

DEBATE

Disability and the Medical Termination of Pregnancy Act, 1972

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On July 21, 2009, the Supreme Court (SC) of India stayed the order of a division bench of the High Court (HC) of Punjab and Haryana in a civil writ petition filed by the Chandigarh administration. The Chandigarh administration had asked for orders in the case of a mentally challenged, 19-year-old woman who had become pregnant after she was sexually assaulted in a government institution. In its judgment the HC ordered that the woman should undergo a medical termination of pregnancy (MTP) and stated that this was in the best interests of the woman in question (1-3).

The SC stated that in this particular case it refused to dilute the provisions of the Medical Termination of Pregnancy Act. It stated that, as per subsection 4a of section 3 of the MTP Act, "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" .(4) The court interpreted that the victim being a mentally retarded woman (and not mentally ill) above the age of 18 years, she alone is competent to accord consent for the termination of her pregnancy.

The woman had been raped at Nari Niketan, a welfare institution at Chandigarh, where she had been institutionalised. She was later shifted to another institution, Ashreya, where her pregnancy was detected on May 18, 2009. Both the institutions were government-run, the former under the administration of the director, social welfare, and the latter under the director-principal, Government Medical College, Chandigarh.

The pregnancy was then confirmed by a medical board comprising two gynaecologists and a radiologist. The woman's mental condition was evaluated by a three-member medical board headed by the chairperson of the department of psychiatry of Chandigarh Medical College who opined that she fell in the category of "mild mental retardation". An ossification test was also conducted which set her bone age as between 19 and 20 years. Following this, a four-member multidisciplinary medical board was constituted and asked to submit its considered opinion on the consequences of continuation of pregnancy and the capability of the woman to cope with it. The board recommended that the woman undergo an MTP after considering her physical, mental and social well being. The Chandigarh administration approached the HC seeking permission to have an MTP conducted as, according to the senior standing counsel for the petitioner, the administration

was unwilling to become a "judge on its own cause". Considering the sensitive nature of the case, including the rights of mentally retarded women and issues related to the interpretation of the statutes relevant to the case, the HC requested the assistance of the advocates general for the State of Punjab and Haryana and also appointed two senior advocates as *amicus-curiae* to assist the court in making a decision.

The hearing in the HC saw discussions on the interpretation of the MTP Act as well as medicolegal literature concerning mental retardation and MTP. The counsel for the Chandigarh administration argued that while interpreting the MTP Act, a mentally retarded person, like a mentally ill person, should be considered incapable of making an independent decision regarding her pregnancy. He supported the argument by citing the appointment of a guardian under section 14 of the 1999 (National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act which includes both mentally retarded and mentally ill patients in the wider category of disabled persons and treats them at par. He doubted the mental capacity of the woman to give consent for the retention of her pregnancy. He referred to the medical records of the girl and made the plea that the woman, with a mental age of a nine-year-old and who is incapable of looking after herself, should be freed from the burden of pregnancy caused by a rape. The views and arguments were supported by the advocate general, Punjab.

Opposing the arguments of the Chandigarh administration, the *amicus-curiae* argued that while amending the Act in 2002, the legislation was fully conscious and informed of the consequences of excluding mentally retarded women from the category of mentally ill persons. He drew attention to medical literature suggesting that in ordinary situations, most people with mental retardation can lead an independent life with some assistance in matters concerning family, housing and employment or when they are under unusual stress. He referred to the Declaration on the Rights of the Mentally Retarded Persons by the United Nations General Assembly Resolution of 1971 which entitled a mentally retarded person to the same rights as any other human being to the extent possible. The petitioner (the Chandigarh administration) drew severe criticism from the *amicus-curiae* for treating the woman as a subject, and for seeking MTP "for the sake of convenience and not for the reason of necessity". The *amicus-curiae* countered the argument that the woman lacked the mental capacity to

give consent for retaining her pregnancy by stating that the MTP Act provided autonomy to mentally retarded women in matters concerning their pregnancy. The *amicus-curiae* held the view that since the woman had clearly expressed her wish to retain the child, the court did not have much option but to allow the retention of pregnancy. The *amicus-curiae* asserted the right of self determination for persons with intellectual disabilities. The advocate general of Haryana shared a similar stand and opposed the petitioner's plea for MTP.

