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“WOMEN AND THE RIGHT TO INDIVIDUAL AUTONOMY”

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Abstract

The Hon'ble Apex Court in its recent landmark case declared Privacy to be a Fundamental Right per se. While elaborating what privacy means, the right to have individual autonomy was held to be an essential component of privacy. This judgment was immediately interpreted to be of far reaching consequences especially upon rights of the LGBTQ community and a wide array of women's rights. This article seeks to discuss what the significance of personal autonomy is when it comes to women in India, keeping in mind the social, legal and cultural contexts they are subject to and whether law alone is enough to help achieve these rights.

Introduction

The Indian society has been undeniably infected with archaic patriarchal notions for a significant amount of time. Over that period these ideas got deeply socialised into the mind-sets of the people- both men and women alike, unquestioned, which led the Indian society to not only become a male dominated society but also gave birth to a systematic discrimination against and unfair suppression of the female segment therein. This problem was however recognised by law makers who tried to tackle it by introducing various legislative and policy measures that thrived to provide women an equal status in the society by aiming to safeguard them against discriminatory and oppressive societal practices and norms and at the same time attempting to uplift them and bring them at par with the status enjoyed by the male population.

However, it was soon realised that merely engraving these rights in the letter of law was not

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enough. There was still a huge gap left between the actual practice and what the law aimed at achieving. Despite firmly concretising the rights of women and the promise of equality, it was disheartening to see that the actual realisation of these was still a far-fetched dream, mainly owing to the reason that these ideas were still not accepted by the male driven society which continued to deprive women of their fair share.

This is where the role of the judiciary can be said to be a crucial one which is the very theme that this paper seeks to explore. The judicial organ has time and again proved its importance, especially when it comes to interpreting the law to give the citizens the desired protection and benefit of the laws which would have otherwise resulted in a futility of the efforts of the law makers that in the absence of proper implementation would only go into vain. Through this research the author would study the approach of the judiciary in this regard and how far has it been successful in its attempts to battle the patriarchal norms, bringing the ideals envisioned by the lawmakers into reality and minimise the gap between theory and practice.

Meaning and scope of the ‘Right to Individual Autonomy’

When we speak of autonomy, it refers to a kind of freedom. Thus, individual autonomy would mean to be a certain freedom over oneself. This freedom can be of thought, actions, beliefs, expression, way of life, and so on and so forth. So an individual can be said to be free in the true sense, when they have the freedom or autonomy to be themselves, without any interruption of extraneous forces or considerations.

In a way, individuals, in their entirety, can be summed as a culmination of the decisions made by such individuals for themselves. These decisions are conscious or subconscious choices that are made every living moment. These choices may range from the most miniscule ones like what to eat, how to dress, where to go, etcetera, and may go upto life altering ones like- what career to choose, who to marry or whether to even get married at all or not. But what if one is not able or rather allowed to make these choices? What if the decisions that one makes, are mostly influenced by external manipulative forces? Would such decisions be attributable to such individual as their own? And then can it be said that that individual is able to manifest their true self? And most importantly, can they be said to be *free*? The answer is no. What can be gathered from these questions is that individual autonomy eventually boils down to the ability to make one's own choices, motivated and inspired by one's own belief systems and thoughts alone and not those of others. It is this capability which is the essential test of true freedom.

In India, the Apex Court has interpreted the Right to Individual Autonomy to be a component of Right to Privacy². The concept of privacy has been defined quite simply as the right of individuals to be left alone. Also, it has been described as the right of the individual to make personal choices and to assert their identities.

Hon'ble Mr. Nariman, J. provides three parts to this right³:

- (i) privacy in relation to the physical body, such as restrictions placed on movement, surveillance of movements, etc.
- (ii) privacy in relation to private information and materials of an individual; and
- (iii) the privacy of choice that is the freedom to make one's most intimate and personal choices.⁴

Further, Justice Chandrachud eloquently stated, "...*The best decisions on how life should be lived are entrusted to the individual.The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions.*"⁵

According to Article 21, liberty enables the individual to choose what to eat, how to dress, or what faith he or she will follow. It was further held that it is both a negative as well as positive obligation of the state to take all necessary steps to protect the liberty of its individuals.⁶

Significance of the right to individual autonomy with respect to women

After having gone through the above definitions and interpretations of what "autonomy" is, it can be safely stated that the concept is not something relatable for the average Indian woman. Infact, the absence of autonomy and control over one's own life decisions is quite an apparent and omnipotent theme running throughout the lives of majority of women across India. This handicap is particularly more highlighted when seen in contrast to the relative freedom enjoyed by the opposite gender (here, the male gender). This disparity and inequality of status between men and women can be easily traced to the patriarchal setup, deeply rooted at the core of the Indian society and has been sadly so, came to be known as a peculiar feature of it.

