

Seeking Reproductive Freedom for Women with Disabilities

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ABSTRACT

The following paper endeavors to provide a glimpse into advocating for establishing reproductive autonomy for women suffering from disabilities by throwing light on abortion through a carrying out a critical analysis on the legal framework to ensure women suffering from any sort of disabilities are not subjected to any sort of discrimination while exercising their reproductive freedom in India. The authors of this research paper have made an attempt to establish a critical balance between the '*right to choose and disability*' through the critical investigation of the Medical Termination of Pregnancy Act, 1971 (amended in the year 2021) alongside the Right of Persons with Disabilities Act, 2016. The authors of the paper have also mentioned about the structural violence and the discrimination to which disabled women are put through which hampers them for accessing their share of reproductive freedom and health care services. Lastly, the paper also makes an attempt to put forward certain recommendations to ensure how disabled women can have access to their share of reproductive rights which enables these women to exercise their fundamental right to choose in order to create a society which is free for structural barriers and is gender neutral.

Keywords- Reproductive Autonomy, Disability, Discrimination, Gender Neutral.

1. INTRODUCTION

The policy makers of India supposedly are responsible to create a hierarchy which is between the primary stakeholders and the marginalized community which has create a social division regarding the accessibility of rights amongst them in the society. One such marginalized group of people who have always had to struggle to have a share of their rights are the women who suffer from any sort of disability whether be physical, emotional or social. Women who suffer from disability (WwD) are subjected to a lot of biasness and discrimination suffer de-merit which happens on the account of them being stereotyped on grounds such as gender, disability, socio-economic condition. As per the World Report on Disability, disability accounts for nearly 15% of the total population of the world, out of which the majority population being women. However, contrary to this, as per the data provided through Census 2011 which stated that women with disability comprise of 1% of the total population in a country like India. The reason for the deviation of data is because the Constitution of India under Article 15 has expressively stated that the state is strictly forbidden from discriminating any citizen on the grounds of caste, creed, sex, religion, place of birth, however there is no any mention of

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disability as a ground. The sole reason as to why disabled women are subjected to a lot of biasness in the society is due to the failure of understanding of the term disability.

Speaking of the Medical Termination of Pregnancy Act, 1971 (amended in 2021) which grants women the fundamental right to abortion, the said piece of legislation however does not address issues of women relating to gender and disability. Keeping this fact in mind, the Act fails to focus on the intersectional barriers faced by women with disability while trying to have safer access to abortion services.

Similarly, the Rights of Persons with Disability Act, 2016 has also lacked in creating an equilibrium between prohibiting of coerced abortions and evading the free consent of women who has suffered a disability. The piece of legislation has lacked in creating a proper balance to determine as to whether is able to provide her consent or not. Both the Medical Termination of Pregnancy Act, 1971 (amended in 2021) along with the Rights of Persons with Disability Act, 2016 have failed to understand that disability as a ground is heterogeneous in nature and thereby have put into use wider terms to cover disabilities under the legislations which has resulted in creation of lot of authoritative power amongst the guardians of women with disabilities who misuse their authority to curb the reproductive freedom of such women with disability thereby creating a social mindset remarking that women with disability are incapable of exercising their reproductive autonomy creating societal shackles. It is of utmost importance to understand that disability as a cause is heterogeneous in nature and there is a distinction between the different kinds of disabilities such as psychological and intellectual disability which is mentioned through the Schedule in the Right of Persons with Disability Act, 2016.

2. METHODOLOGY

The authors of the following paper have adopted a doctrinal approach to critically make an analysis of how reproductive autonomy for women suffering from disabilities can be established thereby giving them equal share of rights in the society. The study carried out by the authors of this paper have also tried to throw light on the structural barriers that disabled women are put through for achieving them thereby suggesting some corrective measures on how the situation can be handled. The authors have made an attempt to carefully securitize the problem of disability with the aid of the Medical Termination of Pregnancy Act, 1971 (amended in 2021) and the Rights of Persons with Disabilities Act, 2016.

3. DISCUSSIONS AND FINDINGS

3.1 Linking Disability with Medical Termination of Pregnancy Act, 1971 (Amended in 2021)

As mentioned earlier, the Medical Termination of Pregnancy Act, 1971 has lacked in its approach to throw light on the problems that women with disabilities are subjected to on the sole grounds of gender and disability. The said piece of legislation oversees these women are at a stage of vulnerability, therefore requiring urgent attention from the law makers to ensure that these women deserve to exercise their fundamental right to reproductive autonomy to deal with pregnancies which is a consequence of the harm these women are subjected to on the account of their nature of disability. The Medical Termination of Pregnancy Act fails to

recognize the issue that women who suffer from any sort of disability are much vulnerable to various sorts of structural violence in comparison to women who have no such disability issue which create a host of hurdles for them to fully exercise their reproductive rights.