The HC also considered the opinion of the medical board which had recommended that an MTP be carried out. The court refused to accept that the particular case could be decided based solely on the interpretation of legal provisions and cited the 1995 Persons with Disabilities Act which, while distinguishing between mentally ill and mentally retarded persons, clubbed them together with reference to education, employment, affirmative action and non-discrimination. The HC decided to exercise its *parens-patriae* jurisdiction (applied in situations where the State must make decisions to protect the interests of people who are unable to take care of themselves) considering the fact that the woman was in the custody of the petitioner State who had to take a decision on the MTP as well. The court held the view that a literal interpretation of section 3(4) of the MTP Act cannot impinge on the constitutional powers of the court, especially its *parens-patriae* jurisdiction. The court decided to get a second medical opinion from an independent expert body at the Post Graduate Institute of Medical Education and Research (PGIMER), Chandigarh. A senior lady judicial officer was appointed as member-cum-coordinator to the expert body, to attach judicial sanctity behind the verdict of the expert body. The division bench ordered that if the opinion of the expert body was in favour of MTP, the administration should proceed with it without any delay. The HC further clarified that if the woman, after acknowledging fully the consequences of the pregnancy, wished to retain the pregnancy, her views along with the report of the expert body should be placed before the HC for further deliberations. The Chandigarh administration was criticised by the HC for its "casual approach and negligence" towards the woman. "We are at pains to observe that (because of) the mechanical approach and callousness with which the welfare institutions are being apparently run, the victim has been deprived of an environment which could have been conducive to her mental growth, social behaviour and an overall personality development." The court in its order also gave directions for improving the conditions of government-run welfare institutions.

The second phase of the hearing was held on July 17, 2009. The expert medical board expressed hesitation in deciding whether the MTP should be conducted. In addition, the expert body's coordinator, the senior judicial officer, expressed her opinion against conducting an MTP. The medical board in its report expressed satisfaction with the woman's physical condition and ability to bear a child. The board suggested that a neural tube defect in the mother was not an indication for termination of pregnancy and refused to comment on the inheritance of spinal cord tumours without knowing the exact

nature of the tumour. They also suggested that the health of the foetus could be monitored for any major congenital defects. On assessing the mental capacity of the woman, the experts' opinion was that there was a "high tendency of suggestibility, poor understanding of life phase demands, significant emotional immaturity and limited understanding of the sexual act and the social stigma associated with a child born out of rape." The experts also suggested that although she was keen on bearing the child and rearing it, she was highly suggestible and her opinion could change in the future. The medical report highlighted the limited mental capacity of the woman and also expressed the medical board's concern regarding social support and care for the mother and child. The report concluded by saying that "any decision that is taken keeping her best interests in mind as well as those of her unborn child ... has to be based on the holistic assessment of physical, psychological and social parameters."

The division bench in its judgment observed that there were no government-run institutions in the area that could provide emotional and social security to the woman and her child in the future. The court concluded that, apart from her physical ability, the woman lacked the intellectual, social, personal, financial requirements and family support to bear and raise a child. The court observed that "if born, the child would not only be deprived of the care and protection of a father, but, on account of the mental handicap of the victim, the mother also." The court held the view that continuation of pregnancy would constitute a grave injury to the woman's mental health and directed the Chandigarh administration to act promptly and arrange for the woman to undergo an MTP.

On July 20, the appellants in the case, Suchita Srivastava and Another, approached the Supreme Court against the High Court ruling and requested an immediate hearing as the woman's pregnancy was fast approaching 20 weeks, the statutory limit for permitting a medical termination of pregnancy. On July 21, the Supreme Court heard the rationales and deliberations of both sides and decided to grant a stay on the HC order, thereby ruling against conducting an MTP. The SC noticed that the HC's decision to terminate the pregnancy without the woman's consent was in violation of the MTP Act. The SC also questioned the HC's decision to exercise its *parens-patriae* jurisdiction and order an MTP when the pregnancy was already 19 weeks old and there is a medical consensus that a late-term abortion is not advised and can endanger the physical health of the woman. The SC pointed out that even though the woman needed care and assistance in the future, this could not be used as an excuse for denying her the exercise of her reproductive rights.

