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Reproductive Rights of Mentally Retarded Women: Constructive Approach of Indian Judiciary

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Key Words

Mental Retardation; Reproductive Health; Reproductive Rights; Public Interest Litigation; India.

The Charter of the United Nations has recognised the rights of humanity without any discrimination towards race, sex, language or religion. Since the Charter, has not defined these rights in 1948, it adopted the Universal Declaration of Human Rights, followed by a number of legally binding declarations, Conventions, and Covenants paving the way for the states to carry forward these rights in their municipal sphere for their free augmentation in extending protection to their citizenry. In tune with the clarion call of the UN, majority of the states have updated their national legal instruments or adopted new ones.

No doubt, under the constant supervision and guidance of the UN, in the contemporary era, men in the World are able to exercise their fundamental freedoms largely. Despite international and national legal guarantees, even today to a great extent man is able to control or dictate the women in the free exercise of their reproductive rights. In the case of mentally retarded, it is nothing but full domination of man, society and the legal institutions, which decide the reproductive choices on the name of law and future interest of women.

In this type world of affairs, it is much more complex to think of the rights of women who are in the custody of state, either in jails, in public orphanages or for psychiatric disorders. It is still worse for victims of rape

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with mental retardation to exercise their reproductive choices. Even if they want to continue their pregnancy, they have to undergo unauthorised abortions for a number of reasons either to protect the interests of the family or their guardians or in the future welfare of the victim or on the name of the problems to encounter by the unborn child. Even in an advanced democratic society like America, the judiciary in number of cases of women those who are living in State custody, particularly in cases of mentally retarded women ordered for the termination of pregnancy under the garb of *parens patriae* (parent of the country)¹ doctrine, citing the best interests of the women in question and society.²

This being the respect given to women's rights in many parts of the world over, the decision of the Supreme Court of India in the recent past permitting a mentally retarded victim to exercise her right of option to chose her reproductive rights freely³ is a welcome step towards augmenting the reproductive rights of mentally retarded women.

The Concept and Definition of Reproductive Rights

Reproductive rights, in general form part of right to health. These rights are a bundle of rights.⁴ They mainly deal with the people's ability to make decisions that affect their sexual and reproductive rights. A number of international human rights instruments categorising them as family rights has recognised these rights.⁵

- 1 This doctrine has its roots in English common Law which grants an inherent power on the State and its organs to protect persons who are legally unable to act on their own behalf.
- 2 Starting from *Buck v. Bell*, 274 U.S. 1927 in a number of cases the methodology was adopted without much deviance. For an excellent review of the decisions and scholarly expositions, see generally, Susan Stefan: *Whose Egg Is It Any Way? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, *Nova Law Review* 1989, 13.405-56.
- 3 *Suchita Srivasta and Anr. v. Chandigarh Administration*, AIR SC 235, 2009.
- 4 Reproductive rights include: a) the right to life; b) right to bodily integrity and security of the person; c) the right to privacy (in relation to sexuality); d) the right to the benefits of scientific progress especially with respect to reproduction; e) the right to education (to allow full development of sexuality and the self); f) the right to health (occupational and environmental); g) the right to equality in marriage and divorce; h) the right to non-discrimination (recognition of gender biases) Sundari Ravindran TK, ed., *Transforming Health Systems: Gender and Rights in Reproductive Health Training Curriculum for Health Programme Managers*, Geneva, WHO, 2008.

5 For the recognition and sources of the right to reproductive choice, in international law of human rights, see *Christina Peckert, Defining and Delimiting the Right to Reproductive Choice*, *Nordic Journal of International Law*, 1998, 6.

The Notion of reproductive rights began to form part of human rights with the 1968 Tehran proclamation. The UN General Assembly in its 1974 Declaration on Social Progress and Development affirmed the reproductive right⁶. However, they have assumed significance from the International Conference on Population Declaration (ICPD) at Cairo in 1994 in advancing the definition of reproductive health⁷. Based on the definition of ICPD, in 1995, the Beijing Platform for Action has delineated the definition of reproductive rights. Accordingly, reproductive rights means:

“Bearing in mind the definition of reproductive health, reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”⁸

The adoption of the Cairo Programme of Action by ICPD, and the Beijing platform of Action 1995, led many lawyers, organisations and human rights activists across the world in advancing the phraseology as sexual and reproductive rights as a part of women’s rights. In the connotation of WHO, they are broadly classified as part of mental health rights.⁹

6 http://www.unhcr.ch/html/menu3/b/m_progre.htm visited on 7.10.2010.

7 Reproductive health means a state of complete physical, mental and social well being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its function and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the laws, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. ICPD Programme of Action: <http://www.un.org/esa/socdev/geninfo/population/icpd.htm#info> accessed on 12.7.2010.

8 Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September, 1995, A/CONF.177/20, (1995) and A/CONF.177/20/Add.1 (1995) para 96.

9 Jill Astbury: Mental Health Aspects of Women’s Reproductive Health: A global Review of Literature, Hand Book of WHO, Geneva, 2009, also available at <http://www.UN.WHO.org/Reproductive Rights>

An examination of definitions of the ICPD, the Beijing Programme of Action, and the Convention on the Elimination of Discrimination of Women¹⁰ has now where described the reproductive rights as rights of women and to exercise freely. The male dominated agenda of international law and human rights once again succeeded in clubbing them as rights of family, and gave the upper hand to operate indirectly to decide the fate of women.

It is interesting to note, much earlier to the Programme of Action of ICPD and the Beijing Conference of Action, Stefan Susan has defined the reproductive rights making them as more women centric without linking them with that of family rights. According to Stefan, reproductive rights are as follows:

“a woman’s right to decide whether or not to bear children, and by whom, including decisions relating to prevention of conception, whether or not to carry a pregnancy to term and whether or not to keep the children she has chosen to bear. The right to make decisions relating to conception will be taken to include the right not to be raped while in state custody, and the decision to carry a pregnancy to term will encompass the right not to be committed or incarcerated because of pregnancy, and to keep custody of the child unless parental rights information termination standards applicable to all parents are met.”¹¹

A critical examination of the definition makes it clear, the definition is not only defines the rights of women in a straight fashion but impose an obligation on the state to protect women from all types of sexual crimes that are committed especially while in its custody. Further, it obligates the state to take care of the children of such women until such women are free from the custody of state.

To advance these reproductive rights and to bring in awareness among the women folk, the largest Non-Governmental Organisation of the World dealing with sexual and reproductive rights of women, namely, International Planned Parenthood Federation (IPPF), has adopted a Charter in 1995 with three principal objectives which are:

- (a) To raise awareness that reproductive rights are human rights;
- (b) to make it clear the connection between human rights language and key programme issue; and

10 Art 16(1)(e) to decide freely and responsibility on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights.

11 Supra note 2 at p.407.

- (c) to increase the capacity of NGO's to interact with human rights process in advancing the reproductive rights of women and their choices to be exercised by them freely.

Based on these objectives, the Charter has developed 12 rights as sexual and reproductive rights¹².

Though the Charter has not added any news rights to the existing ones recognised by various documents of human rights as a part of sexual and reproductive rights, as stated in its objectives, certainly, it will serve as a handy tool with focussed attention to guide women further to achieve their objectives, especially in the developing world. Further, it will enhance ethical levels of various organs around the world to stop, forced abortions among women who are ailing with mental disorders or in the custody of state.¹³

Mental Retardation

Mental retardation is a type of disability, which normally forms part of disability in general. Mental retardation is often coupled with mental illness and considered it as a severe disability factor. In strict legal phraseology, mental retardation is nothing but an inability to learn normally and develop mentally with the growth of age of the person. A mentally retarded person exhibits a comparatively low level of intelligence and impaired adaptive behaviour. Accordingly, mental retardation means;

“ a condition of arrested or incomplete development of mind of a person which is specially characterised by sub normality of intelligence.”¹⁴

In the majority of cases, the deficiencies appear early in childhood. The deficiency may be seen in young age due to the circumstances in which a person is living in a very few cases., A borderline, mild, moderate, severe and

12 They are 1) right to life; 2) right to liberty and the security of person; 3) right to equality and to be free from all forms of discriminations; 4) right to privacy; 5) right to freedom of thought; 6) right to information and education; 7) right to choose whether or not to marry and found a family; 8) right to decide whether or when to have children; 9) right to health care; 10) right to benefit of scientific progress; 11) right to freedom of assembly and political participation and 12) right to be free from torture and in human or degrading treatment.

13 Karen New Man and Judith F Helzner: Biomedical Ethics and Women's Health: IPPF charter on Sexual and Reproductive Rights; Journal of Women's health and Gender Medicine, 1999, 8(4) 459-63.