² *Justice K.S.Puttaswamy (Retired) v. Union of India*, 2017 10 S.C.C.

³ "The Indian Supreme Court Declares the Constitutional Right to Privacy" by Jayna Kothari, (OxHRH Blog, 4 October 2017) available at: <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-declares-the-constitutional-right-to-privacy/> [accessed on April 10, 2021]

⁴ *Supra* note 2.

⁵ *Supra* note 2.

⁶ *Supra* note 4 .

On a study of the entire jurisprudence of women's rights in India, it can be observed that the whole fight has been about equality and autonomy be it the right to choose a life partner, or equal opportunities at place of work, or the right to make reproductive or sexual choices; the list is endless. It is more than often seen that the external forces emerging from the informal⁷ societal structure and cultural norms hold such power over women that they themselves do not have the power to exercise their own authority themselves. This external power over one's power while gives a false sense of having a choice and making one's own decisions, they in reality tend to have the very opposite effect as the resultant product is nothing but the compulsion to be swayed by the extraneous considerations. Women no doubt face harsher sanctions, greater disapproval and more hardships in merging into the society back which further creates fear of breaking societal norms and asserting one's autonomy. This not only constitutes an unconstitutional restraint upon the latter group to exercise their rights and but also prevents them from leading a dignified life.

The extent to which an individual can actually exercise their rights has its roots in the status they enjoy in the society. While the preambular concepts of equality of status and opportunity lie at the core of the Constitution, when it comes to women, it seems as if those virtues and that of "individuality", "autonomy", "independence" and "privacy" have failed to perforate the strainer of the Indian society. In this light, redefining "autonomy" and the rights that come along with it, is a much needed and welcomed step.

Hindrances to Autonomy of Women

Social and cultural practices: Eugene Ehrlich distinguished between societal norms and legal norms. He recognized the inadequacy of legal theories that viewed law merely as a sum of statutes and court decisions. He argued that legal theories that recognized law only as a sum of statutes and court rulings gave an incomplete picture of the legal reality of a community. Eugene Ehrlich distinguished between societal norms and legal norms, noting that legal theories that view law as only a series of statutes and court cases fail to capture the reality of a society in law. "Living law" is the one that regulates social life and it is often very different from the norms for decision applied by courts, and may sometimes attract far greater cultural authority than can be found in the courts. Norms such as these are known as the "living law," and he believes that it is often the "living law" that regulates social life and that its norms may be very different from

⁷ Here, 'informal' means 'not formally established by law'.

the norms in use by courts, and may sometimes attract far greater cultural authority than lawyers could ever comprehend.

Drawing context from this theory a very similar parallel can be drawn about the Indian society. It seems that the legal norms and societal norms of conduct differ from each other due to which the rights of women get compromised. It must be noted that not all these informal norms have legal acceptance and usually never withstand the test of law in courts, however, it cannot be denied that they indeed govern the day to day life of individuals and affect the minutest decision made by them. The practice of dowry, bride burning, honour killings, etc. are only a few examples to start with. Nevertheless, these societal norms or norms of conduct end up having an overbearing effect upon the rights of women which have been guaranteed not only by the constitution of India but several other international instruments.

Non conformity with societal norms is often met with social sanctions such as – not being a desirable candidate for marriage, disapproval from society at large, withdrawal of support from family or spouse, attack on one's character (subjection to character assassination), social stigmatization and ostracization,

Morality and women's autonomy: the expression of sexuality in general has been and still is an uncomfortable subject for the Indian society. That discomfort has been comforted by putting restrictions on the expression of sexuality and the restriction is imposed by establishing sexuality as a moral sin or wrong in the eyes of the society at large and thereby inducing an indirect discouragement through fear of societal disapproval. Such disapproval takes a different dimension in case of women, as their "chastity" has been one of the major virtues defining their existence and in weighing them on "scales of morality" of the society.

While it is important as a society that we prevent and reprimand every wrong committed against women, especially those violating their dignity and bodily integrity, it is also crucial to let them exercise an authority over themselves and make their own decisions and choices. While it is the duty of the society to protect its members from any wrong, it is certainly not their right to interfere with the personal autonomy and individuality of any member in the name of such protection. Such non-legal encroachments upon the autonomy of women amounts to the violation of the sacrosanct fundamental rights guaranteed by the Constitution of India under Articles 19(1)(a) and 21. This unnecessary interference and focus on "*Chastity*" by self-proclaimed vigilantes of women's honour has led to a point where the chastity of women is not anymore as something of their own

to keep but has become the “property” of others to protect. The chastity element has attained a distinct identity, separate from its holder and so much so that instead of questioning the moral compass of the violators of such “chastity”, the society has started using the chastity of the woman as a measure of their virtuousness and ironically enough, made it a matter of dignity and honour of the society at large. It is because of such instances that women often find liberation in exaggerated expression of their sexuality through art, vocalization and other mediums.