The SC in its ruling observed that a woman's reproductive choice itself is a dimension of the personal liberty promised by the Indian Constitution. "The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected." Further, this gives the woman the right to carry the pregnancy to its full term, give birth and subsequently raise the child. The SC made it clear that none of the conditions

for proceeding with an MTP as stated in the MTP Act were applicable in this particular case. The SC referred to the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971, which clearly protects the personal autonomy and rights of the mentally retarded, and observed that the MTP Act protected that very autonomy and right by demanding her consent when it came to the termination of her pregnancy. The Court urged the authorities to look beyond social prejudices and to accept the fact that even people with borderline, mild or moderate mental retardation are capable of being good parents. In view of the medical board's opinion that there was no physical threat to the continuation of pregnancy and no indication that the child would be born with congenital disabilities, and in view of the desire expressed by the woman to have the child, the SC stayed the decision of the HC ordering that an MTP be conducted. The SC ordered that the best medical facilities should be made available to the woman during her pregnancy as well as during the postnatal period. The SC also cautioned against the possible exploitation, with far reaching repercussions, of the dilution of the provisions of the MTP Act in a society still struggling with the social evil of sex selective abortions.

The National Trust for Welfare of Persons with Autism, Cerebral palsy, Mental Retardation and Multiple Disabilities filed an affidavit taking responsibility for protecting the best interests of the woman, including assistance with child care. It was decided that the trust would ensure proper care for and supervision of the woman and her child by coordinating with the Chandigarh administration and experts from PGIMER. The SC also ruled that any one with future grievances regarding the same subject matter should seek directions from the HC of Punjab and Haryana.

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A legal precedent: reproductive rights of mentally retarded persons in India

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The reader is familiar with details of this landmark case: in the first instance, the Chandigarh Administration petitioned the Punjab and Haryana High Court (HC) to terminate the pregnancy of a 19-or 20-year-old, unmarried, mildly/moderately mentally retarded, orphaned, pregnant woman residing in a state-run institution for the mentally challenged in Chandigarh. The HC in its orders dated June 9 and July 17, 2009, permitted termination. Subsequently, the young woman petitioned the Supreme Court (SC) through her advocate, to be allowed to continue with her pregnancy against the order of the HC. Due to the urgency of the situation requiring a decision before the statutory 20-week limit of legal abortion, the SC passed an order immediately. The order was in favour of the petitioner to continue with the pregnancy (1-3).

The case has opened up an unprecedented discussion on the reproductive rights of persons with disabilities. Existing disability legislation, such as the Persons with Disabilities (Equal Opportunities, Full Participation and Protection of Rights) Act, 1995, addresses issues of prevention of disabilities, medical rehabilitation, education and employment. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 focuses on guardianship issues. During the past few years a handful of researchers and activists in the disability rights movement have initiated discussions on this issue (4-12). The Convention on

the Rights of Persons with Disabilities (CRPD) and its Optional Protocol, which India signed and ratified in 2007, have created the legal space for engagement with the whole range of issues around disability, including sexuality and reproductive health that were hitherto invisible in public discourse. Furthermore, it is now binding on India to make existing legislation compliant with the CRPD. It is against this backdrop that the present commentary should be read.

Underlying the legal proceedings is a strong ideology of genetic determinism, moral conservatism and normalisation in the articulation of notions of motherhood, family and childhood. The petitioner was considered incapable of producing a normal healthy baby because of her anatomical and mental deviations. As the report of the First Medical Board constituted by the Punjab and Haryana HC, which the court endorsed, stated:

4. Continuation of the pregnancy in this case can be associated with certain complications considering her age, mental status and previous surgery. There are increased chances of abortions, anaemia, hypertension, prematurity, low birth weight babies, foetal distress and more chances of operative delivery.

Even if the baby was without disease and disability, her capability to parent was summarily dismissed because, as the same medical report stated: