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Sexual Autonomy of Married Women in India: Contemporary Constitutional Challenges

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ABSTRACT

The female body and its autonomy is a contested and debated space. It, however, is an arena where it is construed differently in different contexts and is a site for massive power struggles. The body, being intensely personal, rests within itself the manifestation of social relations, gender, caste, and community. The polarity between a female's mind and body is a fabricated and socially conditioned one. More than often, the manner in which a woman associates herself with her body and its subsequent manifestation results in her rights being violated and suppressed. This further leads to her mental and physical spaces being hindered. Such a division into mind and body categories leads to a loss of autonomy over the body and personhood. Control of society also renders the female body powerless and violates their bodily integrity.

This paper aims to explore the connection between the female body and its rights along with the complex yet complementary relationship between sexual autonomy and women's empowerment in India. The paper proposes to provoke a discourse over sexual autonomy and consent when it is meaningfully given, with full knowledge and understanding of its consequences and understanding it, especially through the lens of fundamental rights.

Keywords: *Sexual and Reproductive Autonomy, Constitutional Legal Challenges, bodily integrity, marital rape, abortion, social stigma.*

I. INTRODUCTION

(A) Defining Sexual Autonomy of Women:

Sexual autonomy means a woman's intrinsic right to self-governance and control over their body without the interference of an outside agency.

It includes the following rights-

1. Expression of Self-Identity- This is the sexual behavior that is defined by women themselves. It includes a succinct expression of their mental, physical, and

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psychological spaces and desires.

2. Sexual well-being- This is the right to a healthy form of sexuality that is free of coercion, violence, or disease. It is the inherent right to seek a safe and satisfying sexual life.
3. Make informed choices with respect to sexual and reproductive health- This inadvertently includes a choice in marriage, raising the upcoming questions- of whether with whom, and when to marry. Most importantly it is to behest the right to sexual reproductive services which are sensitive to the rights and requirements of women.
4. A life clear and unfettered from fear of violence- This includes the environment of living in an imperiled and secure arena and a life that is not subjected to sexual or physical violence. Emotional and sexual violence inside the home by spouses is also condemned here.
5. Education on sexual autonomy and bodily integrity- It includes awareness of bodily integrity which would, in the long run, allow women to take care of their own bodies and allow them to take pride in being themselves.

While sexuality and issues relating to it have come up periodically in the past, it is only now, with the growing feminist concern with the rights of women to their lives and bodies, that sexuality has gained a more enduring prominence.²

However, the right to sexual autonomy does not only mean protection against sexual violence in and outside the personal zone but includes within its ambit, protection of their respect and fulfillment of basic and intrinsic needs. The guarantee of freedom from sexual violence, discrimination, and coercion in and outside relationships, as well as control over one's own body especially while dealing with sexual interactions with others is a complete comprehensive approach to the sexual autonomy of women. To ensure a multifaceted approach towards this issue, early and proper sex education and reliable access to such information and related medical services are also important.

II. A HISTORICAL PERSPECTIVE

Since early times, a woman's role has been limited to procreation, her role as a nurturer has been in conflict with her desires which has made it difficult to assemble these roles because of subjugation and dominance by the male. Analyzing the ancient Indian literature, the crack in the psyche of the patriarchal male propels him to desire as well as fear the woman who is uncoupled from her designated role as houseworker and mother. Curiously, such a crack in the

² Mary E. John, Janaki Nair, "*Sexuality in Modern India: Critical Concerns*, Commun. Res., 4 (1999)".

minds of the male portrays his insecurity and loss of identity. In this manner, the nurturing trait of the woman is idealized and respected but her sexual powers are dreaded. “A woman is idealized as a *Sita* or *Anasuyas* (representing faithful wives) but is dreaded as a *Tilottama* or a *Urvashi* (representing free and unaffiliated women)”. Her sexuality is glorified for fertility and procreation but the bodily traits which make her sexually attractive to males are manifested as a peril to male autonomy. Moreover, her strengths and weaknesses are gauged by how sexually fragile, ideal, and vulnerable she is. As a daughter, wife, and mother, the woman is seen to be in incessant need of a man. It is not astounding that an unmarried adult woman is a mystery even to the social intelligentsia. With a brief analysis of the ancient literature of our country, an interesting fact on gender identity comes to light, which is that as the ages progressed and the patriarchal setup came into place, women's sexuality came to be depicted in a very negative light. The progression of this light is invariably linked to the systematic growth of the patriarchal society.

