WOMEN WITH DISABILITY: A STUDY ON REPRODUCTIVE RIGHTS

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ABSTRACT

Disability as a paradigm entails the impairment of persons not only in a physical or mental form but also in a way that affects the social standing and availability of rights of the persons. The position of disabled people in society stems from an area wherein they are subjected to certain prejudices owing to their disability. When viewed as a separate class of people, women with disabilities can be seen to be placed at a position in society wherein they are subjected to double discrimination due to their gender and disability. One of the examples of the same is the lack of rights to reproductive health and facilities and practice of such reproductive rights being extended to women with disabilities. This article aims to highlight the difficulties in accessing reproductive rights and the currently available and the lack of laws protecting the freedoms and rights of women with disabilities while attempting to practice their inherent right to reproductive and sexual health. The paper mainly focusses on the Indian perspective and the legal provisions in India which aim to safeguard such rights of women with disabilities. Some of the key provisions that the article analysis are United Nations Convention on the Rights of Persons with Disabilities, Rights of Persons with Disability Act, 2016 and The Medical Termination of Pregnancy Act 1971. Along with the legal provisions, the article also highlights certain judgments which highlight the view of the Indian judiciary with respect to the rights guaranteed to women with disabilities and the lack of it thereof. By analyzing the provisions and the view of the Indian legal system on a certain social disability is highlighted and the stigma revolving around the extension of rights of such a nature which women anyways find inaccessible in attaining is highlighted, along with the need of the Indian legal system to step up for the protection of the same.

Disability as a paradigm does not only pertain to having a physical or mental form of impairment, as it also stems from an area of social stigma. Therefore, it is prudent to view disability from the lens of both social and legal aspects to realise the holding of a person with disability. It is a common practice for persons with disability to be treated differently and to be denied rights which are otherwise provided to able-bodied persons whether social, political, or economical. The intersection of gender with disabilities aims to shed light on a theory and the question of how gender may correlate with disabled persons affecting their experience and position in society.

Discrimination is observed to be practiced against women with disabilities by stigmatising their ability to perform the same tasks which able-bodied men as well as women can do, as well as questioning their ability to make decisions, owing to their gender and their disability. When a woman is disabled, she is placed at a position in a society where the stigma is increased two-fold, leading to double discrimination and a higher risk of maltreatment and exploitation. In a developing country such as India, reproductive rights and sexual wellbeing is still an evolving sphere as it is often stigmatised and viewed from judgmental eyes. A disabled woman is often seen as someone who is asexual and dependant on others and hence, assumed to be unable to make decisions regarding their sexual autonomy and reproductive rights. They are seen as being incapable of playing womanly or motherly roles. The right to reproduce is an important right which is protected under *Article 25 of the Universal Declaration of Human Rights*. Under this article, the rights directed to be protected include reproductive rights of women such as privacy and consent. However, there stands to be a question regarding the protection, accessibility, and implementation of such reproductive legal rights of women with disabilities in a hetero-patriarchal country like India which this paper aims to analyse through tracing out the current available reproductive rights extended to women with disabilities in India and their implementation.

The term ‘reproductive rights’ includes the rights which are extended to men and women both and involve the right to be regulate and be informed about their fertility, available and most suitable form of contraception for them and the right of a woman to have a safe and consensual abortion. The recognition of reproductive rights as being a vital right has evolved throughout the years initiated through the *International Conference on Human Rights (1968) Declaration and the International Conference on Population and Development (1994*). An internationally recognised guideline to protection of the right to reproductive health for disabled persons which

has been codified is under the *United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)*, wherein *Article 23(1)(b) and Article 23(1)(c)* states, "*Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:*

b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

c) Persons with disabilities, including children, retain their fertility on an equal basis with others."[1]

In the Indian legal system, protection for such a right of reproductive healthcare has been provided through legislations such as the RPwD and *The Medical Termination of Pregnancy Act 1971*. Pertaining to the provisions that govern the protection of such rights in India, the main act which provides for the protection of rights of persons with disabilities is *Rights of Persons with Disability Act, 2016 (RPwD)*. Under this act, *Section 4(1)* of the act provides that the government and local authorities should aim at eliminating any form of discrimination against women and children with disabilities and ensure that they have access to enjoyment of equal rights as compared to others. It is important to understand that such a guideline for the protection of women specifically indicates the recognition of the factor of double discrimination against women with disability. Double discrimination is described as the intersection and between gender and disability. The discrimination against women with disabilities is doubled due to the social facets such as sexism and ableist nature of the society hence, it becomes important to recognise and provide for special provisions to protect women with disabilities against the multiplied form of discrimination. It is often noticed that there exists a stigma around providing healthcare to women with disabilities as there is a lack of trained health care workers who are aware of the appropriate care needed to provide healthcare to women with disabilities. They often find themselves in a position of unawareness and hence, the brunt of this is faced by women. Due to this lack of training, women are denied the basic right to bodily autonomy and are forcefully sterilised and not provided with basic facilities

[1] United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), Article 23(1)(b)(c).

recognised under *Article 25 of the Universal Declaration of Human Right*s such as contraceptives and maternity care.

