessary monetary support during medical treatment.[85] It rather uses it to eliminate a section of society it considers undesirable.[86] The use of genetics to create a perfect society highlights the intolerance against the differently-abled community. It sends us down a perilous path, where elimination methods are used to control the quality of individuals being born in society.[87] The danger in doing so is evident from the use of eugenics in the Holocaust, where people with DA were persecuted ruthlessly.[88] Sadly, abortion has been an unfortunately effective tool in achieving the same to date.

It is argued that the restriction is narrowly-tailored. This restriction is restricted to abortions that are carried out solely based on DA. In such a case, the compelling interest in favour of eradicating discrimination can trump the reproductive autonomy of a woman.[89] It will not cover cases where the child's condition is incompatible with life due to the severe mental agony the same brings about to the mother. The Supreme Court has upheld this interpretation in the case of *Mamta Verma v. Union of India*.[90] In this case, the foetus's condition was not compatible with life as it could not survive without a skull. Keeping in mind the circumstances of the case coupled with the mental anguish the mother would suffer; the Court

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[85] Tom Shakespeare, *Choices and Rights: Eugenics, genetics and disability equality*, 13 DISABIL SOC 665, 679 (1998).
[86] The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, §4(2), No. 57, Acts of Parliament, 1994 (India).
[87] Nizar, *supra* note 53 at 88.
[88] *Id.* at 88.
[89] Gooder, *supra* note 7 at 560.
[90] Mamta Verma v. Union of India, 2017 SCC OnLine SC 1150.

permitted the abortion.[91] The restriction is thus narrowly-tailored and restricted to certain circumstances alone.

Considering that such abortions reinforce negative stereotypes against people with DA, it is of utmost importance for such abortions to be eliminated to achieve social inclusion and welfare. Keeping in mind that the restriction is narrowly-tailored, the third prong of the proportionality test is satisfied.

D. BALANCING:

The final prong of this test seeks to examine whether the gains received through the imposition of the restriction outweigh the harms caused as a result of the restriction of the right.[92] The court considers the actual impact of the restriction and also assesses the urgency and likelihood of the object ultimately being realized by the measure. In examining the benefits and the harms of the restriction, the court will strike down the law if it does more harm than good.

As established in the previous arguments that this paper has made, the primary goal of such a measure is the elimination of discrimination against a section of society. Considering that there still exists widespread stigma with DAs, there is an urgent and pressing need to instil in the minds of others the need to be accommodative.

The measure in question focuses on redressing the disadvantage that an oppressed group has faced in the past, which also continues into

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[91] *Id.* at 6-7.
[92] Barak, *supra* note 36 at Ch.12.

the present. This is done by prohibiting the abortions at birth itself. As highlighted by the social model of disabilities, the primary disadvantage that accrues to individuals from the community is society's negative outlook towards their status. Eminent scholar Sandra Fredman has put forth four dimensions of the principle of substantive equality, namely "*redressing disadvantage*, *countering stigma, stereotyping and humiliation based on a pre-determined characteristic*, *enhancing voice and participation*, and *accommodating differences as well as achieving structural change*."[93] It is argued that the proposed measure satisfies all four of these principles and is thus in furtherance of the principle.

The first two prongs of this test have been dealt with in depth in the initial parts of this paper in A. *Legitimate Purpose*; and B. *Rational Nexus*. The latter two prongs focus substantially on the element of participation of the group. It is argued that the measure cannot be achieved in a complete manner unless the abortions of the differently-abled are stopped right at birth. As long as there exists a society that privileges one kind of person over another, the effective participation of the differently-abled cannot be ensured. The notion surrounding the differently-abled individuals needs to undergo a social transformation, keeping in mind the importance of community in the life of an individual. This is a move in furtherance of full-fledged structural changes, which are contingent on the attitudes of society towards the differently-abled. As argued by Nizar, the society would think about supporting facilities only if there are individuals present in it who

[93] Sandra Fredman, 'Substantive Equality Revisited', 14 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 712, 712, 727-734 (2016).

require such facilities.[94] Thus, the presence of those with DA will enhance their participation and bring about structural changes as facilities built to accommodate them will ensure that they do not suffer social barriers that hinder their participation in the social or political spheres of live.

However, there are two major counter-arguments against bringing in the proposed amendments that highlight the harms of implementing the same. They are (1) A lack of supporting facilities; and (2) Financial Constraints. It was these two overarching concerns that led to the United Kingdom Courts dismissing a petition that argued for eliminating the relevant clause dealing with the same issue of aborting a foetus with DA.[95] An added concern is whether conditions creating a vegetative state, where no amount of state support can ensure a better quality of life, will be exempt from this framework. This paper will address these arguments before establishing a framework that adequately balances the rights of the mother and the larger social goal aimed to be achieved.