14 The National Trust for Welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act of India, 1999, section 2(r) of the Indian statute.

profound inabilities of a person to learn things like a normal person is classified as mental retardation. Persons with severe and profound instances usually require intensive care and supervision and need to be cared for in an institutionalised environment. Persons with mild, borderline and moderate mental problems are capable of living a normal life in a society, though they may need some kind of supervision and assistance from time to time¹⁵. The reasons may vary from case to case. Normally, abject poverty, lack of nutritional health,¹⁶ either during the time of pregnancy or childbirth, children of disbanded families, children in orphanages or disgruntling living conditions of family etc., may be factors for mental retardation.¹⁷ Like a normal person, mentally retarded persons have their economic, social, cultural, civil, political and legal rights. In the year 1971, the United Nations adopted a Declaration recognising the rights of mentally retarded persons as a separate category even before the adoption of the Disability Convention. According to the Declaration, mentally retarded people have the following rights:

1. Mentally retarded persons have all the same rights as other human beings. They have a right to proper medical care, physical therapy, and to such education, training rehabilitation and guidance, which in turn will enable them to develop their ability to maximum potential.
2. Right to economic security and to decent standard of living.
3. Right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of their capabilities
4. To the extent, possible they should be allowed to live with their own family including foster parents, and to receive the support of community life. If necessary of institutional care, such care need to be provided with due care and diligence that such environment should be conducive to lead a normal life.
5. When is required to protect the interest and well-being they have a right to have a qualified guardian.
6. They have a right to protection from exploitation, abuse and degrading treatment, in case if they are prosecuted for any reason,

15 Section 2(g) of the National Trust for Welfare of persons with Autism, Cerebral palsy, Mental Retardation and Multiple disabilities Act of India 1999.

16 On the nutritional health and affects in the Indian context: Stunted India, A special feature on the largest underweight child children in India and the affects of nutrition: Frontline, 2010, 27(8)(April 10-23); available at www.FRONTLINE.IN

17 Josh Dorsey, Danett Frank and /Shannon Lake, Mentally retarded Women and Forced Contraceptives, PHI Presentation, 1998, Feb23, 305, also available at <http://www.uky.edu/classes/PHI/305.002/ret.htm> visited on 11.7.2010.

they have a right to due process of law with full recognition being given to the degree of mental responsibility.

7. If they are unable, because of the severity of handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or some of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities¹⁸.

Apart from the above rights stated in the declaration, basing on the disability convention and other human rights instruments they have further rights to exercise freely without any kind of coercion or force or discrimination. They are as follows:

- (a) Right to privacy;
- (b) To Love and be loved;
- (c) To develop friendships and emotional relationships;
- (d) To learn about sexual exploitation, sexual abuse, safe sex, and other issues regarding sexuality;
- (e) To exercise their rights and responsibilities in regard to privacy and sexual expression;
- (f) To marry and make informed decisions concerning having children;
- (g) No discrimination is in exercise of sexual and reproductive rights. Equal opportunities be provided to have to reproductive and family planning education; and
- (h) Right to health and develop expression of sexuality reflective of age, social development; cultural values and social responsibility.

Mentally retarded persons need the above special rights, apart from the general human rights for exercise of their will and to nurture their capabilities and every society has a responsibility to recognise them.

Reproductive Rights in the Indian Context

The Indian Legal system (both the constitution and Legal system) is fully equipped to meet the expectations of international law of human rights as per the commitments of the state. The constitutional makers, considering the

¹⁸ UN Declaration on the Rights of Mentally retarded persons, 1971 (G.A. Res.2856 (XXVI) 20.

inequalities that exist in society, empowered the state to extend concessions to women wherever they are deemed fit. In tune with the spirit of the constitution, over the years the state has extended a number of privileges to women to enable them to exercise their rights guaranteed by law.

In tune with the adherence of the state to its international commitments, sexuality and reproductive rights is part of the Indian legal system. Women are free to choose their sexual and reproductive choices. Though abortion was legalised in India under the Medical Termination of Act 1971, and the extensive amendments carried on in 2002, the Act permits the termination of pregnancy up to 20 weeks in exceptional circumstances.¹⁹ Nevertheless, due to illiteracy, poverty, population, blind beliefs, social and cultural factors prevailing in many parts of the country, often women are forced to undergo abortion against their choice, on some pretext or other.