Regressive and outdated legislations: While it is still understandable as to why the society is finding it difficult to come out of its archaic values which have been a part of their socialization from generation to generations, it is hard to comprehend that why such informal and unconstitutional norms that exhibit a blatant inequality *prima facie*, still find place in the statute books of law in a welfare state like India, which has time and again sworn its allegiance to the Rule of Law and Principles of Natural Justice. Survival of regressive laws discriminating against women is almost a betrayal on part of a welfare state like India towards its citizens.

One of the most patent violations of autonomy and privacy of women is seen in Section 375 of the Indian Penal Code, 1860, which carves out an exception for “*marital rape*” i.e., non-consensual sexual intercourse by a husband with his wife. This exception was initially extended only for women above 15 years of age, which meant it was an offence if committed against girls below 15 years, but this was later extended upto the age of 18 years by the Supreme Court⁸, on the grounds of arbitrary distinction between married girls of different age groups. However, the court categorically clarified that this decision of the division bench would not be applicable to married girls over and above the age of 18 years as that was not in issue before it. But despite this, while delving into the reasons for extending the age limit, the court laid down the foundation for unconstitutionality of the exception of marital rape.

The above-said exception suffers with various anomalies such as, legitimising of child marriage, violation of international instruments such as CEDAW⁹ and CRC¹⁰ and inconsistency with other national legislations¹¹ which penalise sexual intercourse with a minor and sexual abuse,

⁸ *Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013, decided on October 11, 2017 (Madan B. Lokur and Deepak Gupta, J.J.)

⁹ The Convention on the Elimination of all Forms of Discrimination Against Women, 1979. It was signed by India in 1980 and ratified in 1993.

¹⁰ The Convention on the Rights of Child, 1989. It was ratified by India in 1992.

¹¹ Such as- Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and the Protection of Women from Domestic Violence Act, 2005 (PWDVA),

respectively. Most importantly, the exception disregards the fundamental rights embodied in Articles 14 and 21 by creating arbitrary distinction between women suffering the same wrong, on the basis of marital status and age.¹² The right to consent, or indeed to refuse consent, to sexual intercourse is innate to a person's sexual autonomy and bodily integrity. Hence, it is a fundamental personal right, entitled to state protection.

Another example of an overlooked legislation is the provision of Section 9 under the Hindu Marriage Act, 1954, which gives the remedy of restitution of conjugal rights to a person whose spouse has deserted them or withdrawn from their society without any reasonable excuse. This remedy has been under the constitutional radar twice as it was contended to be violative of Articles 14 and 21 of the Constitution of India. The question first came before the SC in the case of *Sareetha v. T. Venkatasubbaiah*¹³, wherein the petitioner was an actress and due to her work engagements had to live separate from her husband for five years. She contended that the remedy not only stopped women from choosing their careers, but was also often used as a coercive tool for securing sexual cohabitation in the name of “marital obligations”. While in the said case, the court agreed with the petitioner and declared the provision to be unconstitutional, the decision was later reversed by another bench in the case of *Saroj Rani vs. Sudarshan Kumar Chadha*¹⁴. There the court opined that the remedy of restitution of conjugal rights was to prevent breakdown of marriage and the defence of reasonable excuse had been clearly given by the statute. It is submitted that this interpretation of the SC is erroneous and only strengthens the patriarchal notions.

Other contributing factors include unequal treatment at work place, unsafe environment due to physical and sexual vulnerability, fear of violence from within or outside the family, societal stigmatisation, fear of social ostracization, lack of education and awareness of rights, lack of economic independence, burden of societal expectations and family responsibilities, victim blaming, Pre- set gender roles and norms, internalised misogyny, glorification and idealisation of subordination of women in media by sexist stereotyping of women to be submissive, dependent, needy and incompetent and many more.