Prior to the enactment of the Medical Termination of Pregnancy (Amendment) Act, 2021, the earlier piece of legislation MTPA 1971 was not successful in providing a secure and safer methods of abortion to women with disabilities. The said act did not contain any provisions which throws light on how women with different sorts of disabilities can have recourse to safer methods of abortion, it only addressed ‘mentally disabled women’, and moreover it did not address the structural barriers that these women may face within the time period of twenty weeks. After the amendment of the said act of 2021 which increased the time period from twenty weeks to twenty-four weeks which has included some provisions for disabled women. The Medical Termination of Pregnancy Act, 1971 (amended in the year 2021) with the sole purpose of providing safer methods of abortion to women with the increase of time period has created a secondary obstacle for women suffering from disability in a way. This is a mandatory provision in the current abortion law which creates a direct contradiction with Section 92 (f) of the Right of Persons with Disability Act. which criminalizes any coerced abortion done to a women suffering from a disability.

Moreover, Section 3(4)(a) of the Act mentions about in case a woman is pregnant who is a major and is suffering from mental retardation, her pregnancy cannot be terminated without the consent of the guardian in writing. This provision ensures abortion services for women suffering from mental disabilities but whether to continue or terminate the pregnancy lie with the decision of the guardian and with the Registered Medical Practitioner. With the incorporation of the above section, one such issue which raises question is who has the “right to choose” in scenarios where a woman is suffering from a disability which is mild in nature and she is capable of understanding the gravity of the situation. Another scenario being “Whether the society would enable women with disability the fundamental right to make decision for themselves”?

The concept of Legal Capacity implies that an individual has been given a right which is back by sanction to make decision independently regarding their spheres of life alongside an individual will be recognized as a person under the provisions of law. The earlier mentioned provision recognized women with disabilities as minors which renders them incapable to make decision regarding their health and well-being thereby enabling their legal guardians to consent on their behalf which is binding on such women. With the aspect of psychosocial disability. Such women automatically are denied their rights in case their family members use such a cause to falsify such women to be fully insane which is not unusual in a country like India.

Following such a scenario, the Supreme Court of India in the landmark case of *Suchitra Srivastava v. Chandigarh Administration* threw light on the difference between mental retardation and mental illness which is recognized by law and have stated that guardian’s opinion with mental retardation cannot be treated similar to mental illness. As the Medical Termination of Pregnancy Act, 1971 fails to provide a clear understanding of the term ‘mentally ill’ and states it as an individual who is in urgent need of treatment due to a condition of mental disorder than mental retardation. Due to the use of various terms has led the court to state

certain judgements where the courts as well as the medical professionals have misinterpreted the terms which has eventually broaden the dimension of the terms. This eventually results in curbing the legal capacity of a woman who is able to provide consent even if she has suffered from mild illness within the dimension of the legislation. The decision forwarded in the *Suchitra Srivastava* case precedes the Mental Healthcare Act, 2017 and therefore fails to draw a distinction between ‘*psychosocial disabilities*’ and ‘*persons of unsound mind*’, a lacuna which has been cleared under Section 3 (5) of the Mental Health Act of 2017 where it has been mentioned that the state of mental capacity and psychosocial disability is to be treated differently on case basis.

3.2 Conceptual Framework: The Right of Persons with Disabilities Act, 2016

Women who suffer from disability of any sort are generally supposed to be subjected to a host of problems like sexual exploitation which ultimately creates a hindrance for them rendering them incapable to take care of their own children. A gross violation of women’s reproductive rights occurs when she is subjected to involuntary sterilization which is carried out on women with disability on the sole ground of eugenics theory which certifies this practice as ‘*improving stock*.’ Any such disability which is seen in women is considered as a hindrance to the development of the society which creates problems for women to genetically create a healthy womb, although the above theory is considered baseless and is medically debunk, the theory does affect the mindset of the families, policy makers, and medical professionals which hold opinions towards establishing reproductive autonomy for women in a society. Guardians of women suffering from any such kind of disability may decide on behalf of their wards to opt for the abortion procedure to avoid complications in the future. In a scenario, where disabled women are kept under supervision at medical institutions, medical termination of pregnancy is seen as the only option available for such women who are mostly impregnated due to sexual abuse carried out at the said premises. Women with disability are always subjected to harsh criticism in relation to their incapability to have and raise children and having a family of their own. Therefore, all these scenarios collectively contribute to prevent women with disability to experience motherhood. In order to avoid such issues, India as a country approved the Convention on the Rights of Persons with Disabilities (CRPD) on 1st October 2007 and brought into sanction the Right of Persons with Disability Act, 2016. Section 92(f) of the Rights of Persons with Disabilities Act states to ensure the bodily integrity of women who suffer from any disability, but on the contrary the said piece of legislation has lacked in recognizing the traumas and the vulnerabilities these women are subjected to on the account of their nature.

