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Contraceptive Rights and Women's Autonomy – A Legal-Feminist Perspective

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ABSTRACT

Traditionally, conceptions of sexuality were seen as a social construct of male power: defined by men, forced on women. This was reflected in the laws that were drafted through the eyes of men, aiming to regulate sexual reproduction of women. Third-wave feminists wanted to prioritize greater autonomy in women's reproductive rights, which included access to safe and healthy contraception methods amongst others. This paper attempts to enter a socio-legal discourse on whether right to contraception is an essential part of women's autonomy. The international framework along with various feminist approaches to the issue are explored. The differences between the western struggle for a right to contraception versus the Indian struggle for the access to contraception is noted. The current laws governing right to reproduction in the country, (specifically contraception) is delved into. Finally, the stance of Indian Courts is analyzed in comparison with the feminist approaches. The idea that laws governing childbirth is not purely with regards to the biological function, but an extension of gender dynamics, is the inherent point at issue.

Keywords–*Right to reproduction, Contraceptives, International laws, Feminism, Indian context*

I. INTRODUCTION

Sexual integrity is a basic human right. It is a right of self-ownership and self-determination that is just as pertinent in ensuring personal autonomy as the others. The traditional image of a woman as being biologically built solely for pregnancy, first began to be questioned during the late 19th century. Women wanted to manage their sexuality and the use of birth control was thus seen as a form of self-determination and revolution.[2]They wanted to include access to contraception and abortion in the fight for women's reproductive rights. However, as policies began to be developed, the movement became more of an attempt by men to control the sexuality of women, rather than providing her with basic human rights. Now, the policies

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[2] Tara Anand, *A Brief Summary Of The Third Wave Of Feminism*, FEMINISM IN INDIA, (April 27, 2018), https://feminisminindia.com/2018/04/27/brief-summary-third-wave-of-feminism/.

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related to contraception are targeted at women; failure in contraception methods results in condemning women; responsibility of family planning relies on women.

II. INTERNATIONAL BACKGROUND ON REPRODUCTIVE RIGHTS

Reproductive rights issues are some of the most strongly disputed issues worldwide, regardless of the socio-economic level of the population, its religion or culture.[3] International instruments such as various human rights agreements require governments to continuously provide family planning and contraceptive information and services. These include the requirement to promote family planning services, remove laws that limit access to contraceptives, ensure that a wide variety of safe and effective birth control methods are available, etc.[4]

The Convention on the Elimination of all Forms of Discrimination against Women (hereinafter "CEDAW"), one of the primary international instruments that cover women's rights, guarantees women:

- Equal rights in deciding *"freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."*[5]
- Right to education which is inclusive of "*access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."*[6]

In the last two decades, the trend in women's access to contraceptives in both developed as well as developing countries has shown an increase. A study done by the United Nations in 2015,[7]to determine world contraceptive patterns, revealed:

1. 64% of all married women use contraceptives
2. 216 million married women worldwide have an unmet need for modern contraceptive methods
3. Only 60% of demand for family planning in certain developing countries such as Africa is satisfied

[3]LARA M. KNUDSEN,REPRODUCTIVE RIGHTS IN A GLOBAL CONTEXT1 (Vanderbilt University Press 2006).
[4]United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14:The Right to the Highest Attainable Standard of Health (Art. 12)*(August 2000).
[5]Convention on the Elimination of all Forms of Discrimination against Women, Article 16.
[6]Convention on the Elimination of all Forms of Discrimination against Women, Article 10.
[7]United Nations Department of Economic and Social Affairs, Population Division,*Trends in Contraceptive Use Worldwide* (2015).

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4. On the other hand, more developed nations like Australia, has contraceptive prevalence of 68% among married or in-union women aged 15 to 49 years, and only 10% unmet need for family planning

Moreover, in Australia, a prescription is required to obtain most forms of female contraception, such as birth control pills, implants, injectables, and IUDs. Some doctors refuse to give prescriptions to women who were not married, while some refuse to prescribe for any women.[8] This is essentially the struggle faced in such western societies wherein a women's basic right is hampered by predominantly male doctors attempting to reinforce their authority over a women's sexual morality.