This can further be shown through the marked gap in the approach toward the autonomy of women's sexuality from the *Vedas* to the *Dharmashastras*. According to the Vedic texts, sexual union was considered a unique and prime representation of creation as well as creativity in males and females. Association of a woman's sexuality, both with fertility and companionship as well as personal emancipation was very well portrayed in the Vedic age. The girl child at this age also had the freedom to choose the husband of her own choice when she had reached maturity. Boys and girls associated freely at various festivals held over the course of the year with the objective of finding a partner for themselves.

Over time, and with the growing dictate for male progeny, the woman's body solely became a mode of begetting sons. “Male lineage became an all-important factor in society. The area of ancestry became absolutely paternal wherein, past memories, obligations and other related ceremonies towards the ancestors began to be concentrated around the male lineage”. The fecundity of women naturally became a big obsession. It began to be viewed as a source for obtaining sons, a kshetra whose fertility had to be maintained and exploited. Perpetuation of males became the purpose of a woman's body.³

Thus, the levels of socially acceptable behavior were transformed. The male-dominant model got even more elaborate and polished with time. ‘Female’ in the *Dharmashastra* and in the *Kamasutra* are poles apart, it is as if they are two separate beings. Vatsyayana, the author of the *Kamasutra* authorizes a broad range of carnal pleasures, which include: female pleasure,

³ Surabhi D. Sheth, Women's Sexuality: A Portrayal from Ancient Indian Literature, 71 MANUSHI 14 16.

prostitution, and homosexuality, even explaining techniques for making the woman more comfortable and satisfying her sexual appetite by the use of certain aphrodisiacs, etc. It is here that the woman is equal in her ability for sexual pleasure and prerogative.

III. FEMALE BODY IN INDIA - SOCIAL CONSTRUCTION

The body of a woman, within the Indian context, is a zone wherein socially approved norms pertaining to the ideal woman are acutely embedded. Since the adolescence of a girl child, the chief objective of her socialization process is to imprint within her the appropriate code of conduct which sadly includes the horror of self-denial. More so, the process which is undertaken by the parents and family members is to train the girl early on so that she is able to see her own life primarily in terms of being serviceable to others. Such commands for the demonstration of a bodily self in day-to-day life are very clear-cut and defined in a full-fledged way by the predecessors. Thus, the manner in which women identify themselves with their own bodies becomes the root cause of their degradation and subsequent suppression in a patriarchal and male-dominated culture. A woman is primarily seen as a tool for the sexual satisfaction of her spouse and then to reproduce along with the complete and non-shareable role of child-rearing and nurturing. This becomes her entire life and status. Thus, her position in society is marked and defined by this predominant and principal bodily function.

In this intensely embedded system of patriarchy, the status of a woman is defined with respect to being subordinate to men where virginity and chastity are considered virtues and constitute a benchmark to mark her standard in society. A man's 'macho' behavior is interpreted and accepted as a ticket to inflict violence on the opposite sex whereas a woman's behavior should be good and obedient, not to forget chaste and pure. Unfortunately, the archetypal depiction of a 'good woman' is still the kind of woman who maintains an aura of silence, adjusts, and compromises herself and her needs in order to 'uphold the dignity' of the family, wherein her nature is sacrificing and obedient.

Such a social construct of the girl child begins very early with household identities from where her primary identity is made to be linked. Early-age marriage is a social norm that defines the status of the girl up front. In several rural parts of India, nearly half the girls are married off very early by their families, upon just reaching adolescence. "Consequently, adolescent girls procreate early so the question of autonomy becomes null". She is expected to negate herself and her desires and submit herself to her husband and other household duties. Since sex and sexuality is a taboo in society women do not have the kind of right through which they can express their choices and desires. Even more so, the socially constructed value system stipulates

that women do not have the kind of autonomy to make sovereign choices with regard to their bodies or sexuality.

They are acclimatized to the extent where they themselves begin to believe that everything that happens within the space of the four walls inside the home is 'personal' and should not be deemed 'public' which would hamper the honor and dignity of the home and bring shame to the family. They do not have control and autonomy over their sexuality and cannot decide freely on matters related to their sexuality including sexual and reproductive health, free of coercion, discrimination, and violence.⁴

These are the reasons through which the female body grows to become the pedestal upon which the Indian family is erected and the whole concept of gender inequality comes into play where she unknowingly begins to negate her own existence.