As mentioned earlier Section 92(f) of the Right of Persons with Disabilities Act, 2016 states that it is a criminal act of performing or directing a medical procedure on a woman with disability which harms her fetus and leads to termination of the same without her express consent.

The Right of Persons with Disabilities Act, 2016 has substituted the term ‘severe disabilities’ with the term ‘high support needs’ which is of utmost importance as the term ‘high support needs’ which mentions the benchmark disability of more than 40% which shall be accessed by an assessment board under Rule 8. It is of utmost importance to take note that cases surrounding disability issues varies from person to person and each case is required to be dealt with

separately where the opinion of a qualified medical professional shall be taken into account who shall determine if a woman suffering from disability is able to take decision regarding embracing motherhood, if so then she cannot be denied of the same.

3.3 Challenges for Disabled Women Seeking Abortion Services

With respect to all the reasons which already create hindrances for women with disabilities from accessing safer availability of abortion services such as stigmatized societal attitude, lack of education regarding sexuality and comprehensive sex education alongside a host of other factors play a dominant role towards women from accessing abortion services within the gestational period. Moreover, women suffering from disabilities have uneven access to proper health care facilities which makes them a vulnerable group in the society. For example, a report from Census 2011 claims that a mere 37% of females who suffer from disability have education and amongst the whole population which comprises of disabled and non-disabled women, hardly 1.8 % women have employment in the job sector. This reported data therefore provides us with a glimpse stating that women who are disabled have to take care of additional expenses on the account of their nature which makes their livelihood even more difficult.

Another challenge faced by women with disabilities is when they are married off to elderly men as a result of the dowry system which again leads them to be in a place where they are sexually exploited in an unsafe environment which proves detrimental to their overall health. Moreover, women with disabilities are troubled with the issue of abandonment after marriage as the legislations in India provides that if either person in a marriage is of unsound mind, it provides a valid ground for the annulment of marriage.

With the purpose of ensuring that disabled women's rights and properly safeguarded within the legal system, it becomes pertinent that all sorts of structural, patriarchal and societal barriers which creates taboo for such women should be done away with. In order to achieve the above stated goal, it is necessary to make a transformative shift in the institutions which are present in our society.

3.4 Contradictory Provisions- The Rights of Persons with Disabilities Act, 2016 vs The Medical Termination of Pregnancy Act, 2021

The Rights of Persons with Disabilities Act, 2016 has certain provisions which are directly contradictory with The Medical Termination of Pregnancy Act, 2021 which have been discussed in thoroughly in order to enable to understand the conflicting provisions.

Section 13(1) of the Rights of Persons with Disabilities Act, 2016 mentions about persons with disabilities have been provided with the legal right which is based upon equality regarding decision making in all aspects surrounding their life.

Whereas, The Medical Termination of Pregnancy Act, 2021 under Section 3(4)(b) states about termination of pregnancy of a 'mentally retarded person' shall be done only after the express consent from the legal guardian.

The nature of conflict created in these two provisions is that The Rights of Persons with Disabilities Act, presumes incapability of a women to take decisions on her own account

Whereas the Medical Termination of Pregnancy Act, 2021 makes an assumption regarding incapacity of a woman suffering from disabilities.

Section 92(f) of the Rights of Persons with Disabilities Act, 2016 states that carrying out an abortion on a disabled woman who is above the age of 18 years without receiving her consent is to be considered a criminal offence which is punishable up to a time period of five years. Whereas under The Medical Termination of Pregnancy Act, 2021 states that consent of a woman who is mentally ill is not required in case such procedure is to be carried out on such a woman.

4. Conclusion

It is of utmost importance to take note that looking into the vulnerable conditions of women who suffer from disabilities, safeguarding their bodily integrity and reproductive autonomy is a necessity in today's time. It is crucial to consider the fact that only in a scenario when a woman has lost her mental capacity to take a decision regarding her reproductive rights, as for an example in cases of psychological disability, her right to take a decision should be vested in someone else. Scenarios whether a woman is able to understand the nature and consequences of her decision in case she suffers from minor instability should be distinguished from cases where she completely loses her mental capability should be clearly specified.

Through this paper, the authors have made an attempt to highlight some of the core issues which need a strategized approach within the domain of the legal landscape to address the problems within the disability framework. It is the need of the hour to actually take steps to ensure how women from the marginalized communities, women with disabilities can have access to proper reproductive health care services like abortion, access to safer contraceptive methods etc. International organization which works towards creating an equitable society must ensure that the laws which are present must be in uniformity with each other in order to fill the lacunas relating to provisions of informed consent, guardianship alongside the capacity of decision making when it comes to women with disabilities.

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