

Mumbai (Women`s Feature Service) - In India, a disabled girl-child is usually at the receiving end of a lot of contempt and neglect. Women with disabilities have been consistently denied their rights. In a landmark decision, the Supreme Court (SC) of India recently allowed a 19-year-old mentally challenged orphan girl to carry on with a pregnancy resulting from a sexual assault. The Punjab and Haryana High Court ruling had earlier ordered medical termination of pregnancy (MTP).

Giving the facts of the case, Advocate Colin Gonsalves who had argued for abortion in this case, said that the girl, who was kept at Nari Niketan, Chandigarh, a government institution for destitute women, was raped some time in March 2009 on the premises by the security guards. In May 2009, the pregnancy was detected. The media widely reported the rape but no institution or individual came forward in the woman`s support. In the same month the Director of the Government Medical College and Hospital constituted a three-member board comprising a psychiatrist, a clinical psychologist and a special educator to evaluate the woman`s mental status. Their report did not suggest anything out of the ordinary except that "she also cries almost daily". The board found her mental age to be nine years and placed her in the category of mild mental retardation.

A few days later, a four-doctor Multi Disciplinary Medical Board was constituted, which included a psychiatrist. It recommended an MTP. The Punjab and Haryana High Court ultimately went on the basis of these reports. The second one concluded that "the continuation of pregnancy in this case can be associated with certain complications considering her age, mental status and previous surgery. There are increased chances of abortion... pre-maturity... foetal distress and more chances of operative delivery including anaesthetic complications." The committees concluded that the woman "has adequate physical capacity to bear and raise the child but that her mental health can be further affected by the stress of bearing and raising her child."

This case thus raised fundamental issues relating to consent and to the support required while assessing consent. Eventually most mentally challenged women will, if properly supported, be able to indicate whether they wish to abort the pregnancy or proceed with it, concludes Gonsalves.

Shampa Sengupta, Director of the Sruti Disability Centre in Kolkata, says that if the woman wants to keep the baby she should be allowed to do so. "We as civil society must take the responsibility of supporting her. How can we forget the UN Rights of Persons with Disabilities Convention?" she asks.

Sengupta, who has worked on disability for the last 10 years, adds, "How can we say her choice is not valid? Because the doctors say so? If you or I do not consider the doctor`s word as final, why should this young girl? Also, why is it that no one is talking about the rapists and how Nirmala Niketan came to have male employees?"

"The SC judgment has focused more on pro-life arguments and the rights of the child," states Bhargavi Davar, who heads the Bapu Trust in Pune, an organisation devoted to challenging the

mindset and practices of the Indian mental health establishment. She points out that several women's organisations have responded to this judgment by focusing on women's rights and the right to abortion.

But nowhere in this dialogue between the state and civil society has the issue of reproductive rights and s*xuality in the context of psychosocial and mental disability been discussed.

Many state institutions for women living with a mental disabilities, with the co-operation of families, routinely sterilise, abort or give the child away for adoption without the consent of the mother. Many women's organisations and NGOs that provide care have an equally problematic custodial outlook towards such persons. Argues Davar, "In this case, we have not heard the woman's voice anywhere, while we have several third party arbitrations and advocacy. We do not know what the woman wants. Whether the mentally challenged woman has the `capacity` to take care of the child is another question riddled with prejudices and stereotypes."

In the 1990s at Sirur, Maharashtra, 17 mentally challenged girls below 18 years were peremptorily hysterectomised. The state chose to control the girls` reproductive rights by deploying extreme measures. The professionals involved in that decision neither denied that hysterectomies were done, nor did they perceive them as a violation. They justified them as having been done in the best interests of the girls.

Dr Anant Phadke from Pune who filed a Public Interest Litigation (PIL) on the issue, says that case is still on. In January 2009, the state filed an affidavit stating "Mentally retarded adolescent girls or adult women have no sense of hygiene during menstruation." Shockingly, this is the prime reason given by the government for backing the controversial decision. Justifying its move, the government stated that, unlike stools or urine, menstrual flow is continuous and lasts up to at least 100 hours a month.

It added that caregivers find it difficult to deal with inmates who are uncooperative; and that poor hygiene can lead to infection and laceration on thighs and genitals and that increased flow can cause anaemia. Behavioural problems and psychotic symptoms also cause difficulties for care-givers.

All that is needed to perform the operation is the consent of the parent/guardian and certification from a psychiatrist and gynaecologist that hysterectomy is needed.

"We are challenging these guidelines," says advocate Anand Grover adding that the hysterectomies were performed for the convenience of the institute, to prevent pregnancy in case of s*xual abuse and not for the woman's welfare. The Government had no authority to conduct a hysterectomy on mentally disabled women and such a move violates the fundamental rights of such women and the provisions of the Mental Health Act.

Shruti Pandey, a human rights lawyer from Delhi, admits that this is a case that is "so grey". Says Pandey, "To my mind, this case was not about abortion per se, it was about whether the law of this country recognises and protects the agency of a woman to take decisions for her life and body, especially all its nuances when the woman is a person with mental retardation (MR)

or any other disability."

Legally, this case showed - which the HC also noted in detail in its first order - that the Medical Termination Of Pregnancy (MTP) Act does not deal with access to abortion of women with MR, and that it wrongly distinguishes between women with mental retardation and mental illness, leaving the former out totally. Also that the Act does not understand that both these kinds of women are more likely than not to be destitute, in which case guardianship is not that simple.

Clarifies Pandey, "If the SC has said this woman wants to go ahead with the pregnancy, in principle I would support the decision. Every woman has a right to bear children, including women with mental disabilities. But if the court says it is the right of child to be born/not to be killed, and so the pregnancy must go on, that is hugely problematic. In any case, if the SC says no MTP, I would like to see what support mechanism it relies upon, institutionally, and not merely on the assurances and hyperbole of individuals and NGOs. I would also like this decision then to lead to the state`s accountability for creating and sustaining comprehensive and reliable support systems for all persons with disabilities, within a rights framework. This is definitely an obligation under Article 12 of the UN Rights of Persons with Disabilities Convention, which India is totally ill-equipped to deliver on, as this case shows."

This case indicates eloquently that the Indian legal framework has to be strengthened a great deal to bring it in line with international legislation.

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