This being the general condition of women to exercise their reproductive rights freely, it is less said is the better in cases of women who are leading life in the custody of state or in orphanages or in psychiatric care in exercising of their option of reproductive rights freely. However, the recent judgement of the Supreme Court of India upholding the rights of mentally retarded women under the care of state is a bold and welcoming step in upholding the promotion of reproductive choices of women in India.

An Over View of the Judgment

The court in a public interest petition,²⁰ upholding the contention of a public spirited lawyer, Suchita Srivasta²¹ that a mentally retarded woman has the

19 The grounds include grave risk to the physical or mental health of the women in her actual or foreseeable environment, as when pregnancy results from contraceptive failure, or on humanitarian grounds, or if pregnancy results from a sex crime such as rape or cohabitation with a mentally-challenged woman, or on eugenic grounds, where there is reason to suspect substantial risk that the child, if born, would suffer from deformity or disease. For comprehensive discussion on the *Abortion Laws of India*, Siddivinayak.S.Hirve, *Abortion Law, Policy and Service in India: A Critical Review*, *Reproductive Health Matters*, 2004, 12(24) 114-121.

20 The concept of Public Interest litigation is evolved by the India Judiciary about two decades ago, to drive the state to discharge its legal and constitutional obligations to preserve the rights of the citizens as guaranteed by the law of the land. Accordingly, any person with an interest to uphold the legal rights of the citizens in quandary, if neglected or violated by the state may bring in to the attention of the courts (this is restricted only to High Courts and Supreme Court which are the constitutional courts) for their views. However, it is for the judiciary to decide whether such issue is to be taken up or not.

21 *Supra* n 3.

option to exercise her reproductive rights freely, and reversed the decision of a division bench of Punjab and Haryana High court which permitted the termination of pregnancy of a mentally retarded woman against her wish. The brief facts of the case are as follows:

The woman in question (the name has been withheld by judiciary in order to avoid stigmatisation and other social problems), is an orphan and a victim of rape, who had been abandoned by her parents at an early age, and was under the custody of a charity mission in New Delhi. Thereafter, she had been admitted to a government institute for Mentally retarded Children in Chandigarh. From there, she was shifted to 'Nari Niketan' a welfare institution in Chandigarh. Finally, she has been transferred to 'Ashreya' a newly established welfare institution. All the above institutions are maintained by the Government of Chandigarh administration.

On 16 May 2009, a medical social worker and staff nurse working at Ashreya, observed that the victim was showing signs of nausea and complained about pain in her lower abdomen in addition to disclosing the fact that she missed her last two menstrual periods. Acting on their own, they conducted a pregnancy test, which showed positive. Based on the information, the administration constituted a medical board on May 18, 2009, which confirmed a pregnancy of eight to ten weeks.

After confirmation of pregnancy, the authorities filed a first information report with Chandigarh police, who registered a case of rape under sections 376 and 120B of the Indian Penal Code.²² After an ossification test, it was found that the victim's condition is a mild mental retardation. Thereafter the administration had constituted a multi disciplinary medical board to examine the victim. After a careful examination, the board opined that the victim's age may be around 19-20 years, but her mental maturity is that of a child of 11 years, hence the pregnancy may be terminated. Since no legal provision authorises the administration to terminate the pregnancy unilaterally, the administration sought the judicial opinion of the Punjab and Haryana High Court. In the first instance, the court directed the administration to constitute a multidisciplinary medico-legal board and a set a number of questions to answer by the board. The expert body after a

22 These two sections confer powers on the police to register cases of molestation took place under the custody of state and empower them to carry investigations to trace the culprits.

careful examination of the victim, in reply expressed its opinion to continue the pregnancy. Unfortunately, optimistic approach of the board, the plea of the counsel of the victim, and the request of the Advocate General, appointed by the court as *amicus curie* (legal advisor to assist a court) to continue the pregnancy of the victim on sympathetic grounds, as she was willing to bear it, fell in deaf years. The court ordered for termination of pregnancy, considering prudent interest of the mother and unborn child, since the victim is mentally retarded and may not be able to cope up with future problems of parenting due to the capacity of understanding is that of an 11 years child.