Under the RPwD such rights are provided under *section 10* of the act. The section provides that the government must ensure that the appropriate information concerning reproductive rights and family planning is made available to persons with disabilities. In furtherance of this, to ensure that such information is made available to persons with disabilities, it has been provided under *section 25(2)(k)* that, the government is to ensure that there is promotion of "*sexual and reproductive healthcare especially for women with disability*"[2] through introduction of policies and programmes. *Section 39(2)(c)* of the act provides that the government shall undertake appropriate sensitization programmes to 'foster respect' for the decisions related to bearing and raising a child, made by a person with disability. Under *section 92 (f)* of the act, which provides for punishment for offences of atrocities, it is provided that a person shall be punishable for imprisonment if he *'performs, conducts, or directs*' [3] a medical procedure to be conducted which leads to resulting in termination of pregnancy of a woman with disability without her consent, and in cases with severe disability, the consent of her guardian. *Section 3 of the Medical Termination of Pregnancy* Act provides under *section 3(4)(a)* that the termination of pregnancy of a woman with disability, specifically a 'mentally ill' person shall not be allowed to be executed without prior permission of her guardian.

Although, the Indian legal system has attempted to ensure that women with disabilities are protected through the provisions mentioned, it mostly includes them in the ambit of persons with disabilities, and there is a lack of provisions regarding the recognition of the intersectionality of sexism and ableism faced by women with disabilities. Although the provisions under the RPwD recognise reproductive rights of women with disabilities, they fail to accommodate sexual rights explicitly under any provision. Similarly, under section 10, the act provides that the government should provides access to 'appropriate' information regarding family planning, however, there is ambiguity regarding what amounts to 'appropriate' information, thus granting the government the scope of interpretation with respect to the wide or narrow application of this provision. Similarly, *section 92(f)* of the act does not provide for what constitutes a 'severe disability', placing reliance on ambiguous interpretation. The MTPA, under *section 3(4)(a)* creates an ambiguous scope of interpretation of the term

[2] Rights of Persons with Disability Act, 2016, s.25(2)(k).
[3] Rights of Persons with Disability Act, 2016, s.92(f).

"mentally ill". The act provides that a mentally ill woman is a person who requires treatment for a reason involving any mental disorder other than mental retardation. The definition is not inclusive and open to interpretation of individuals. Even though the *Mental Healthcare Act 2017*, provides for the definition of 'mentally ill' under *section 2(s),* which provides specific reference to what constitutes a mental illness and limits the need for subjective interpretation, the same has not been incorporated in the MTPA.

The judiciary's interpretation of the legal provisions and the recognition of the right to reproductive health can be seen from the landmark judgment of ***Suchita Srivastav vs Chandigarh Administration***[4]. In this case, the appeal was filed on behalf of a mentally retarded woman who had become pregnant due to an alleged rape. She was an inmate in the welfare institution located in Chandigarh which was run by the government. The High Court had directed the termination of her pregnancy even though she had expressed her will to bear the child. This judgment was rationalised on the reason that the woman had no guardian and would be unable to take care of the child. The case was appealed to the Supreme Court with the main fact in issue that if the woman wanted to bear the child and since there was no consenting guardian, could there be a forced sterilisation for the best interest of the woman? The Supreme Court in the appeal held that, "*Her reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be 'mentally retarded' should give her consent for the termination of a pregnancy.*"[5] The judgment relied on Section 3(4)(a) of the Medical Termination of Pregnancy Act, 1971, which provided that, "*No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [mentally ill person], shall be terminated except with the consent in writing of her guardian.*" [6]This judgment was considered a steppingstone for establishing the equality in the right of a woman with disability to bodily autonomy and exercise of her reproductive rights and was under the ambit of *Article 21 of the Constitution* which guarantees the right to personal liberty.

[4] SLP(C) 5845/2009.
[5] SLP(C) 5845/2009.
[6] Medical Termination of Pregnancy Act, 1971, s.3(4)(a).

Although the Suchita Srivastav judgment was a progressive one and opened the gateway to the implementation and recognition of reproductive rights, it was also a problematic precedent as there was a strict application of the definition of a mentally ill person as defined under the MTPA. As discussed, the MTPA provides an ambiguous definition of who a mentally ill person is. The judgment placed reliance on the fact that the woman was not a 'mentally ill' person but suffered from 'mild' retardation. This meant that the Supreme Court was of the view that since the woman did not fall under the ambit of 'mental illness' hence, her decision was respected. This creates a distinction between the mental illness and mental retardation. Although both the conditions are a type of disability, be it an intellectual disability or a mental illness, it is imperative that they be placed at the same position. The effect of this judgment can be seen in another case which took place in 2015. In the case ***Anand Manharlal Brahmbhatt v. State of Gujarat***[7], a wandering mentally ill woman was found to be fourteen weeks pregnant. Since the guardians of the woman could not be located, the court took upon itself the responsibility to protect the best interests of the woman and directed for a termination of the pregnancy for the benefit of her health. The application of the Suchita Srivastav case can be seen in the judgment. The court created a distinction stating that in the Suchita Srivastav case, the woman was diagnosed with 'mild retardation' whereas in the case at hand the woman suffered from schizophrenia. The court held that it was a severe mental illness and not a mere mild retardation. The woman would hence, according to the court, be unable to care for the child like the woman in the Suchita Srivatav case would be able to. It is evident that the application of the precedent set in 2009, is creating a distinction between mental illness and intellectual, as well as leaving it to the interpretation of the courts to determine the scope of the term 'mental illness. This nullifies the progress established in the Suchita Srivastav case to an extent that it portrays mental retardation to not qualify as a mental illness and hence, positioning it at a position which does not protect the reproductive rights of the woman with disability, rather placing reliance on intellectual abilities and also discriminates between the two groups, under Article 14 of the Constitution of India.

The case also points us towards the direction of the possible social evils of forced sterilisation and abortions that take place in the absence of criminalisation of such acts and the secrecy of conducting such procedures. Such a social evil dates back to 1994 when the practice of forced hysterectomies became public. These were being conducted on mentally challenged women

[7] Special Crim. App. No. 4204/2015.

without their consent, at *Sasson General Hospital, Pune*.[8] In the present scenario, it is a known and established fact, that women with disabilities are seen as been incapable of making their own decisions relating to bearing a child, owing to which they are forced to go through procedures which terminate their pregnancy. Even if the consent of the woman with disability is not acquired, it is provided through legislations that such a pregnancy could be terminated by the consent of the guardian and in cases where the guardian does not exist, the state facility in which the woman with disability is taken care for, assumes guardianship. As there is ambiguity regarding the definition of a mentally ill person under the MTPA, the doctors usually protect their own rights and create a safeguard for themselves by insisting on the consent of the guardian, which hence compromises the privacy and right to bodily autonomy of a woman with disability. This displays the lack of consent and protection of the rights of women, as it is also unclear as to what constitutes a mental illness under the MTPA. Since there is a lack of trained professionals to deal with medical procedures and the protection of exercise of reproductive rights, such forced abortions and other medical procedures which compromise reproductive and sexual rights take place through discrete and illegal procedures which are unsafe. *The Criminal Law (Amendment) Act 2013*, does not recognise such a risk and inequality faced by women with disabilities and hence, fails to criminalise forced abortions and coerced sterilisation. There lacks criminalisation of such acts under any of the criminal legislations such as the IPC, and hence leads to a lack of recognition of the severeness of such acts. It is imperative to understand that it might be difficult for a woman with disability to fight for her right in such cases as she might be coerced by her own guardian in the name of protecting her best interests under the garb that she would not be able to make her own decisions. It is unclear whether such acts are carried for the best interest of the woman with disability or stems from the bias that she is a woman, already assuming her to be incapable of independence along with being disabled.

It can be seen that from the perspective of protection of the reproductive rights of women with disabilities, India has attempted to take a step forward towards the recognition of such rights, it is still in the ambiguous zone of defining the specifics of such provisions and mainly relies on the interpretation of the courts. There is a lack of the recognition of double discrimination and as such any schemes and programmes to spread general awareness regarding the same, as it has been left to the local authorities to ensure the same. There seems to be more provisions

[8] TheHindu, Divya Sreedharan, 'The silenced wombs', (2013).

regarding persons with disabilities which also includes women, rather than specific legislations for woman with disabilities which concentrate on their issues only. With regards to the accessibility of such rights, it has been established that the unawareness and lack of training of healthcare professionals and their bias and social stigma towards the woman with disabilities makes it difficult for woman with disabilities to access any of the provisions made available to them. This stems from the fact that being a woman, there is a pre-existing bias that the woman is incapable of being a sexual being and apart from that owing to her disability, there is a need to protect her and 'guide' her choices with respect to childbearing and sexual wellbeing. It is important that there are laws introduced which provide freedom and autonomy and are gender specific to cater to the fact that women with disabilities face double discrimination.