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Right of Reproduction of Women with Disabilities

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ABSTRACT

Women with disabilities are entitled to the same reproductive and family planning education as any other woman, so that they may realise and enjoy the full range of rights guaranteed to them by the Convention. UNCRPD recognises the right to reproduction and access to sexual and reproductive health rights. The right to abortion for a mentally retarded woman was considered by the Supreme Court in Suchitra Srivastava's case. The court also considered the scope of the state's Parens Patriae jurisdiction in the case of the right to abortion. Sec. 3(2)(i) of the MTP Act is also analysed. Women frequently face obstacles while trying to receive treatments for reproductive health, and the healthcare system's lack of readiness often has a negative impact. The right to access reproductive healthcare and the right to privacy available to pregnant women with disabilities is analysed. Even though UNCRPD provides the right to have a family and to procure children, forced sterilisation is common with women with disabilities. The right of disabled women to get pregnant and to have children, like abled women, is acknowledged. As per Art.22 of UNCRPD, the right to have the privacy of a disabled woman is usually at stake as she has to depend on caregivers for her medical check-up.

Keywords: *Reproduction rights, forced sterilisation, Abortion, privacy, discrimination.*

I. INTRODUCTION

Individuals have the right to choose whether or not to have children and to maintain their reproductive health. This may include the freedom to have children, end a pregnancy, use birth control, receive reproductive health care, learn about sex education in public schools, and utilise contraception. One of the fundamental human rights is the ability to procreate. The legal neglect of women's reproductive health is a component of a larger, institutionalised bias against women. All couples and individuals have the right to make their own responsible decisions on the number, spacing, and timing of their children. It also encompasses the right to information and the means to obtain it, the right to the highest level of reproductive health, and the right to make reproductive decisions free from violence, coercion, and discrimination.

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Studying a variety of policies, programmes, and laws is necessary for understanding reproductive health rights, like the rights to food and nutrition, sanitation, livelihoods, education, non-discrimination, full disclosure and informed consent, comprehensive healthcare, and freedom from violence, etc. Reproductive rights started recognition since International Conference on Population and Development in 1994. The issue of millions of women not using modern contraceptives to prevent unwanted pregnancies and reducing maternal deaths were discussed in the conference. Their rights to employment and education have been acknowledged during the past several years, but their rights to sexual and reproductive health have mostly gone unrecognised. The right to a standard of living adequate for the health and well-being of an individual is provided by international instruments.

An individual is referred to as a "person with a disability" if they have a long-term physical, mental, intellectual, or sensory impairment that, when coupled with other circumstances, rights recognised by existing legal frameworks, regulations, and agreements on an international, regional, and national level. Women with disabilities are perceived as asexual, dependent, and in need of care, making them unable to perform traditionally accepted "womanly" roles like caring mother and sexual partner.

UNCRPD recognizes right to reproduction[3] and access to sexual and reproductive health rights. For achieving these rights women with disabilities need to be provided with age appropriate, accessible information of sexual and reproductive health and to have recognition of their rights to have a sexual relationship, marriage, establish a family, enjoy reproductive health and physical integrity.[4] The Convention sets a new standard for respecting the rights of people with disabilities to make their own decisions in an inclusive environment free from discrimination. Women with disabilities have got a right to get reproductive and family planning education, enabling them to exercise their rights provided by the Convention. [5] This right reiterates the medical model approach of disability. A medical view of sexual & reproductive rights focusing on violence and force and solving all these by sex education and medical assistance is expressed in the Convention. The right to reproduction is confined to the protection of persons with disabilities from forced sterilization and sexual abuse. Even though right to reproduce is addressed under UNCRPD, it does not find any reference of forced sterilizations and pregnancies. The special Rapporteur for the rights of disabled persons on sexual and reproductive rights had filed a report elaborately discussing, various sexual and reproductive

[3] UNCRPD. Art.23

[4] Schaaf.M, *Negotiating sexuality in the Convention on the Rights of Persons with Disabilities,* SUR International Journal of Human Rights,2011. Volume 8(14)113.

[5] Id., Art10.

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health services, including contraceptive counselling, pre-natal care, post-delivery and post natal care, infertility treatment , safe abortions and prevention and treatment of various sexually transmitted diseases.[6] UNCRPD does not as such address the issue of reproductive rights of persons with disabilities. Even though UNCRPD deviates from the medical model of disability to the social and human rights model, it encompasses the medical model as far as the right to reproduction is concerned. This view is adopted by pinpointing the issue of violence involved in the reproductive rights of persons with disabilities. The right of the persons with disabilities to have children was considered as a health issue rather than an issue where the person wants to live her life freely just like all normal persons.