At the outset, I will first address the argument pertaining to whether conditions creating a vegetative state, where no amount of state support can ensure a better quality of life, will be exempt from this framework. I propose the ban on abortions for the sole basis of disability. When disabilities combine with other factors, such as immediate death *in utero* or death within 28 days or a vegetative state, there is a very persuasive argument that can be made for the mental health of the mother and the

[94] Nizar, *supra* note 53 at 190.
[95] Heidi Crowter v Secretary of State for Health and Social Care, [2021] EWHC 2536 [125].

postpartum separation that eschews from the same. Thus, since there is a grave danger to the mental health of the mother, considering the absolute absence of facilities and no other suitable solution to creating a better quality of life, such abortions should be permitted. Thus, the condition of the sole ground of disability has been very categorically used.

One of the main reasons associated with the stigma towards those with DA is the lack of facilities that can assist parents. The society has structured its environment in an ableist manner, thereby bringing about the need for additional facilities.[96] Consequently, there is severe mental trauma associated with the birth of a differently-abled as the entire onus of raising such a child lies on the parents of the child who are devoid of any additional support. This mental agony is reason enough to carry out abortions under section 3(2)(b)(i) of the Act. Any attempt to restrict such abortions needs the unconditional support of the state and related actors. As held in the case of *Anuj Garg*,[97] the onus was on the state to ensure the safety and security of women without curbing their freedoms under Article 19. In this case, a legislation that forbade women from working at bars was struck down on the simple grounds that the vulnerabilities of the woman were not reason enough to carry out protective discrimination. The Supreme Court held that it was the duty of the state to ensure their safety while permitting them to carry out their professions. It thus becomes imperative for the state and society to facilitate the inclusion of individuals in society.

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[96] Nizar, *supra* note 53 at 109.
[97] Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, ¶37-38.

This inclusion is in furtherance of the Rawlsian difference principle, wherein, those who are disadvantaged for any reason whatsoever are provided additional resources to bring them at the same pedestal as the others.[98] Having launched the Accessible India Mission, the state has sought to promote inclusivity and accessibility among the differently-abled.[99] For instance, 71% of government schools are now friendly to those with DAs.[100] The Indian legislature has enacted the Rights of Persons with Disabilities Act 2016 which eschews the principles of equality and non-discrimination,[101] protection and safety,[102] and accessibility to a wide array of activities.[103] Moreover, the Act creates provisions for social security,[104] healthcare,[105] insurance,[106] and rehabilitation,[107] and creates a separate fund to support those differently-abled who require additional support.[108] This is

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[98] John Rawls, 'Justice as Fairness' in Robert E. Goodin and Philip Pettit (eds) *Contemporary Political Philosophy: An Anthology* (3rd edn., Wiley Blackwell 2019).
[99] Accessible India Campaign, GOVERNMENT OF INDIA MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, (November 8, 2022) https://disabilityaffairs.gov.in/content/page/accessible-india-campaign.php#:~:text=What%20is%20Accessible%20India%20Campaign,Ministry%20of%20Social%20Justice%20%26%20Empowerment.
[100] Ambika Pandit, Around 71% of govt schools across country made disabled friendly: Ministry Data, THE TIMES OF INDIA (Jun 7, 2022 12:43 AM), https://timesofindia.indiatimes.com/india/around-71-of-govt-schools-across-country-made-disabled-friendly-ministry-data/articleshow/92045921.cms.
[101] The Rights of Persons with Disabilities Act 2016, §3, No. 49, Acts of Parliament, 2016 (India).
[102] *Id.* at §8.
[103] *See Id.* at §11.
[104] *Id.* at §24.
[105] *Id.* at §25.
[106] *Id.* at §26.
[107] *Id.* at §27.
[108] *Id.* at §§86-88.

a progressive effort in the right direction that seeks to normalize DAs rather than stigmatize them.

However, there is plenty that is yet to be accomplished on this front. The stigma towards the differently-abled is sadly still widespread in society. If we consider Court complexes alone, it is estimated that 67% of complexes are not friendly to those with DA despite there being a Supreme Court judgment that mandates structural changes to court complexes to make them so.[109] Furthermore, the differently-abled are denied access to education, mobility, and employment.[110] It is a recent judicial intervention that has sought to propound their rights of equality and non-discrimination. Recent judgments of the Indian courts have facilitated the reasonable accommodation of differently-abled individuals, enabling them to come to par with other people.