III. THE FEMINIST POSITION

Despite motherhood being put on a pedestal, an unexpected pregnancy can be frightening. For instance, poor women may find, having children could mean introducing them into socio-economic circumstances where their safety could not be guaranteed due to lack of economic independence. Mothers are frequently forced to remain with abusive men for these very reasons and motherhood therefore culminates into being just another way of enforcing women's subordination to men. This victimization of women through motherhood can be understood in light of *The Dominance Theory*. Proposed by Catharine MacKinnon, an American radical feminist legal scholar, it emphasizes treating sexuality as a social construct of male power.[9]

Drawing a parallel between Marxism and Feminism, this theory states that sexuality in Feminism holds the same importance as work does to Marxism.[10] To be deprived of it, is to lack power.[11] Hence, by that very analogy, to control one's sexuality is equivalent to controlling the power relations in society.

However, another school of thought notes, that while the right to legalized contraception applies to everyone, these choices are only valuable to those with resources. Woman cannot freely choose whether or not to have a baby or end a pregnancy when her options are limited by oppressive circumstances or lack of access to services.[12] This is the heart of *The*

[8]SUSAN MAGAREY, DANGEROUS IDEAS: WOMEN'S LIBERATION, WOMEN'S STUDIES, AROUND THE WORLD17 (The University of Adelaide Press, 2015).
[9]CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128(Harvard University Press, 1989).
[10]Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).
[11] Catharine A. MacKinnon, *Excerpts from MacKinnon/Schlafly Debate*, 1 LAW & INEQ. 341 (1983).
[12] Supurna Banerjee & Nandini Ghosh, *Debating Intersectionalities: Challenges for a Methodological Framework*, SAMAJ 19 (2018).

Intersectionist Theory; an understanding that incorporates both the idea that personal experiences have roots in structural problems and the idea that personal action has social consequences.[13]

Although in western societies like Australia, the focus is on the right to contraception, in an Indian context, various other factors come into play, such as, for starters, familial obligations. An attempt to study the influence of mothers-in-law on young couples' family planning decisions in rural India revealed, *"Mothers-in-law… wanted to make decisions about daughters-in-law's use of female sterilisation… They did not want their daughter-in-law to undergo the operation until she bore the number of sons the mother-in-law required."*[14]

Women in such societies cannot negotiate contraception, neither can they seek assistance from men who often believe contraception to be a 'women's business' and not something they should bother about.[15] Religion too, plays an important role in determining the norms of the group.[16]

Free access to contraception, is hence key in ensuring the highest standard of physical and mental health.[17] A women's childbearing role is intertwined with her enjoyment of related rights, such as the rights to education and to work.[18] Legislations cannot aim to address one while disregarding the other.

IV. INDIAN LEGAL FRAMEWORK

India has no specific statute to govern or control the advertisement and sale of contraceptives in an exclusive manner. The country attempts to incorporate reproductive rights through its national policy on family health.

The National Family Health Survey (NFHS-IV, 2015-16)[19] shows 53.5% use of Contraceptives among married women (aged 15-49 years) out of which 47.8% use modern methods (majority of such women preferring 'traditional methods').Although India's National Population Policy grants women access to the full range of contraceptive methods, the local governments continue to introduce schemes promoting female sterilization. As a

[13] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).
[14]Arundhati Char, et al.,*Influence of Mothers-In-Law on Young Couples' Family Planning Decisions in Rural India*, 18(35)REPRODUCTIVE HEALTH MATTERS154 (2010).
[15]Ministry of Health & Family Welfare,*Health Management Information System Reports*, GOVERNMENT OF INDIA, https://nrhm-mis.nic.in/hmisreports/frmstandard_reports.aspx.
[16]Amirrtha Srikanthan & Robert L. Reid, *Religious and Cultural Influences on Contraception*, 30(2) JOGC129 (2008).
[17]International Covenant on Economic, Social and Cultural Rights, Article 12.
[18]International Covenant on Economic, Social and Cultural Rights, Articles 6 and 13.
[19]Ministry of Health and Family Welfare, *National Family Health Survey (NFHS-4)*, GOVERNMENT OF INDIA (2015-16), http://rchiips.org/NFHS/pdf/NFHS4/India.pdf.