II. THE RIGHT TO ABORTION

In order to better understand how current societal structures prevent or limit people with disabilities from making the reproductive health decisions that are best for them, as well as what policy solutions must be developed to ensure reproductive justice is a reality for all, it is important to explore the intersection of the disability and reproductive justice communities.

A women's rights-based approach has historically been absent from reproductive health laws and policies in India, which have instead prioritised demographic goals like population control while also implicitly or overtly undermining women's reproductive autonomy with provisions like spousal consent requirements for access to reproductive health services. India continues to have the highest rate of child marriages and 20% of all maternal fatalities globally, despite a national law that makes it illegal for girls under the age of 18 to get married, as well as policies and programmes to ensure women have access to maternal healthcare.[7]

a) Case study of Suchitra Srivastava v Chandigarh Administration

The right of abortion of a mentally retarded woman was considered by the Supreme Court.[8] A mentally retarded woman got pregnant from an alleged rape at a government run welfare institution and the High Court of Punjab and Haryana approved the termination of her pregnancy. The question came up before the Supreme Court was that whether the decision of the High Court in giving approval for termination of pregnancy without the consent of the woman in question was correct. Parens Patriae jurisdiction of the state was applied by the High

[6] Report issued by Special Procedures, Special Rapporteur on the rights of Persons With Disabilities, A/72/133, Published on 14/07/2017 available at https://www.ohchr.org/en/calls-for-input/report-sexual-and-reproductive-health-and-rights-girls-and-young-women-disabilities accessed on 22/12/2022

[7] Tanvi Mathur, Reproductive Rights of Women in India, Legal Service India, E- Journal, available at https://www.legalserviceindia.com/legal/article-3372-reproductive-rights-for-women-in-india.html, accessed on 10/12/22

[8] *Suchitra Srivastava v Chandigarh Administration*, (2009)8 SCC 766

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Court in holding that abortion can be done and the 'best interest' of the woman was also considered. The woman was already pregnant for more than 19 weeks and the abortion can endanger the health of the woman who undergoes the same. The report submitted by the medical board categorised the state of the woman as mild mental retardation and had stated that her mental status affects her ability for independent socio-occupational functioning and self-sustenance. The Board had also noticed that she has limited understanding of the sexual act and relationship and the concept of pregnancy. But the Board was in favour of continuation of pregnancy and the woman herself was willing to bear the child. Still High Court had directed to terminate pregnancy. This was challenged in Supreme Court. Medical Termination of pregnancy Act specifies the conditions in which an abortion can be done.[9] This provides explicit provisions that legalise disability- selective abortions. The Act mainly focuses on the physical and mental health of the mother. It does not recognize a women's right to abortion, but regulates the grounds on which abortions can be performed. The reasons stated for abortions have direct nexus with the health of the mother but, abortion on the basis of physical or mental abnormalities of the foetus have no connection with the risk to life of the pregnant woman. Thus law itself considers disability as a substantial risk. But risk to whom- Whether to mother or to child in the womb. The law is ambiguous with respect to this and can be assumed that law considers disability as dangerous. Thus disability is the most projected justification for abortion under law. This will be decided by the medical board, which does a disability – selection medically. A medical model approach is perceived in the case of foetus disability selection. Right to abortion has never been recognised as a normal recourse for expecting mothers. Article 21 of Indian Constitution clearly provides 'personal liberty' and the right to make reproductive choice is also a dimension of personal liberty. [10]This reproductive choice has to be exercised to procreate as well as to abstain from procreating. The crucial question has to be the woman's right to privacy, dignity and bodily integrity. This can be construed as no restriction on the exercise of reproductive choices like a woman's right to refuse participation in sexual activity or the insistence of use of contraceptive methods. Thus a woman's reproductive right include a woman's entitlement to carry on a pregnancy to its full term, to give birth and to raise children. As the woman in question is an orphan who is a resident of the government run institution, State has a compelling interest in protecting the life of the prospective child. Here in the present case, the woman was not mentally retarded but she has mild mental retardation, as mentioned by the

[9] MTP Act,1961, Sec.3.

[10]Suchita Srivastava and Others v Chandigarh Administration, (2009)SCC1, Justice K.S.Puttuswamy V Union of India, 2012a:para72, 2012b:para46, 2012c: param38, Kumari. D v State of Karnataka, WP 104344/2021

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medical Board. Hence the state's Parens Patriae jurisdiction need not be exercised.