In the case of *Vikash Kumar*,[111] a petition was filed because the petitioner was denied the use of a scribe during the conduct of the UPSC exam as he could not produce a disability certificate. In his verdict, Justice Chandrachud held that the principle of reasonable accommodation was a key facet of the principles of equality and non-discrimination under Articles 14 and 15.[112] The state was thus obligated to provide facilities and additional

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[109] Dhananjay Mahapatra, *67% of Court Complexes not Disabled Friendly,* THE TIMES OF INDIA (*May* 2, 2022 9:07 AM), https://timesofindia.indiatimes.com/india/67-of-court-complexes-not-disabled-friendly/articleshow/91243369.cms.

[110] N Janardhana and Others, *Discrimination against differently abled children among rural communities in India: Need for action*, 6 J NAT SCI BIOL MED 7 (2015).

[111] Vikash Kumar v. UPSC, (2021) 5 SCC 370.

[112] *Id.* at 44, 62.

support to the differently-abled in an attempt to facilitate their complete participation. Furthermore, the principle was a manner of recognizing the inherent dignity and equal worth of every individual by removing social barriers that prevented effective participation.

In addition, the judgment of *Jeeja Ghosh*[113] lays down a key aspect about the dignity of the differently-abled. It was a petition filed against the inhumane act of lifting differently-abled people using wheelchairs without their consent. Similarly, users of prosthetic callipers and limbs were forced to remove the same for security checks. The Court highlighted the need for the differently-abled to be treated by the state with dignity.[114] Similarly, the case of *Disabled Right Group v. Union of India*[115] cast a duty on the University Grants Commission to formulate guidelines to facilitate the inclusivity and increase in accessibility of college campuses to the differently-abled community.

Thus, the judgments of the Supreme Court have repeatedly cast upon the state and related entities an obligation to facilitate the inclusion and simultaneously uphold the dignity of the differently-abled. It is in furtherance of the principle of substantive equality, which entails bringing disadvantaged individuals at an equal footing in reality. The elimination of the stigma through these means is a pre-condition that needs to be fulfilled before the proposed law can come into force. In the absence of any

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[113] Jeeja Ghosh v. Union of India, (2022) 1 SCC 202.
[114] *Id.* at 6.
[115] Disabled Right Group v. Union of India, (2018) 2 SCC 397, ¶35.2.

hindrances, there is little doubt that individuals would approach physicians to enquire if their child would be born with DAs.[116] The argument that abortions ought to be allowed due to the lack of facilities is a bleak and weak one. The state ought to use resources and rapidly-developing technology to empower those with DA rather than diminish their value by denying them equality before the law.

The second hurdle that needs to be overcome is the provision of financial support. The argument put forth in support of abortions of the differently-abled is that resolving the impairment of the foetus may require medical expenditures to be undertaken. This is often an argument of the biological model of disabilities, wherein it is argued that disabilities are a health condition. Moreover, it perceives the group as weak and incapable due to the DA.[117] Such a model is extremely reductionist in that it promotes the image of a perfect ableist body and looks at differential abilities as a curable disorder. The alleged functional barriers are a by-product of the ableist construction of society itself. A transformation of societal perception is the first step to establishing that this school of thought is premised on a problematic assumption that DAs are an impediment to effective functioning. Although this model is rightly the subject of criticism, this paper recognises that surgeries and medication may be imminent at

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[116] *If abortion based on gender is wrong so is abortion based on disability: U of C prof*, CBC RADIO, (Apr 15,2016), https://www.cbc.ca/radio/the180/abortions-for-some-but-not-all-left-footed-braking-and-regret-over-raising-a-secular-child-1.3536556/if-abortion-based-on-gender-is-wrong-so-is-abortion-based-on-disability-u-of-c-prof-1.3536619.

[117] Petasis, *supra* note 48 at 42-44.

certain points in a foetus' life. An inability to meet the costs of the same due to financial constraints constitutes mental agony under the MTP Act.

In the case of *Suparna Debnath*, the Court allowed a woman to get an abortion for several factors, one among them being that the costs of surgeries that the child would require during its life were extremely high. In the absence of any financial support from the state, the court held that the pregnancy contributed to severe mental anguish for the mother.[118] Eliminating stigma and bringing in the proposed amendment thus needs to take into account such financial constraints faced by parents.[119] It thus becomes important for the state to ensure financial support to the mother to protect the interests of a differently-abled foetus.[120] The framework thus laid down depends on the continuous support of the state and related actors in facilitating inclusion and increasing access to financial resources.[121]

Although it may be argued that such measures impose a high burden on the state and that any meaningful change is not imminent, there are three arguments to rebut the same. *Firstly*, it is pertinent to note that a differently-abled person's potential has been curbed by social barriers. There are simple facilities such as scribes, walking ramps, or wheelchair-friendly buses that are seldom provided to facilitate the inclusion of the community in society. More often than not, these have been the subject of