result, contraceptive use is the lowest among women from ST (48%) followed by OBC (54%) and SC (55%) while female sterilization is the highest among women from OBC (40%) followed by SC (38%), ST (35%) and other social groups (61.8%).[20]

The family planning programme in India is driven by the need for controlling the population by controlling women's fertility rather than ensuring their rights to enjoy safe sexual relations.[21]The courts of the country have begun realising the problem behind this approach.

The Supreme Court of India in 2009 recognised for the first time, women's rights to access contraception services and choose birth control methods freely.[22] *"The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods."*[23]

This was further buttressed in the Puttaswamy judgment which found that the constitutional right of women to make reproductive choices, is a part of personal liberty under Article 21 of the Indian Constitution.[24]

Reproductive health-related laws and policies in India do not take a women's rights-based approach.[25]Moving beyond this restrictive context, the Apex Court in 2016held that, *"the freedom to exercise these reproductive rights would include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion."*[26] It thus ensured women's autonomy and gender equality remain core elements in the discourse surrounding reproductive rights.

In *Devika Biswas,* the Court reiterated the Intersectional school of thought – vulnerable groups with impoverished socio-economic conditions do not have the leisure to make a meaningful choice with regards to their reproductive rights.

Essentially, both the Dominance Theory and Intersectionality, attempt to highlight a pattern when it comes to access to birth control - the gender inequality underlying it. Noticeably, the

[20]Ministry of Health and Family Welfare, *National Family Health Survey (NFHS-3)*, GOVERNMENT OF INDIA (2005-06), http://rchiips.org/nfhs/nfhs3.shtml.
[21]Partners for Law in Development&SAMA Resource Group for Women and Health, *Sexual Health and Reproductive Health Rights in India*,NATIONAL HUMAN RIGHTS COMMISSION,April,2018, at 91.
[22] Suchita Srivastava & Anr. v. Chandigarh Administration, (2009) 9 SCC 1.
[23]*Id.* at 15.
[24]Justice K S Puttaswamy v Union of India, (2017) 10 SCC 1.
[25]Centre for Reproductive Rights, *Reproductive Rights in Indian Courts*, 2017 https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf.
[26] Devika Biswas v. Union of India, (2016) 10 SCC 726, 754.

Indian courts have highlighted the same; the current government policies focusing on contraceptive methods are violative of women's "substantive equality", and the State must make policies that are grounded on gender equity instead.[27]

V. CONCLUSION

Whether or not women use contraceptives is not a simple issue. Women usually have to bear the responsibility for contraception and differences in gender relations indicate that they do not have power to insist on contraceptive use by their male counterparts. The non-involvement of men and boys in matters related to reproductive rights contributes to the idea perpetuated by patriarchy that contraception is a women's matter.

Even as women use and talk about birth control as common practice, the larger ideological debate has been one that has excluded women. Any policy or program aimed at increasing access to contraception fail to place women's decision making needs at the centre of it.

The CEDAW committee in the concluding observations to India, recommended that the State

"(b) Provide women with… increase access to and use of effective and affordable methods of contraception, including by subsidizing them, in order to reduce the use of abortion as a method of family planning;"[28]

However, this has not yet been incorporated effectively. An inclusive legislation to govern access to contraceptives, is the primary necessity. The efforts of Indian courts in recognising reproductive rights as fundamental rights has started to create a shift in the ideology. Laws related to reproductive health need to acknowledge the discriminatory stereotypes of population control, and must instead cater towards women, in order to uphold her rights to body autonomy.

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[27] *Id*. at 756.

[28] U.N Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined 4th and 5th Periodic Reports of India : Committee on the Elimination of Discrimination against Women*, UNITED NATIONS (18 July 2014), https://digitallibrary.un.org/record/778815?ln=en, at ¶ 31.

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