As per MTP Act,[11] ordinarily a pregnancy can be terminated only if the medical practitioner is satisfied that the continuation of pregnancy involve a risk to the life of pregnant woman or if there is any risk that the child born will have serious mental or physical abnormalities.[12] The explanation to this section states the termination of pregnancy if it is the result of rape or failure of birth control methods. In all these circumstances, the consent of the woman is necessary.[13] As an exception to this section, the pregnancy of a girl below the age of 18 years or mentally ill person can be terminated, if consent is accorded by the guardian. In the present case, as the woman is an orphan, state was exercising Parens Patriae jurisdiction. But Supreme Court was of the view that as the girl is above 18 years of age and is having mild mental retardation, as contemplated in Sec. 3(4) (a), State's guardianship cannot be mechanically extended. The victim in this case, had neither consented for abortion, nor is the state in a capacity to give consent for abortion as a guardian. Supreme Court was not in favour of diluting this provision regarding consent, as there is high possibility of misusing the provision. The distinction between mental retardation and mental illness cannot be disregarded so as to interfere with the personal autonomy accorded to mentally retarded persons for exercising their reproductive rights.

In the present case, the victim wants to continue the pregnancy till its full term and deliver the child. As per the observation of the medical board, the victim is physically capable of continuing the pregnancy and the possible risk for her physical health is same as that of any other woman. Hence the court held that the decision taken by the High Court to terminate the victim's pregnancy without her consent was not in pursuance of her 'best interest'.

When the mentally retarded persons, because of their handicap, is not able to exercise all their rights in a meaningful way or certain rights has to be restricted or denied, the restriction or denial has to be done only after taking legal safeguards against all forms of abuse.[14] Thus on a proper analysis of the above provision, it can be interpreted as, the disabled persons' right can be limited by proper restrictions, which is for the ultimate benefit of the woman.

The present case reveals the social stereotypes and prejudices that operate detrimentally to the mentally retarded persons. The persons who are having mild retardation are capable of living in normal social conditions and do not need institutionalised supervision. Moreover every disabled person has the right to live with their families or with foster parents and to participate

[11] Sec. 3(2)(i), MTP Act, 1971.
[12] Id., Sec.3(2)(ii)
[13] Id., Sec. 3(4)(b).
[14] UN Declaration on the Rights of Mentally Retarded Persons, 1971, G.A.Res. 2856 (xxvi) of 20 December, 1971, Para7.

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in all social, creative or recreational activities.[15] The institutionalism tends to be associated with more social stigma and the mentally retarded person is denied the opportunity to be exposed to normal life conditions.

b) Present Scenario

Time has changed and more and more disabled woman are experiencing pregnancy.[16] Women with Disabilities show a sense of normality of their existence because of pregnancy, as she can affirm her capacity to enjoy motherhood. Women frequently face obstacles while trying to receive treatments for reproductive health, and the health care system's lack of readiness often has a negative impact. [17]The common barriers persons with disabilities suffers are physical access barriers, communication barriers, cultural barriers and lack of awareness from the providers about the issues concerning persons with disabilities. Woman with disabilities face all these issues in matters of family life and sexual relationships.

The most important aspect is that, no particular governmental study is available on the reproductive health status of women with disabilities and the reproductive health care experiences of this group. Only if data is available, on pregnancy experiences, number of living children, number of miscarriages, type of delivery, health care access in pregnancy etc., and a need based reproductive health services for woman with disabilities may be effected positively. The lack of adequate data makes it difficult to understand the gravity of issues relating to disabled woman. They have limited access to sexual and reproductive rights. This exclusion is further compounded by the opacity of the laws in India. Access to safe abortion is also an issue with disabled women due to inaccessible health care facilities and information, insensitivity of health care workers and infantilisation and invisibalisation of women with disabilities.

