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FEMINIST JURISPRUDENCE ON **REPRODUCTIVE RIGHTS OF WOMEN**

AUTHORED BY - DR. JESMIN BANU KHAN¹

The reproductive right is the natural human right of every individual. Presently, there is no international human rights convention, which specifically talks about surrogacy. However, there are so many international human rights instruments which are provided reproductive rights² Para 7.3 of the International Conference on Population and Development (ICPD). Thus, reproductive rights are recognized as basic natural human rights by various human rights instruments. Therefore, reproductive rights also include surrogacy as a right to procreate with the help of science and technology. In India, the reproductive right is protected under the right to life and personal liberty.³ The Indian judiciary has also recognized the 'right to reproductive autonomy as an aspect of the right to privacy in *B. K. Parthasarathi v. Government of Andhra Pradesh*.⁴ Therefore, the surrogacy, which provides the chance to infertile couples to become parents should also to be the protected by the Constitution of India. But the surrogacy arrangement involves several social, ethical, and legal issues. It is challenged as unethical practice as amounting to commodification, exploitation of women. There productive rights of the single women, lesbian couple, commissioning women, and surrogate women also involved under a surrogacy arrangement. Thus, to solve the variety of issues of surrogacy there is an urgent need for surrogacy Law as surrogacy is the last ray of hope, of becoming the mother of her genetic child.

Sexual and reproductive rights are areas of research wherein the individuality of women is challenged and hence there needs to be comprehensive research on these issues of grave socio-legal importance. Contextual understanding of the issues is essential to make socio-economic policies and laws for the betterment of half of the earth's population. Sexuality and reproductive rights have been seen from different angles, and hence the idea of reproductive justice has emerged in the recent past and holds significance for legal and socio-political scholars to date. The idea of reproductive justice is based on the legal consequences of the resilience of women towards socio-

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² UDHR. art. 16.

³ INDIA CONST. art. 21.

⁴ AIR 2000 AP 156.

legal order that tried to disapprove the existence of the individuality of women rights in terms of sexual and reproductive rights. The present paper has also approached from a point of view human rights for sexual and reproductive rights of the women that bear significance to the fundamental debate and discussion on such rights of the women. The present paper attempts to recognize the existence of the cross-cultural and transnational experiences about the reproductive and sexual rights (primarily reproductive rights) of the women that theorize perceptual study towards improved and contemporary notion globally about sexual and reproductive rights-related issues of the women. The present paper covers the literature from countries in American, African, Asian regions to cover a global approach towards perceptual and situational analysis of the issues related to sexual and reproductive rights. The present paper thus covers multiple aspects hovering around the issue of reproductive rights those analyses from social, economic, legal, political, and feministic approaches, therefore making the present study holistic for understanding the different scenarios through which the present issue bypasses in different regions of the world.

In this research, the researcher will explore the reproductive rights of women and shall conduct a thorough study of what the reproductive facilities are provided to women in India and how well the development of the law has for the protection of women's rights. In India, Women have many reproductive rights but in this study, the mental health, the physical health, the reproductive health, and the types of reproductive rights regarding the adoption of a child, removing of reproductive organs, discrimination of gender bias, implants, *etc.* will be discussed. There will be a comparison with the other countries to see what changes and suggestions the government should inculcate for the betterment of the rights given to women regarding reproductive rights. The scope of the paper will be covering the genesis and the current situation of India with reproductive.

India was one of the few countries to participate in it and adopt its Reproductive rights. It has been first recognized as an inalienable human right in 1968. It is recognized as an extended corollary of various rights, like the right to health, right to life & personal liberty, and right to equality which are enshrined under the Indian Constitution. But the irony of the situation is that the health care system in India, particularly the public sector, facing a wide range of issues that have deteriorated the availability, accessibility, acceptability, and more importantly, the quality of reproductive healthcare, which should have been otherwise properly ensured by the state. It is imperative to highlight that the reproductive rights of women in India are challenged by various factors like diverse cultural, social, and economic circumstances. Though the judiciary in India has played a

pivotal role in ensuring women's reproductive rights, yet many challenges need to be reformed to attain a progressive society that ensures an unbiased reproductive right to its women. The paper seeks to address the various international, national, and judicial responses that have advocated for these rights, as well as the issues and challenges that need attention by lawmakers to have a more comprehensive reproductive right for women.

in *Suchita Srivastava & Another v. Chandigarh Administration*⁵ the Apex Court observed that a woman's right to make a reproductive choice is also a dimension of "personal liberty" under Article 21 of the Constitution of India, 1950.

Reproductive rights has been first recognized as inalienable human rights way back in 1968, and India was one of the few countries to participate in it and adopt it in principle. It is recognized as an extended corollary of various rights, like the right to health, right to life & personal liberty, and right to equality. But the irony of the situation is that the health care system in India, particularly the public sector, faces a wide range of issues that have deteriorated the availability, accessibility, acceptability, and more importantly, the quality of reproductive healthcare, which should have been otherwise properly ensured by the state. It is imperative to highlight that the reproductive rights of women in India are challenged by various factors like diverse cultural, social, and economic circumstances. Though the Indian judiciary has played a pivotal role in ensuring women's reproductive rights, yet there are so many challenges that need to be reformed to attain a progressive society that ensures an unbiased reproductive right to its women. The paper seeks to address the various international, national, and judicial responses that have advocated for these rights, as well as the issues and challenges that need attention by lawmakers to have a more comprehensive reproductive right for women.

In this research, we will explore topics of sexuality and reproductive rights of women. We will focus on the merits and demerits of the same and shall conduct a thorough study of what the reproductive facilities are provided to women in India and how well the law has developed for the protection of the same. We shall also look into the major input of sexuality and rights and how it has evolved through the years. Women in India have many reproductive rights but in our study we will be going through mental health, physical health, reproductive health, and the types of reproductive rights regarding the adoption of a child, removing of reproductive organs,

⁵ 2009 (9) S. C. 1 (India).

discrimination of gender bias, implants, and etc. Now onto the sexual rights, we will observe the right to choose sexuality, sexual relations, decisions to take in sexuality, to be accepted as part of whichever sexuality is preferred, and to be treated equally as a woman regarding sexual advances. Our scope will be covering the genesis and the current situation of India with reproductive and sexual rights. In concluding, we will be making sure some change is initiated and how the UN has helped India as a country for the protection of women and their reproductive and sexual rights and their involvement of the same.

The right to protection of life and personal liberty under Article 21 of the Indian Constitution includes the woman's right to make the reproductive choice. Reproductive choices can be exercised to procreate and to abstain from procreating both. A woman's right to privacy, dignity, and bodily integrity should be respected is the crucial consideration before the court. There should not be any 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 the use of contraceptive methods. There is also a compelling State interest in protecting the life of the prospective child; therefore termination of pregnancy is only permitted when conditions specified in the Medical Termination of Pregnancy Act, 1971 are fulfilled. The Act can also be viewed as a reasonable restriction on the exercise of reproductive choices.⁶

It was held in *Goutam Kundu v. State of West Bengal*,⁷ the appellant in a maintenance suit disputed the paternity of the child and prayed for a blood group test of the child to prove that he was not the father of the child. It was held that a child born of a married woman is deemed to be legitimate unless the contrary is proved. Such a presumption could be rebutted by a strong preponderance of evidence and not a mere balance of probabilities. Court must carefully examine as to what would be the consequence of ordering the blood test whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman. The Court observed that such a demand for subjecting the child to a blood test would be slanderous, embarrassing, and humiliating for the woman; was contrary to the right to guaranteed personal liberty under Article 21 of the Constitution.⁸ The feminist legal theory demonstrates how the exclusion of feminine perspectives from the law has impacted the content and interpretation of women's rights. Feminist legal theory critiques Western liberal thought not only in the legal discourse but also from broader social,

⁶ MAMTA RAO, LAW RELATING TO WOMEN AND CHILDREN 80-81 (4th ed., 2018).

⁷ (1993)3 SCC 418.

⁸ DR. N. K. CHAKRABARTI & DR. SHACHI CHAKRABARTY, GENDER JUSTICE 154 (2nd ed. 2018).

political, and economic perspectives. In general terms, the principal argument of feminist legal theorists is that the method of legal reasoning promoted by Western liberalism carries a bias in favor of men. The feminist contentions on women's rights endorsed in this dissertation are framed within a general critique of liberal legalism, a concept which entails a set of assumptions that promote, inter alia, an atomistic conception of the legal person and a formulation of the legal person by reference to qualities that are typically associated with masculinity.⁹

Feminist legal theory is concerned with both practical and theoretical implications that masculinist assumptions have on the development of women's rights. In theory, feminists observe that women struggle to attain legal subjectivity when the legal person is characterized in atomistic terms. It follows that women's reproductive biology constitutes an implicit obstacle for the incorporation of women's experiences in defining rights. The liberal legalist insistence on autonomy, self-possession, and self-determination conflicts with its narrow definition of women as related and divided by the experiences of childbearing and childrearing. Similarly, the practical implications of liberal legalism are the difficulty in reconciling the aspirations of women as autonomous agents in society with the limitations that liberal preconceptions impose on their recognized rights.

This paper adopts feminist contentions on women's reproductive freedom to contest the characterization (or lack thereof) of women in legal discourse. In order to advocate women's rights and equality, it is necessary to contest the bias inherent in the law. Feminist scholars have pointed out that deploying the law to dismantle patriarchal power structures may be a futile exercise. In fact, the law has served as a vehicle for patriarchal ideologies that conveniently repress women's perspectives. The question is whether the law can be used both as a "site" and a "tool" for feminist struggles against patriarchal structures.¹⁰ Whilst feminist legal theory must acknowledge that the law is open to conservative patriarchal interpretations, it is a nonetheless fluid and indeterminate entity which lends itself to reformist interpretations. Therefore, it may be concluded that law can be used both as a site and a tool for feminist endeavors; it may be critiqued for its current interpretation and application but its universality should be used to advance feminist interpretations.

Accordingly, the feminist challenges liberal legalism and the resulting contentions on women's

⁹ R. Hunter, *Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism* 13 TARCFLLT (2013).

¹⁰ C. A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (9th ed., 1987).

rights. The debate over women's reproductive autonomy reveals how the law draws from social and political practices, as well as moral/ethical arguments, to justify the imposition of limits on women's enjoyment of rights. In particular, the ongoing abortion debate explains the legal discourses opposed to feminist contentions. On the one hand, feminists contend that women's rights, *e.g.* the right to self-determination in relation to their reproductive biology, prevail over the speculative rights of the fetus; thus, women should be guaranteed access to legal abortion. On the other hand, anti-abortionists argue that allowing women's reproductive autonomy conflicts with the right to life of the fetus. This argument entails a biological reductionism of women that arises in society and has consequences in the legal definition of women's rights against the rights of others.¹¹

The moral and ethical objections to women's reproductive autonomy rely on "natural" definitions of sexuality and gender. They allege that since women have the capacity to bear children, then they ought to do so irrespectively of social, political, and economic circumstances. Feminists consider that these objections constitute unsatisfactory accounts of women's experiences and, ultimately, are attributable to a lack of feminine input into social organization. In other words, these narrow definitions of reproductive biology and gender act in the interests of patriarchal systems and to the detriment of women. The value attached to the unborn fetus, for example, reinforces the idea of the biological family whilst disregarding other activities that women may engage in within society. By contrast, the characterization of the unborn as a rights-bearing individual seems to conflict with the abovementioned autonomous conception of the individual. The valorization of the unborn reveals the flexibility of legal rules to favor masculine perspectives and sub-ordinate women. It demonstrates fluidity in the legal discourse which enables it to be deployed to silence women's voices and postulate masculinity as a paradigm to the law.

In this sense, human rights law is capable of oppressing and discriminating against women. The inability of legal frameworks to accommodate gender-specific expectations is equally embodied by the international human rights system. The obstacles that Western liberal thought encounters when attempting to incorporate a gender dimension in the law. The cross-cultural and systemic oppression of women is rarely addressed when negotiating the content of human rights, and this makes it virtually impossible for women's rights to be addressed in substance. Feminist critiques of international law contend that it is not possible to substantiate women's rights without

¹¹ C. Smart, 'The Woman of Legal Discourse' 1(1) SLS 29 (1992).

deconstructing the social and political forces that operate to oppress women.

Feminist strategies must entail two fundamental exercises. The first is to expose the bias inherent in mainstream legal theory and introduce a gender dimension in legal discourse. Secondly, they must actively seek to translate that gender dimension from theory to practice. The problem with liberal legalism is not merely theoretical (although theoretical frameworks enable women's oppression); it flows into practice by attaching to the decision-making processes of legal actors. In this respect, the projects of feminist judgments have expanded the scope of legal decision-making by drawing directly from feminist theoretical concerns.¹² In doing so, feminist scholars and lawyers have explored the possibilities offered by feminist approaches to judicial decision-making; these inspiring initiatives have defined a new strategy in feminist advocacy of women's rights. They inform us that it is possible to introduce a gender dimension in legal practices, interpret and apply legal rules with attention to the legal construction of gender and the gendered experience of law. Contrastingly, the traditional approaches to judicial decision-making exacerbate "women's struggle to attain legal subjectivity". The innovative feature of feminist judgments is that they recognize the bias inherent within the law, reconcile its implications with the facts of a case, and strive to ensure gender justice.

The methodology of feminist judging demonstrates that, if interpreted and applied from a feminist perspective, the law can be deployed to advance the interests of women. Although politically-motivated judging has been criticized as violating "the tradition of judicial impartiality",¹³ it is questionable whether traditional judicial reasoning is itself impartial. Rather, the feminist legal theory provides sufficient evidence to contest the claim of objectivity and neutrality in the law. The idea that men reason more objectively than women is blatantly discriminatory of women's intellectual capacity; however, feminist judgments need not necessarily emanate from women. It is the construction of facts, the application of rules, and the factors are taken into account that determines whether a judge has adopted the feminist approach, not their sexual identity.

The feminist approach to rewriting two judgments given by the European Court of Human Rights, expansively interpret pre-existing rights, *e.g.* the right to privacy, to meet women's needs as members of society if we depart from narrow evaluations of their reproductive biology to

¹² FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 30 (R. HUNTER, ET.AL., eds., 2010).

¹³ Ipp, D., *Maintaining the Tradition of Judicial Impartiality* 12 SCULR 87, 95 (2008).

acknowledge women's social, political and economic interests. The two rewritten cases, *A, B and C v. Ireland* and *P and S v. Poland*,¹⁴ concern claims against states where abortion access is virtually impossible. The relevance of feminist judging in these cases is that it realizes the universality of human rights by interpreting them in light of gender perspectives. Feminist judgment writing encapsulates the objective of the dissertation: articulating women's rights through the application of feminist standards.

The past, present, and future of women's rights

Feminism has sought to deconstruct and examine the different ways in which the law and legal process discriminate against women or feminine experiences of reality. A relevant example of women's discrimination is found in situations related to sexuality and gender, where law tends to evaluate women's experiences through masculine standards. As MacKinnon points out, the law has relied heavily on existing societal structures that empower men and disempower women, respectively, based on naturally occurring sexual differences.¹⁵ It has been argued that, while sex is determined by a biological assessment, gender amounts to the social consequences of that assessment.¹⁶ In this respect, the law acts as a catalyst of those social consequences by constructing women according to society's understanding of gender identities and roles: it creates abstract rights that authorize and promote masculine experiences of reality while establishing feminine accounts as exceptions to their resulting standards. As a result, the law's recognition of women's gender-specific rights is curtailed by the "dominant paradigm" of masculinity within the legal process.¹⁷

Feminists have focused on the broader social, political, and economic realities that law accommodates. Virtually all feminists agree that the law has developed within a patriarchal system that depends on and encourages women's subordination to men. Although it is farfetched to state that law serves the interests of all men, it is nevertheless reasonable to argue that it does not further the interests of most women as women. This is because, within a patriarchal system, the law has framed its content within an exclusive view of the world: liberalism. In fact, liberalism is rooted in masculine perspectives on social and economic relations that tend to marginalize women, whose role in society has been historically confined to the familial and private sphere. Feminists have

¹⁴ ECHR (GC) 25579/05; [2012] ECHR 57375/08.

¹⁵ C. A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (9th ed., 1987).

¹⁶ K. O'DONOVAN, *SEXUAL DIVISIONS IN LAW* 62 (1985).

¹⁷ Hunter, *op.cit.*

consistently challenged the legal implications of this worldview, emphasizing the impacts that liberal legal frameworks have on women's social (and legal) experiences.

Liberal legalism creates a set of abstractions that do not incorporate women's social reality in the legal process. The rights that derive from it – for example, property rights and fundamental rights like privacy and free speech – cater to the activities that have been most commonly conducted by men in relation to the public sphere; one that, until more recent years, had been largely inaccessible to women. Furthermore, the recognition of rights in liberal legalism is apparent in its initial formulation of another abstract concept: the legal person. According to the liberal legalist view, an individual must be autonomous, self-possessed, and self-contained.¹⁸ It is from this basic definition that liberal legalism derives its fundamental rights. The presumption constitutes a barrier for women's recognition as beneficiaries of gender-specific rights. The liberal legalist view of the "legal person" is problematic if we are to use the law as a tool for women's emancipation in society, in that it may not represent their sexual and reproductive experiences and detracts from their ability to attain legal personhood in certain gender-specific situations.

The liberal formulation of the 'person' views the 'other' as a possible threat to the 'self'. On the other hand, women's biological and reproductive experiences do not lend themselves to liberal definitions and dichotomies; they are excluded from a liberal account of rights and freedoms because the experiences of child-bearing and rearing, for example, contravene the imperative of (biological) autonomy, self-containment and so forth. Thus, the initial liberal formulation of legal personhood acts as a boundary for gender perspectives in the law by embedding masculinity into primordial legal definitions: it prevents the social experience of gender from finding expression and vindication through law. As a result, feminists have targeted law's inability to address the experiences (*e.g.* in the context of reproduction) affecting women from women's own standpoints: the gender norms and bias inherent in the law are a starting point for any feminist discussion on women and the legal process.

Liberal legalism has based much of its developments on the notion of equality among legal persons. Conversely, feminism remains critical of its understanding of equality: equal to whom? This question reconciles the liberal claims of equality with the fact that liberalism adopts masculinity as a standard to which individuals must conform in order to attain subjectivity.

¹⁸ S. Sheldon, *Re Conceiving Masculinity: Imagining Men's Reproductive Bodies in Law* 26 JLS 129-149 (1999).

Feminists point out that, although liberal legalism claims to provide a neutral account of rights, it is in fact tainted by a masculine legal discourse where rights that affect men directly take precedence over women's interests.¹⁹ The liberal notion of equality is limited; it suggests that women can aspire to the same rights as men where relevant, but ignores the fact that there are gender-specific rights that cannot be sourced from masculine experiences of reality. This *formal* notion of equality assumes that gender justice is achieved by treating women equally to men under all circumstances, even where men are not treated at all. Contrastingly, feminism seeks to implement the concept of substantive equality, which can produce equitable outcomes for both men and women according to their specific circumstances in life.

Deconstructing reproductive rights in the liberal rights discourse

A tangible defect in the notion of formal equality is the limited importance given to women's reproductive autonomy. While liberalism presupposes autonomy as a characteristic of the legal person, it does not grant autonomy to those who do not conform to its standards by definition, *i.e.* women. For example, the experience of pregnancy can severely limit women's autonomy and participation in society as individuals. Similarly, the reproductive services that are necessary to pregnant women in order to improve their social and economic status are often inaccessible to them. Abortion-seeking women experience legal provisions that prohibit or limit access to reproductive services and enshrine social consequences based on their sex: when women get pregnant and cannot obtain an abortion, they must become mothers and accept the role of child-bearers and -rearsers in society. In this regard, feminist contentions on women's reproductive autonomy seek to engender women's legal subjectivity. In doing so, they provide an important lesson on how the legal process should develop to positively impact women's social reality. The liberal claims that law can be neutral in gender-specific situations demonstrate that the legal process is either ignorant of women's reality or unwilling to repair it and achieve substantive equality between men and women.

Many feminists have articulated abortion claims within liberal legal frameworks; they have defined reproductive freedom in the popular terms of "a woman's choice" and have aggregated

¹⁹ A. GREAR, SEXING THE MATRIX: EMBODIMENT, DISEMBODIMENT AND THE LAW – TOWARD THE RE-GENDERING OF LEGAL RATIONALITY 13 (2011).

ideas of autonomy with the right to privacy.²⁰ Whilst women's autonomy and privacy rights must be respected, the structure of such arguments is problematic because it relies on qualities associated with masculinity, *e.g.* autonomy, and rights attached to them, *i.e.* privacy. This approach can be limiting in addressing feminine issues and formulating abortion as a "private matter" should be avoided for three reasons.

First, privacy in reproductive rights tends to trivialize the "public" environmental factors that produce involuntary pregnancies and, thus, create a demand for abortion access.²¹ These include issues of public interest, such as the culture of rape or non-consensual sex, poor sexual health education or family planning and the fallibility of contraceptive methods. Further, constructing abortion as a private matter assumes that women who have recourse to abortion are free from social, economic, and political constraints linked to the abovementioned factors which may have caused their pregnancy in the first place.²²

Secondly, the legal concept of privacy does not serve the feminist purpose of valorizing women's rights as part of the public sphere. As a relatively new legal right, privacy incorporates liberal dichotomies and oppositions, conflicting interests, and competing rights,²³ whilst neglecting the importance of collective responsibility both within the private and the public sphere. The concept of privacy ranges from a Twenty-First-century idea of data protection to "the right to seclusion, [...] to be left alone".²⁴ It draws from the patriarchal tradition of categorizing social relationships and demarcating the boundaries between public interest and private property. Yet, the privatization of women's reproductive lives reinforces men's control over women. The privacy of child-bearing and -rearing is at the core of women's oppression: the biological family, where women's role is reproductive, is the private sphere where sexual subordination is most powerful. Reinforcing the idea that women's reproduction belongs to the private sphere may detract from feminist arguments on the significance of reproductive control, binding women to the notion of the nuclear family where they serve as mothers.

²⁰ L. Smyth, *Feminism and Abortion Politics: Choice, Rights, and Reproductive Freedom* 24(3) WSIF 335 (2002).

²¹ *Ibid.*, p. 336.

²² N. CHARLES, *FEMINISM, THE STATE AND SOCIAL POLICY* 164 (1999).

²³ L. M. FINLEY, *Breaking Women's Silence in Law: the Dilemma of the Gendered Nature of Legal Reasoning* FSS 4011 (1989).

²⁴ D. NEUBERGER, *Is nothing secret? Confidentiality, privacy, freedom of information and whistleblowing in the internet age* SALAL (2015).

Finally, abortion as a private matter precludes the possibility of public discourse on the complexities of contraception and the implications that child-bearing has on women's lives; it justifies leaving issues related to the "private sphere" largely unspoken.²⁵ It is in the context of reproduction, home, and family that women's traditional roles are defined. But in that context, the narrow definition of privacy also precludes any involvement by society as a whole and, therefore, is an impediment to social and legal reform.²⁶ Reproductive freedom requires us to envisage our lives as a net of social relatedness rather than as an effort to detach ourselves from others. It can trigger a "collective purpose concerning matters like abortion that seem so intrinsically personal and private";²⁷ it would enrich the concept of reproductive freedom as the guarantee of social possibilities, including a woman's right to self-determination that is of universal value.²⁸

However, if we decide to frame abortion and reproductive rights in terms of privacy, we must acknowledge that privacy is a dimension in which a woman has "the right not to have an identity imposed upon her by the state or third parties that she cannot freely affirm and embrace";²⁹ it is her right not to be characterized as a mother or a fetus' host, and the right for her bodily integrity not to be undermined by the public-private distinction. The correct conceptualization of the right to privacy can be used as a tool to defend women's identity and integrity from the persistent patriarchal efforts to oppress women by way of reproductive subordination.³⁰ If we understand autonomy as a personal aspiration rather than a biological definition, we can define it as a form of self-governance rooted in our capacity as humans for rational choice.

Asserting women's reproductive autonomy against the rhetoric of the unborn

Naffine describes different trends in legal reasoning about personhood. The one that I find of most interest is that of religionists.³¹ According to their theoretical framework, it is the presence of human life alone that creates legal rights because life itself is "divinely valued and

²⁵ H. BARNETT, 'PATRIARCHY: PUBLIC AND PRIVATE' IN H. BARNETT (ED), SOURCEBOOK ON FEMINIST JURISPRUDENCE 135 (1997).

²⁶ O'Donovan, op. cit., pp. 11-15.

²⁷ R. Petchesky, *Abortion and Woman's Choice* (1986), p. 392.

²⁸ *Ibid.*, 398.

²⁹ Cohen, J. L., *Democracy, difference and the right of privacy*, 1996, as cited in Smyth, op. cit., 343.

³⁰ Petchesky, op. cit., 394.

³¹ N. NAFFINE, *LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON* 23 (2009).

valuable”.³² Hence, religionists are perhaps the only category of legal thinkers that ascribes value to human life before it takes part in social interaction – an aspect, in my view, of particular importance to the feminist counterarguments explained below.

There have been different responses to the religionists’ stance. Sherwin contends that the value ascribed to life should be measured by the level of social integration of the person, and it is insufficient to define personhood as an atomized state.³³ Even if one did define it as such, it remains unclear how a fetus, is *inevitably* attached to the woman, could enjoy equal rights as an autonomous person. After all, abortion involves severing the attachment between the fetus and the woman; yet, the fetus is not capable of surviving without her.

The religionist perception of the fetus as instantly valuable is incongruent with the social and political nature of human beings. A fetus, whose life can neither be “sustained nor destroyed” without the woman’s involvement, cannot be equal to a socially integrated and autonomous person such as the woman in question.³⁴ In fact, it cannot be without her. To this effect, the dissenting judges in *A, B, and C v. Ireland* made sensible observations on the fact that the rights of a fetus “whose life has not been definitely determined [...] and whose participation in social interaction has not even started” cannot a priori attain a measurable value.³⁵

The value we attach to the life of the unborn “reflects and shapes the relative value we place on women and women’s activities” beyond their reproductive biology.³⁶ Similarly, the rights attached to the unborn fetus determine the social and legal consequences of women’s biological functions. The nuclear family as a patriarchal institution depends on biological hierarchies; there, the rhetoric of the unborn acts as a link between women’s biological functions and their social consignment. A commitment to the provision of social needs would increase the likelihood of women’s rights being prioritized above fetal rights, emphasizing the value of women’s broader social participation.

³² Ibid.

³³ S. Sherwin, *Abortion Through a Feminist Ethics Lens* 30(3) D 335-336 (1991).

³⁴ Ibid., 336.

³⁵ [2010] ECHR (GC), 25579/05.

³⁶ F. Olsen, *Unraveling Compromise* 103(1) HLR105 (1989-1990).

Sherwin's observations on the social desirability of abortion for women are, ultimately, the most valuable counterargument to the prioritization of fetal rights. She emphasizes the variety of reasons why women seek an abortion, including health complications, financial considerations, age, or other circumstances such as education and career goals. The mere fact that a woman does not want to be pregnant should be a sufficient ground for her to obtain an abortion. Women should enjoy the same breadth of reproductive decision-making as that which allows men to be defined as autonomous and self-possessed: the reproductive role of women would no longer be their social value.³⁷

The law's construction of gender and its control over women's reproduction has insidious social and economic consequences that exacerbate inequality between men and women. The following section explains how feminist efforts have opposed restrictions to women's reproductive autonomy on social and economic grounds.

The lack of international standards on human rights: universalism v. relativism

The international human rights framework has recently developed a gender dimension. Since the Universal Declaration on Human Rights in 1948, the international framework has significantly enhanced its understanding of human rights to encompass women's concerns. This new gender dimension is exemplified by the Convention on the Elimination of all Forms of Discrimination against Women (hereinafter, CEDAW) of 1979. The CEDAW acknowledges that, despite the ratification of other international treaties, "extensive discrimination against women continues to exist".³⁸ For this reason, an ad hoc treaty for women's interests is crucial. However, the ratification of the CEDAW has seen the rise of several cultural objections to the content of women's rights, as well as disputes as to whether the nature of those rights can be deemed "universal". After over thirty years, objections to women's universal rights persist and the debate over abortion is far from resolved. In this chapter, I explore the international approach to women's rights, its merits and demerits, and the means by which feminist strategies contribute to a human rights discourse that is more decisive on the content of those rights.

³⁷ S. FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 10 (1st ed., 1970).

³⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

The 1993 World Conference on Human Rights (hereafter, World Conference) constituted an opportunity to highlight the importance of protecting the rights of historically oppressed groups, including women;³⁹ yet, the ideological challenges of a new global society emerged rapidly among states. Different cultural perspectives were (and continue to be) the reason for the reluctance of member nations to establish and adhere to international standards on human rights. As discussed in this chapter, the recurrent grounds for dissent have been moral and religious beliefs that tend to be averse to women's reproductive freedom.

The efforts of the international community, governed by the United Nations (UN) system, have been undermined by a self-sabotaging approach whereby human rights are discussed in the abstract rather than in reference to actual events.⁴⁰ After the World Conference, several attempts were made to address the universality of human rights, albeit using the same inconclusive approach. At different times the universal character of human rights was challenged by states who asserted interpretations of human rights compatible with their own cultural standards.⁴¹ It became apparent that the UN was not so united in its promotion and protection of human rights after all. For example, in relation to women's rights, objectors most commonly complained that "an active minority [was] trying to impose its certain set of ideas on the majority of the international community",⁴² the minority being Western liberal nations.

Although "universal" human rights may have the effect of neutralizing the plurality of cultural perspectives present in the global society, the cultural objections made by member nations on different occasions either ignored or justified the fact that the oppression of women is a "systemic and cross-cultural phenomenon" that has little to do with cultural plurality;⁴³ therefore, discussions on women's rights should not be defined by specific cultural perspectives that nevertheless pertain to patriarchal and masculinist societies. On the other hand, the definition of women's rights as an "inalienable, integral and indivisible part of *universal* human rights"⁴⁴ would require a consensus on their substantive character. Sincere there is no such consensus among member nations,

³⁹ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

⁴⁰ Alan Riding, *A Rights Meeting, but Don't Mention the Wronged*, New York Times, June 14, 1993.

⁴¹ C. M. Gerson, *Toward an International Standard of Abortion Rights: Two Obstacles* 5(2) CJIL 753 (2005).

⁴² H. E. Ms. Shahla Habibi, Presidential Advisor on Women's Affairs, Fourth World Conference on Women, (Beijing, September 1995).

⁴³ N. Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism* 25 CHRLR 49 (1993).

⁴⁴ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, Article 18.

universal women's rights are illusory. Promoting women's rights on the false premise that there is a universal understanding of human rights logically frustrates the discussion on women's rights: it conveniently relieves the international community from the onerous duty of encountering the substance of women's rights.⁴⁵

From a feminist perspective, cultural relativism is a double-edged sword. On the one hand, it may be welcomed as a subversive strategy to overthrow the dominance of Western liberal thought and its silencing of different ethical and moral voices, especially in the law. On the other, cultural relativists' *a priori* defense of "cultural" standards risks justifying social practices that are oppressive of women; their rejection of a universal human rights system differs from feminist critiques of the liberal claims of objectivity/neutrality. Feminists contest liberal claims without excluding the possibility of attaining a universal account of human rights; rather, they point out that universal human rights have yet to be realized.⁴⁶ The feminist argument is that universal human rights must encompass a gender dimension that has so far been neglected or voluntarily ignored. The absence of an unequivocal account of the content of women's rights in the UN human rights system is the basis on which the new global society has failed to establish international standards on reproductive rights.

Adopting feminist standards in international and regional reproductive rights claims

In the follow-up to the World Conference, women's rights – in particular, abortion rights – increasingly gained the attention of the international community.⁴⁷ The renewed human rights resolutions pledged to improve and protect the reproductive health of women within the unaltered framework of human rights. At the same time, member nations were exhorted to help women avoid abortion as a method of family planning.⁴⁸

⁴⁵ Vienna Declaration and Programme of Action, para. 26, where states were discouraged from objecting to the content of the Declaration and Programme, although objections could have been addressed constructively and differences between views discussed as should be done in any panel of discussion.

⁴⁶ Rebecca J. Cook, Human Rights and Reproductive Self-Determination 44 AULR 975 (1995).

⁴⁷ The 1994 International Conference on Population and Development and the 1995 Fourth World Conference on Women resulted in a Programme for Action and a Declaration and Platform for Action, respectively. See United Nations Population Information Network (POPIN), 'Report of the International Conference on Population and Development' (18 October 1994), A/CONF.171/13; UN Doc., 'Report of the Fourth World Conference on Women', 15 September 1995, A/CONF.177/20/Rev.1.

⁴⁸ UN Doc A/CONF.171/13, para. 7.24.

Overall, the focus of the UN was not so much on realizing women's reproductive autonomy as it was on ensuring the implementation of government policies that could regulate and control women's reproduction. The emphasis of the conferences held in Cairo and Beijing was on unsafe abortion as a "public health concern";⁴⁹ the right to self-determination was not as central to the discussions on women's reproductive rights. Greater attention was given to situations in which abortion-seeking women are victimized. States were encouraged to "consider reviewing laws containing punitive measures against women who have undergone abortion" and concern was shown toward the inhuman treatment of women who have previously resorted to illegal abortion.⁵⁰ As discussed in the previous chapter, reproductive health is pertinent to sex, which is determined in biological terms. Contrastingly, reproductive autonomy has a broader significance; it relates to gender, which is a social construction.⁵¹ Hence, aligning women's reproductive autonomy to their reproductive health obfuscates the larger, systemic discrimination against women that is inherent in the restriction of the former.⁵²

The promotion of women's reproductive rights must adopt a holistic approach to address the different facets of sex *and* gender discrimination. Thereafter, it is possible to formulate adequate reproductive rights to be incorporated within the universal human rights framework. The international community and its bodies must abandon particular cultural objections and address the cross-cultural reproductive repression of women. Once the substantive content of women's reproductive rights is affirmed, it becomes possible to explore strategies for their enforcement in different jurisdictions.

Complementing international standards with feminist expectations

In 1979, the Convention on the Elimination of all Forms of Discrimination Against Women introduced an unprecedented gender perspective to the international community. In doing so, it revealed the weakness of treaties formulated within the mainstream human rights framework. First, CEDAW remained silent on the global issue of illegal abortion, which is relevant to women across all continents and has fatal consequences that are regularly documented by international

⁴⁹ Ibid., para. 8.25.

⁵⁰ UN Doc A/CONF.177/20/Rev.1, para. 106(k).

⁵¹ Cook, op. cit. (1995), p. 982.

⁵² R. Cook, *International Human Rights and Women's Reproductive Health* 24(2) SFP 73(1993).

organizations.⁵³ Secondly, CEDAW avoids standard-setting with regards to abortion access, which frustrates its own purpose of advancing women's interests and does not take full advantage of its legally binding nature. Once again, the lack of substance in defining women's rights diminishes its impact on domestic realities.

Insofar as it does not speak out on abortion, CEDAW can be included in the mass of international treaties that disregard feminist contentions on reproductive autonomy. The UN accepts that “[t]he legal status of abortion is the sovereign right of each nation”⁵⁴ thereby assigning women's reproductive rights to the private sphere of the nation-state. I argue that the reluctance to confront the oppressive nature of restrictive abortion policies is inadequate for a treaty body that purports to eliminate discrimination against women. For example, the requirement that states should take “appropriate measures” to fulfill their obligations under CEDAW – without any reference whatsoever to what is appropriate in the case of abortion access – could be viewed as proof that the treaty is an incomplete system for the protection of women's rights as human rights.⁵⁵

While it is unsatisfactory as a sole basis for the advancement of reproductive rights, CEDAW can be of assistance in international feminist advocacy of abortion access. Although CEDAW lacks the insightfulness provided by the feminist contentions, its added value remains relevant to the struggle for reproductive autonomy. For example, Ireland and Poland have been frequently called upon by the CEDAW Committee to review the impact of their abortion law regimes. The Committee's contribution toward the substantive recognition of women's rights is that it functions as a watchdog that can single out those countries whose practices are incompatible with international standards; from that point onwards, feminist critiques of the international standards provide a more comprehensive analysis of the impact that domestic laws have on women's reproductive freedom.

⁵³ The World Health Organization has reported that approximately 47 000 women die due to unsafe abortion each year. (November 14, 2015) http://apps.who.int/iris/bitstream/10665/75173/1/WHO_RHR_12.01_eng.pdf?ua=1

⁵⁴ UN Department of Public Information, United Nations Fact Sheet Number 6, October 2000 (no longer available online), as referenced in Gerson, op. cit., p. 754.

⁵⁵ H. Charlesworth, et.al. *Feminist Approaches to International Law* 85(4) AJIL 613, 633 (1991).

Conclusion

The first basic claim is that liberal legal discourse is biased in favor of men. The United Nations' increased attention to women's substantive equality, dignity, and autonomy demonstrates that there is a global issue of women's inequality that ought to be addressed. The UN has made some efforts to raise awareness on this subject and to introduce a 'gender dimension' into human rights discourse. In particular, it has brought to the attention of the international community the fact that reproductive rights in several countries lack a feminist perspective. At the same time, the CEDAW of 1979 has been a catalyst for important feminist observations on the importance of incorporating a gender dimension into legal discourse. Yet, throughout its history, CEDAW has been unable to bring about a radical change in legal reasoning and decision-making: perhaps because, as part of the male-dominated system of international law, it lacks the critical impetus that underpins feminist enterprises.

In concluding remarks, making sure some change is initiated and how UN has helped India as a country for the protection of women and their reproductive and sexual rights and their involvement of the same. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise her child.

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