

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:

5. Being mildly mentally retarded, she is unable to look after herself and cannot fend for herself if left to her own devices. She was aware that there is a child inside her, although she had absolutely no idea how it came to be there. She cannot mother a child. Motherhood is not only holding the child but it is a complex relationship which is beyond her capability and comprehension.

Furthermore, if allowed to proceed with the pregnancy, the petitioner would carry the identity of an unwed mother and the child would be a bastard who, in addition to having a mentally retarded mother, would end up growing up in a dilapidated environment with other mentally retarded inmates in a state-run home. To make matters worse, the young woman was herself an orphan with no social or financial support. Phrases like "Pregnancy of an unwed mentally retarded girl" and "... this Court should avert the tragedy of a 'child' bearing another child..." underscore the underlying prejudices.

All these factors "logically" militate against having the child. And yet missing from this equation is the fact that the medical boards and high courts, which claim the power of decision-making, are themselves the organs of an inert state: a state that vociferously claims to uphold the human rights of its citizens but shows no willingness to protect the most vulnerable. The CRPD clearly affirms the right of persons with disabilities to a family and parenthood for which state parties are duty bound to provide the necessary assistance and resources. In the face of such apathy and indifference, one wonders what course the SC would have taken in the absence of a more or less literal reading of the amended Medical Termination of Pregnancy (MTP) Act, 1971 * wherein the consent of a mentally retarded adult woman is essential for termination of her pregnancy before 20 weeks.*

In the exercise of its *parens patrie* jurisdiction, the HC argued that an orphaned mentally retarded woman cannot be equated to one with legal guardians, parents and kin, and hence the issue of giving consent takes on a different hue. Consequently, the June 9 and July 17 orders rejected a literal reading of section 3(4) of the MTP Act requiring the consent of a mentally retarded adult woman in the best interest of the ward. One can ask why the state could not in its *parens patrie* function challenge prevailing norms of marriage and the heteronormative family and put forward alternative ideas of care.

While biomedical knowledge is cloaked in a garb of scientificity, variability in biomedical practice is taken for granted, which is why the opposing decisions of the two medical boards constituted by the Punjab and Haryana HC did not come up for interrogation. While the first board recommended termination on grounds of substantial risk to the physical and mental health of the woman and the strong possibility of serious physical or mental abnormalities as to result in serious handicap in the child, the second board gave a more nuanced verdict. While it noted several health problems including her positivity for the hepatitis B surface antigen (HBsAg), it did not rule in favour of termination of the pregnancy. It opined:

Her physical status poses no major physical contraindications to continue the pregnancy. The health

of the foetus can be monitored for any major congenital defects. Her mental state indicates limited mental capacity (intellectual, social, adaptive and emotional capacity) to bear and raise the child. Social support and care for both the mother and child is another crucial component. Therefore, any decision that is taken keeping her best interests as well as her unborn child has to be based on the holistic assessment of physical, psychological and social parameters.

In its order of July 17, 2009, the HC directed termination of the pregnancy in the best interest of the petitioner in spite of the Medical Board's findings that the petitioner had expressed her willingness to bear a child and was physically fit to do so. Working from another set of premises, the SC stayed the order of HC primarily because termination of the pregnancy at this late stage (19 weeks) was not in the best interest of the petitioner. If she were a minor, then the welfare institution would be her guardian; and it could legally sanction abortion in her best interest, but since she is a major her consent is vital. Taking cognizance of reproductive rights, it ruled that a woman's right to reproductive decision-making is a dimension of the fundamental right to liberty under article 21 of the Constitution. The SC ruling is path-breaking as it unequivocally endorses respecting the autonomy of mentally retarded persons in the area of reproductive choice.

There are those who would argue that since the petitioner was not provided with the necessary supportive assistance to arrive at giving an informed consent, it was unethical to force her to continue with the pregnancy considering she did not have a clear understanding of its consequences. But is it not also true that if this case had occurred in a family context, abortion would have been the automatic choice of the kin? This is not say that allowing the petitioner to continue with the pregnancy should be a test case to push for recognition of reproductive rights of mentally challenged persons, but the reality is that precedents arise out of unique situations: and when codified, they can have beneficial consequences in future judicial interpretations. In that sense, this case is a watershed development in disability jurisprudence in the country, which is still in its infancy (13).

It is hoped that the Court will monitor the National Trust, which came forward to take responsibility for the welfare of the petitioner and her child during her lifetime. That will be the ultimate test of the Indian state's commitment to the overall wellbeing of its citizens with disabilities.

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- * *Amendment introduced vide Act No 64 of 2002 that though mental retardation may be incurable, the person has a fundamental right to be a part of the social mainstream. A mentally retarded woman above 18 years of age has the right to self-determination with regard to the continuation or otherwise of her pregnancy.*

Right to human dignity

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The Supreme Court (SC) judgment on the right of a mentally retarded woman to continue with her pregnancy (1) was the outcome of a petition filed in the apex court. This petition appealed against the order of the Punjab and Haryana HC to terminate the pregnancy of a woman who had been raped by staff at the government shelter, Nari Niketan, in Sector 26, Chandigarh where she was an inmate. The High Court had based its reasoning on the fact that the woman was an orphan suffering from mental retardation and would therefore, be unable to look after the child once it was born.

One of the arguments that the SC accepted, while reversing the HC judgement, was that the Medical Termination of Pregnancy Act did not permit a medical termination of pregnancy (MTP) to be performed on a mentally retarded (not mentally ill) woman who had attained the age of majority, without her consent. It also accepted the arguments of the advocate appearing in the SC that the woman wanted the child, was physically fit to bear the child and would be capable of looking after it with supervision. The Bench consisting of Chief Justice K G Balakrishnan and Justice P Sathasivam was confronted with this human rights issue in a special leave petition against an interim order of the Punjab and Haryana HC for immediate termination of the pregnancy. The Bench issued a notice to the Chandigarh administration, on whose petition the July 17, 2009, order was passed. It was argued that doctors did not form the opinion that termination of pregnancy was in the best interests of the girl, and that the medical report suggested that she required support and supervision to help her raise the child. The girl had expressed

an unambiguous and unequivocal desire to keep the child. The petitioner argued that termination of pregnancy against the mother's wish was against the provisions of the MTP Act, 1971, and the Rights of the Disabled.

It is granted that a girl, even if mentally retarded, should not be deprived of the right to motherhood provided she is given proper support in fulfilling the tasks entailed. However, the condition in which the woman has been living, and will continue to live even after the birth of her child, does not suggest that she will have any such support system. Besides, this woman was a victim of sexual abuse by the institution's staff – the very people appointed for the inmates' welfare and security. What guarantee is there that this situation will change and that she as well as her child will not be targeted in a similar fashion in the future?

In fact the central issue in this case concerns the treatment of a destitute and vulnerable, mentally handicapped woman in a government-run institution. Medical experts have certified the woman's mental age to be just nine years. This makes the crime even more complicated and heinous. And what do we make of the fact that her pregnancy was not detected for more than two months even though an attendant is apparently assigned the duty of recording the menstrual cycles of all the inmates? This reflects gross negligence on the part of the staff assigned to look after the inmates.

One has to visit any of the shelter homes for women and children, institutions that are supposed to provide protection, care and training in skills that would enable them to earn their