¹² Socio-Legal Review, “Independent Thought v. Union of India and the Unconstitutionality of Marital Rape”, Nov 6, 2017, available at: <https://www.sociolegalreview.com/post/independent-thought-v-union-of-india-and-the-unconstitutionality-of-marital-0is%20not%20rape%E2%80%9D> [accessed on April 7, 2021]

¹³ AIR 1983 AP 356

¹⁴ AIR 1984 SC 1562, (1984) 4 SCC 90

Special Role of Judiciary in realisation of Rights of Women and Asserting their Autonomy

In the *Puttuswamy* case¹⁵ keeping the dignity of an individual as one of the core rights guaranteed by the Constitution, the court developed that jurisprudence around right to privacy and held individual autonomy to be included in such a right. However, when it comes to women, this is not the first time that the courts have attempted to secure their autonomy in making decisions pertaining to their own life. Although scattered, various attempts have been made in the past of this nature in the form of securing reproductive rights¹⁶, right to choose a life partner¹⁷, right to get married¹⁸, right to bodily integrity¹⁹, protection from sexual harassment²⁰, right to maintenance²¹ and the list goes on.²²

The Court in the *Puttaswamy* case²³ as well referred to several previous key decisions around women's autonomy over their bodies and sexuality as part of the right to privacy, including the right of women to work during at night²⁴, protection of reproductive rights²⁵, the right to bodily integrity²⁶, the rights of unwed mothers²⁷ and the right to decide regarding marriage, children and the choice of a family life.

According to the Court, these were matters of one's most intimate and personal choices and essential in the pursuit of happiness, which is grounded in autonomy and dignity. Specific references to protections of one's sexuality, sexual orientation and gender identity were also made in this regard. Hon'ble Mr. Bobde, J. held that- "*the right to privacy is confined not only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he or she is*".

¹⁵ *Supra* note 2.

¹⁶ *Air India v. Nargesh Meerza* (1981)

¹⁷ *Shakti Vahini v. Union of India* on 27 March (2018)

¹⁸ *CB Muthamma v. Union of India* (1979)

¹⁹ *State of Maharashtra & Anr. v. Madhukar Narayan Mardikar* (1990)

²⁰ *Vishaka & Ors. v. State of Rajasthan & Ors.* (1997), *Delhi Domestic Working Women's' Forum v. Union of India & Ors.* (1994)

²¹ *V. Tulasamma & Ors v. Sesha Reddi (Dead) By L. Rs* (1977), *Daniel Latifi v. Union of India* (2001).

²² International Women's Day: 30 SC Judgments on Women's Empowerment, available at: <https://www.livelaw.in/know-the-law/landmark-decisions-of-the-supreme-court-that-changed-the-course-for-women-in-india-153592?infinetscroll=1> [accessed on April 13, 2021]

²³ *Supra* note 2.

²⁴ *Anuj Garg & Ors v. Hotel Association Of India & Ors* on 6 December, 2007

²⁵ *Suchita Srivastava & Anr v. Chandigarh Administration* on 28 August, 2009

²⁶ *State Of Maharashtra And Another v. Madhukar Narayan Mardikar* on 23 October, 1990

²⁷ *Abc v. State(Nct Of Delhi)* on 6 July, 2015

The Way Forward

The broad delineations of the rights of privacy given by the Supreme Court is one of the most impactful and promising contributions to feminist jurisprudence till now and is already witnessing the huge potential it has for the advancement of women's rights, as it is being used to challenge the criminal law exemption to marital rape and to challenge the constitutionality of outdated family laws that restrict women's rights.²⁸ A positive impact of the judgment can already be seen in the Medical Termination of Pregnancy (Amendment) Act, 2021- which has now given even unmarried women the right to access medical assistance to terminate an unwanted pregnancy. It can however not be ignored that the legislature deprived these women of such a basic fundamental right to personal autonomy, healthy life and dignity for almost half a decade.

This right to individual autonomy is an umbrella right that encompasses various human rights within itself. It helps an individual assert their individuality and make their own choices. The right to live a life of liberty, free of any undue interference be it from the State or the society, is the fundamental right of every human being and the key to a dignified life. It can be said to be an inalienable human right and hence a part of the values comprising of the Basic Structure²⁹.

While making laws for the benefit of women and giving them wide interpretations are crucial for upholding rights of women, but the real autonomy of women lies in the exercise of the rights. The biggest hindrance that is recognised is the informal structure of the society constructed by socio-cultural norms prevailing in the society which can only be battled through gradual initiatives of bringing reforms at grass root levels. Scrapping down regressive, outdated and demeaning legislations, gender sensitization, imparting of sex education amongst adolescents by discussing the scientific and psychological aspects and not socialising it as a moral compass into those young minds, refraining inappropriate objectification and representation of women in media and State along with NGOs to conduct legal awareness drives are a few suggestions to begin with.

In the end, the right to individual autonomy, is nothing but the right to choose; it is when one ceases to have a choice, it cannot be said that they are free in the true sense of the word. Every individual, including women, have the right to freely make choices and assert their individuality. "Choice" lies at the bottom of every democratic nation; any interruption that hinders such a choice is undemocratic and is liable to be eliminated by the state and the society at large.

²⁸ Supra note 4.

²⁹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461