The RPD Act, 2016 necessitates govt. to make necessary information regarding reproductive and family planning accessible to persons with disabilities.[18]'Government is to ensure measures and schemes to promote sexual and reproductive healthcare measures for women. [19] It is necessary to undertake campaign and sensitization programmes for respecting the decision by disabled persons on matters of family life, relationships, bearing and raising children, and spacing between children[20]

[15], Declaration on the Rights of Disabled Persons,1975, Art.9
[16] Blackford.K, *et.al, Prenatal Education for Mothers with Disabilities,* Journal of Advanced Nursing, 2000(32), 898-904
[17] Id.,
[18] The Rights of Persons with Disability Act, 2016, Sec. 10(1)
[19] Id., Sec. 25(2)(k)
[20] Id., Sec.39(2)©

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The MTP Act asserts that abortion can be done only with the consent of the pregnant mother.[21]MTP Act has been amended twice- once in 2002, wherein the word lunatic was changed to mentally ill person and in 2021, the gestational limit for abortion was increased from 12 weeks to 20 weeks[22] and the time within which termination of pregnancy can be done after complying with all procedure prescribed is increased from 20 weeks to 24 week.[23]In this amendment also, a progressive definition of the term mental illness was not provided. The Mental Health Care Act, 2017,[24] provided a comprehensive definition for the term mental illness. It defines mental illness as 'a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgement, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence. This definition will more clearly explain mental illness and that will help effectively in identifying the mental conditions of the pregnant woman. The Amendment carried out in MTP Act, 2021[25] ought to have adopted the definition in MHA, 2017. There is lack of synergy between these laws and that creates confusion as to meaning and implications of the term. The lack of synergy between Medical Termination of Pregnancy Act, 1971, Mental Health Care Act and Rights of persons with Disabilities Act is an issue and the confusions make the access more difficult.[26] The Indian Courts' approach[27] towards MTP Act does not help in improving the access to safe services or clarify the provisions to service providers. It does not help in drawing a uniform interpretation of MTP Act.

III. RIGHT TO ACCESS TO REPRODUCTIVE HEALTHCARE

Access to and the standard of reproductive health care for women with physical impairments, are hampered by barriers in the built environment, pervasive prejudices and biases, and insufficient disability competency of healthcare professionals. A person's physical, emotional, psychological, and social well-being in relation to their sexuality is referred to as their sexual health. This includes having control over their fertility, being protected from STDs, being free from coercion, stigma, censorship, and violence, and having access to pleasurable and secures sexual experiences. Denial of these rights to women with disabilities is an issue whiuch have to

[21] MTP Act, 1971 , Sec. (4)(b)
[22] MTP Act, 2021, Sec.2(b)
[23] Id., Sec 2©
[24] The Mental Health Care Act, 2017, S.2(s)
[25] Id.
[26] Id.,
[27] Ashok Kumar v Anupama Sharma, FAO-M.No.29/2015, 21 January 2015

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be addressed by the authorities. A study was conducted in Chandigarh in 2015 regarding the denial of access in sexual and reproductive health care. The study was done with 50 women with disabilities out of which 78% had locomotors disability, 8% were blind and 6% were deaf. The study showed that 36% of women with disabilities reported physical barriers in accessing the facilities, including, lack of ramps or transportation and inappropriate examination tables. 22% cited long waiting hours and 20% stated inaccessible toilets as barriers. 8% complained the attitude of health care providers as a barrier and 6% reported that with assistance they could have accessed the facility better. [28]

IV. RIGHT TO PRIVACY

Article 22 of the Convention of Persons with Disabilities addresses the issue of Right to Privacy of disabled persons. Nobody shall be the target of wilful or unlawful intrusion into their personal space, that of their loved ones, their homes, their communications, or other means of contact, or of unlawful assaults on their honour and reputation. People with impairments have a legal right to defence from such intrusions or assaults.[29] Since privacy and reputation are essential components of human dignity, protecting them makes sense as part of a global agreement based on those principles. In the opening sentence of Article 22, privacy and reputation rights are completely protected, and the language used makes no reference to the rights of those who are not impaired. Therefore, Article 22 offers "more than just anti-discrimination. There is a deviation to go beyond simple anti-discrimination laws to define a right to substantive equality, ensuring that results, not just treatment, are equal. The fundamental rights outlined in the first sentence of Article 22 require separate treatment when the safeguards society generally provides are insufficient to protect the privacy and reputational interests of people with disabilities.

Perceptions about women with disabilities as incapable mothers, as asexual beings, prevent them from accessing crucial information pertaining to sexual and reproductive rights. Another important aspect is the right to privacy of disabled woman. When a woman with disabilities is pregnant, she has to go to hospital and the decision regarding the pregnancy or any other directions will be given to caregivers. In the case of deaf woman, the issue is further complicated as the hospitals do not have sign language interpreters, left out with the option of relying on caregivers and family members. In all such situations, the privacy of woman is at stake.

[28] Report of the study conducted by Post Graduate Institute of Medical Education and Research(PGIMER),2015 as Quoted in Shreya Raman, *India's Laws fail to uphold Abortion Rights of Woman with Disabilities,* 11/11/2021, Behan Box, Disability Rights, available at https://behanbox.com/2021/11/11/indias-laws-fail-to-uphold-abortion-rights-of-woman-with-disabilities/ accessed on 10/07/2022.
[29] UNCRPD, Art22

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It is obligatory for the states to make appropriate information, on reproductive and family planning, available to women. The authorities have to ensure that the disabled women also have to enjoy their life to the fullest.

V. FORCED STERLISATION

The issue of forced sterilisation is addressed by international instruments. UNCRPD reinforces the right of people with disabilities to found and maintain a family and to retain their fertility on an equal basis with others.[30] Similarly persons with disabilities have the right to recognition everywhere as persons before the law and to enjoy legal capacity on an equal basis with others, including access to the support they may require to exercise their legal capacity.[31]There should be free and informed consent for providing health care to persons with disabilities.[32]The Human Rights Committee prohibits torture, inhuman or degrading treat on any individual including persons with disabilities.[33] Forced sterilisation is considered as an act of violence and every women or girl with disabilities have a right to maintain a family and to have highest standard of sexual and reproductive health.[34] Forced sterilisation may constitute torture, cruel and inhuman treatment and is a crime against humanity.[35] This is a method of medical control of a women's fertility, which violates her physical integrity and security and is violence against women.[36]

Forced Sterilisation is performed on women and girls with disability for many reasons like population control, menstrual management and personal care, pregnancy prevention, naming the few. This in turn results in denial of human right of women or girls with disabilities –their right to reproduce is violated. Along with systematic exclusion from complete sexual and reproductive health care, this denial also includes limited options for voluntary contraception, an emphasis on menstruation suppression, poorly managed pregnancies and births, involuntary abortion, and the denial of parental rights. Forced sterilisation is the result of charity model and religious model of disability wherein disability is considered as a personal tragedy. Some

[30]Id., Art.23
[31] Id.,Art.12
[32] Id., Art.25
[33] International Covenant on Civil and Political Rights., Art. 7
[34] United Nations, *The Beijing Declaration and the Platform for Action:* Fourth World Conference on Women, Beijing, China, 4-15 September 1995; A/CONF.177/20/Add.1.[paras. 95-96]
[35] UN Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, 15 January 2008, A/HRC/7/3,[paras.38, 39].
[36] Radhika Coomaraswamy(1999), *Report of the SpecialRapporteur on Violence Against Women, its Causes and Consequences: Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, (55th Sess.), E/CN.4/1999/68/Add.4 (1999), [para.51].

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disabled women may find it difficult to comprehend or express what was done to them, which makes them more susceptible to forced sterilisation. The practise of application of parens partiae jurisdiction by the guardian or others giving consent for sterilisation also aggravates the situation.

Arguments in favour of their "best interests" frequently connected with social issues, such as minimising burden on caregivers, the absence of adequate safeguards against sexual abuse and exploitation of women and girls with disabilities, and the absence of adequate and suitable services to support women with disabilities in their choice to become parents.

VI. CONCLUSION

Although laws protecting the rights of people with disabilities have been passed, sadly, these laws have not taken into account the intersectionality of discriminations that disabled people face. Right to privacy, bodily integrity and reproduction of women with disabilities should be safeguarded and for that adequate amendment have to be made out in MTP Act. Both in the context of the rights of people with disabilities and in the context of human rights generally, it is still unclear exactly what constitutes an uninvited, unjustified, or abusive intrusion into a person's private space. It is clear that women with disabilities lack facilities and the consent of the women should be considered material in decisions affecting their lives. A deliberate involvement on the part of the government is necessary for bringing out equal participation in society and for the proper implementation of provisions relating to reproductive and sexual relations of the disabled woman.[37] There should be proper access to birth control mechanisms by disabled women. These steps include making parenting and sexual education programmes accessible and available, teaching self-defense and assertiveness skills, offering the community the personal assistance and support services that will lower the risk of sexual abuse, keeping an eye on the places where women and girls with disabilities are frequently housed and offering alternative methods of contraception that are less harmful to the body. The promise made by Article 22 of the CRPD for the protection of the privacy, dignity, and reputation of people with disabilities is encouraging, but it is only the beginning of a change of the premise.

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[37] Supra 16,17 &18.

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