Hence, the woman's mind and body are persistently molded to accommodate the expectations of society where her bodily integrity is severely violated.

IV. ACQUIRING GREATER SPACES

Over the past few decades, collective and combined efforts of the women, several organizations and other help groups have paved the way forward focusing on bringing about some change in the lives of the women claiming the rights to sexual autonomy and bodily integrity. A recent shift is now being seen with the emergence of spaces that enable discussions and discourse building on issues pertaining to women's sexuality and reproductive health, along with exploring the zones of desire and consent.

- The Vishakha Judgment, 1997-

The Supreme Court in 1997 laid exhaustive guidelines for sexual harassment at the workplace and recognized it not only as a personal wrong and injury towards the distressed woman but also as a severe breach of her core fundamental rights. As per the guidelines of the Court, institutions, as well as employers, are held accountable and blameworthy if they fail to implement preventive as well as remedial steps in order to create the workplace as a safe space for women.

Yet, the implementation process is a deeply problematic area in the sense that most of the institutions have not set up complaint mechanisms or redressal committees to actively address and intercept sexual harassment. Even if such mechanisms do exist, they are practically

⁴ Surabhi D. Sheth, *Women's Sexuality: A Portrayal from Ancient Indian Literature*, 71, Manushi, 14-23, 1992.

ineffective or constitute no powers. The majority of the women thus, either suffer in silence fearing loss of their jobs, others quit when things get out of hand. In some cases of extremity, women choose to end their life. Incidents of sexual harassment in the workplace are especially worse in the private sector where the perpetrators are usually people wielding power and other privileges.

- The Domestic Violence Act, 2005-

The bill of the said act aimed at inclusive protection of women from all forms of violence, namely, domestic, physical, sexual, verbal, and economic in nature. This bill was the culmination of a decade-long struggle and campaign by women-centric bodies, NGOs for domestic violence, and other legal bodies.

The passing of this Act was a thoroughgoing legislation that provided women with a civil law as a remedy to shield them from the clutches of domestic violence. It covers broadly four areas-provided with the exhaustive definitions of domestic violence and domestic relationships and to obtain orders of protection with special provisions for ‘protection officers’ and ‘counselors’ which recommend the creation of guidelines for the class of service providers and other special Magistrates who deal directly with the cases of Domestic Violence.

Sexuality, as an issue relating to the autonomy of women, is a lesser-discussed and addressed area that needs to be fully explored in order to understand the concept of autonomy. Sex, being a little-discussed topic and a taboo in Indian society become an arduous subject which is a primary reason why research on sexuality is very minimal. Furthermore, it is considered a less important issue as compared to the more critical problems, such as war, poverty, climate change, etc. The state also acknowledges a limited grasp of sexuality, so structural ideologies remain moot, especially under the patriarchal setup. “Sex is considered acceptable only through the lens of marriage, otherwise, pleasure, desire, expression of sexual behavior, etc., find no place which means that sex is only an instrument for procreation, canceling all other aspects of pleasure which are an integral part of the act”.

As a result, women are denied any rights which are related to their own body or sexuality. They are merely considered and treated as property of the men in their lives. It is through them that they acquire any form of agency. Unfortunately, they do not have any autonomy and cannot freely decide what they want and desire from themselves outside the purview of marriage, and even if it is within the bracket of marriage, it is usually coerced.

(A) Demystifying Consent-

When one person voluntarily gives assent or approval to the desire or the proposal of another,

it is termed as Consent. It is generally used as a term of speech, each area having its own unique definition and usage, such as in law, research, medicine, or sexual relationships.

In order to make sexual relationships healthy, communication, honesty, and respect are important. It further eliminates the power or control that one partner might feel over the other if consent is not given or consent is coerced, which increases the feeling of autonomy over one's body, mind, choices, and desires.

The most problematic area is that in any manner of sexual consent, the presumption of 'giving' it rests on the woman, which leads to the widely prevalent notion that sex is 'done' to women by men. This further acknowledges another notion that women do not initiate sex, which cannot fundamentally impossible because sexual desire is as basic as the need to eat, sleep etc. Virginity is another social construct that makes desire non-existent for women because as explained above, chastity is considered a virtue which operates against the dominant male narrative.