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[118] Suparna Debnath v. State of West Bengal, 2019 SCC OnLine Cal 9120, ¶¶ 20,21.
[119] High Court on its Own Motion v. State of Maharashtra, 2017 Cri LJ 218.
[120] Ramaswamy, *supra* note 54 at 14.
[121] *Id.* at 29-30.

legal disputes.[122] If these hindrances are eliminated, their participation in society will increase. Subsequently, their contributions will increase and thus be equal to those of others.[123] The costs are thus overrun by corresponding gains. Furthermore, it is pertinent to note that any assumptions about the abilities of a differently-abled individual cannot be judged or inferred from a society that is structured around ableism. The very same society has denied them the opportunity for effective participation. It is only once meaningful change and subsequent participation are achieved that inferences about the same can be made.

Secondly, the underlying premise behind the costs approach is the creation of a society founded on the principle of reciprocity. This approach ensures that society consists of individuals who can give material goods and services back to the economy. As highlighted by theorists such as Anita Silvers, the contemporary structure of the social contract not only excludes differently-abled people from governance but actively dismisses their participation in the same.[124] This is because they are not able to reciprocate or contribute back to society in a similar fashion as an able individual. There is an urgent and pressing need to move away from a bargaining approach founded on reciprocity because of how it negatively impacts those who are not able-bodied individuals. It is prudent to note that bargaining does not have to be the sole precondition to interpersonal cooperation. An

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[122] Vikash Kumar v. UPSC, (2021) 5 SCC 370.
[123] Nizar, *supra* note 53 at 100-108.
[124] Anita Silvers and Leslie Pickering Francis, 'Justice Through Trust: Disability and the "Outlier Problem" in Social Contract Theory', 116 ETHICS 40 (2005).

alternative to this is a trust-based approach, wherein society can take steps to facilitate the inclusion of individuals and the provision of facilities without any thought of reciprocity in mind.[125] Such an approach promotes a sense of belongingness and ensures that individuals can help each other.

Thirdly, the high costs of facilitating gender equality and the impossibility of achieving it immediately were not barriers for the state to imposing bans on sex-selective abortions.[126] If we consider the long-run impact of this measure, there was a significant improvement in the sex ratio at birth in a short-period of seven years from the enactment of the legislation that forbade the same.[127]

The elimination of such abortions also goes a long way in supporting people who acquire differences at a later stage in life. For instance, a ramp built to accommodate a single wheelchair may be used in the future to facilitate and help every individual who has an illness or a fractured leg.[128] The sensitization of society towards those with DA facilitates the accommodation and inclusion of an able individual who acquires DA later in his life as well. The facilities and services can be provided to these members of society, thus preventing additional expenses from being incurred on the same. Keeping in mind the overarching goal of substantive equality achieved by the amendment despite the restriction on

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[125] *Id.* at 70.
[126] Ramaswamy, *supra* note 54 at 30.
[127] Arindam Nandi and Anil B. Deolalikar, '*Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios? Evidence from a Policy Change in India*', ONE HEALTH TRUST (2013) https://onehealthtrust.org/wp-content/uploads/2017/06/ssrn-id2200613_8-1.pdf.
[128] Nizar, *supra* note 53 at 190.

reproductive autonomy, this paper believes that the benefits outweigh the harms. The restriction is, therefore, proportional to the object sought to be achieved.

IV. CONCLUSION

The Constitution in its essence promotes the principles of equality and non-discrimination. The courts have also upheld the right to dignity in various judgments as an important facet of the right to live. While the current policy ignores those with DA rather than addressing their concerns, there is an urgent and pressing need to move away from the same. The abortion of a differently-abled foetus entrenches a singular ableist view of society that promotes a view of the inferiority of such a community at large. It is thus important for society to be accepting of differences for its overall betterment.

Although the right to reproductive autonomy is sacrosanct and deserves to be upheld at all costs, there are some circumstances where the overarching social goal of the state can prevail over the right. In an attempt to promote equality of opportunity guaranteed under Article 14 and ensure the right to live with dignity under Article 21, this amendment to the law ensures that the discrimination against the differently-abled community can be ended. This paper has highlighted the inherent discrimination faced by the differently-abled community by permitting the abortion of a foetus who will be born with DA. It distinguished a blanket ban followed by Poland and qualified circumstances where the abortion of a foetus with DA will be

permissible. Having tested the hypothetical amendment to the law on the anvils of proportionality, this paper believes that the restriction on abortions solely based on such DA will nonetheless be desirable, but more so, valid in law.