When the matter was referred to the Supreme Court, after a careful scrutiny of the report of the expert body, and after an examination of international and municipal legal provisions, the court reversed the decision of the High Court. It stated its opinion that, the established principles of law have in no way authorised the state or its organs or empowered it to interfere with the free exercise of life and liberty and privacy rights of the women in exercise of her reproductive choices, even in the case of a mentally retarded person²³. Further, it observed that in the given case, since the victim only exhibits mild mental retardation, which is different from mental illness, there is no place for law to intervene and order for abortion as a guardian and to decide things unilaterally. Moreover, in the present case, as the orphanage wherein she was living expressed its willingness to take care of the child and the mother, there are no further problems associated with the birth of the child. The court directed the administration to take steps for the smooth delivery of the victim as per her wish. Thanks to the positive verdict of the court, it was reported later that after delivery,²⁴ the victim's health increased considerably.

Conclusion

In spite of its techno-legal advancements, being an emerging global economic player, due to the dominance of caste and power politics, blind beliefs even today in India, women's sexuality and reproductive rights are considered within the parameters of family planning and birth control. The underlying philosophical contours of the judgement should be a revelation to the state

23 Renu Adlaka: *A Legal Precedent: Reproductive Rights of Mentally retarded Person in India*. *Indian Journal of Medical Ethics*, 2010,7 (2) 1-3.

24 Rakesh Shukla: *Free to Choose: Mental Retardation and Reproductive Choices*, <http://inforchangeindia.org/index2.php?option=com.content> visited on 13.7.2010.

to take a number of measures that mental and reproductive health of women and the underlying issues of it²⁵ have to address on an urgent basis beyond the realm of birth control or family planning measures.

To achieve this, the state has to amend some of the existing legislations and change policy perspectives. To remove administrative hurdles, delays and to change the mindset of the younger generation, it has to evolve a well-structured educational curriculum to impart sexual education from secondary school stage onwards. It has to take steps to propagate through media and other avenues and empower the NGO's to steer the policy orientations of state to stop traditional beliefs that women are only meant for the service of family.

In spite of legalisation of abortion, a number of illegal abortions are still taking place in various parts of the country. The State should take stern steps to cancel the licences of such private hospitals, nursing homes and the doctors. After the judgement of the court, the responsibility of the State and other organs such as social service Institutions and NGO's and human rights activists has considerably increased to take steps that women suffering with mental disorders especially with learning disabilities need to be taken care due to their adolescence. It has taken steps to publicise that mentally retarded women too have their due share of legal rights like any other normal women. It should also initiate steps to drive away the age-old traditional beliefs among the various sections of the society, such as, solitary confinement of mentally retarded people tying them with locked chains and associated violence.

The state has a onerous duty to halt a number of common abusive practices towards mentally retarded adopted by the society such as not to beat, allowing them to wear good clothes, sexual abuse, not paying due attention to their basic needs, humiliations in the schools and in public places and solitary confinements etc. Though some movies have been taken in promoting the rights of mentally retarded, the behavioural attitudes of the society have not changed to the extent expected to result in. In tune with the legislative policy, the state should make separate budgetary provisions to improve the social

25 The issues connected them are: psychological issues of related to pregnancy, child birth, and the postpartum period, and the mental health effects of violence, sexual violence, adverse maternal outcomes, early births and miscarriage, surgery on and removal of reproductive organs, abortion, premarital pregnancies in adolescents, menopause, infertility, forced contraceptives, genital mutilation, unwanted and illegal abortions, etc.

and reproductive health of mentally retarded. This will go a long way in enabling the mentally retarded women to achieve their right of privacy, life and liberty to lead a life like any normal women.

Apart from the above, the observations made by the court against the judgment of the High Court certainly bring the point to the fore that the National Judicial Academy need to bring in substantial changes in its functioning in imparting training to judges. The training imparted to judges need to be broad based. It should include professionals and educators of various disciplines, that of doctors, psychologists, scientists, researchers and academicians to give them an understanding from a varied disciplinary perspective to appreciate the positive sociological conditions in disposing cases of particular nature such as disabled persons in specific and the women's sexuality and reproductive rights in general.

Certainly, if the suggested steps implemented seriously, it would go a long way in the promotion of the rights of mentally retarded women in specific and women in general to achieve their reproductive rights freely. It will also result in the change of mindset of the people, especially in the country side that women are mostly are fit to be as a good mother, housekeeper, demigod, and have no much role in taking positive qualitative decisions about their sexuality and reproductive rights.