Hence, women are so socially conditioned into believing that they have no sexual agency of their own which is why such consent need not be understood, discourses are lesser held and this deeply embedded issue is considered 'not so important'.

In India, the law does not contemplate the absence of consent in marriage as according to Lord Hales's theory, a woman while marrying consents to all sexual activity which need not be given every single time. Her consent is implied permanently. Nothing is farther away from the truth than this theory through which non-consensual sex is not considered a crime in the country. This actually takes every sexual autonomy of a married woman, who may or may not want to engage in the sexual advances of her spouse within her entire married life. A distinction here, of the public and the private space is created which is further explained through the following spaces.

Consent is a crucial component, but it does not operate through an 'all-or-nothing' pattern but has to be harmonized and balanced keeping in mind other important factors such as the autonomy of a person, rights of others, etc. Especially in rural areas, the blot circling the female body and other related issues actually prevents women from obtaining any information that is connected to their bodies and sexuality. "Another disturbing fact is that women exhibit increasingly low levels of awareness over their own body, health, and consent, including consensual or non-consensual sex, contraception, pregnancy, etc".

Since there is a huge caste/class barrier in the matter of ingress, a large number of women have a weak approach to sexual healthcare provision. One major reason behind it is their low self-esteem, which is conditioned early on through society and also affects their reproductive choices

and the capability to make independent decisions.

(B) The Constitutional Position:

The two most recent petitions before the Delhi High Court, namely, *RIT Foundation v. Union of India* and *All India Democratic Women's Association (AIDWA) v. Union of India* asking for marital rape to be criminalized and be made an explicit offense are no doubt, a direct consequence of the government's denial to take notice of the monumental report by the *Justice J.S. Verma Committee*. This committee was established as a consequence and upshot of the horrifying Nirbhaya gang rape in 2012. The government, however, has since stated that criminalizing marital rape will pose a hazard to the pious institution of marriage, several experts have interpreted this view as unsustainable.

On December 16, 2012, only after a week after the gang rape of a girl who was a paramedic, led to country-wide outcry and protests, the then United Progressive Alliance (UPA) government swiftly constituted a board which was steered by Justice (Retd.) J.S. Verma to recommend and submit "possible amendments to the Criminal Law to provide for quicker trial and enhanced punishment for criminals committing sexual assaults of extreme nature against women". The output, after receiving about 80,000 suggestions, was a historic document consisting of 644 pages, completed within 29 days, recommending across-the-board changes. Whilst most of its propositions helped to configure the *Criminal Law (Amendment) Act*, which was passed in 2013, the most progressive and revolutionary suggestions within it, including the one on marital rape which would secure the sexual autonomy of married women to a huge extent, were neglected and further ignored.

While contending for the AIDWA and the RIT before the High Court lately, advocate Karuna Nundy cited from the Puttaswamy case that "privacy must not be a cover to conceal patriarchal mindsets".⁵

V. RECENT JURISPRUDENCE OF THE COURTS IN INDIA

The cases of *Anuj Garg & Ors v. Hotel Association of India & Ors* as well as *Navtej Johar v. Union of India*⁶ have held that 'discrimination on the basis of sex' is to be seen in the light of any form of discrimination which is based upon a stereotypical judgment and understanding of sex in question. Thus, females, not having autonomy over their own bodies is completely

⁵ Jagriti Chandra, *Key Judgements Puncture Government's Defense on Marital Rape*, THE HINDU, (Jan. 13, 2022 21:31 IST <https://www.thehindu.com/news/national/key-judgments-puncture-governments-defense-on-marital-rape/article38267927.ece>).

⁶ *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321, (2018) 10 SCC 1.

founded upon an archetypal understanding of the set prescribed gender roles in a patriarchal society- This is discriminatory under Art.15(1) of the Constitution of India.

Making reproductive choices is a woman's right which is an extension of 'personal liberty' and her physical autonomy and bodily integrity flow from her basic and inalienable right to life, dignity, and privacy under Article 21 of the Constitution. Furthermore, in the case of *Suchita Srivastava v. Chandigarh Administration*⁷, it was stated that "*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*".

Chandrachud J in *Joseph Shine v. Union of India*⁸ has held: "*(T)he delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny*".

Expression of a person's sexual desire is an integral part of the Right to Self-expression which is protected under Article 19(1)(a) of the Constitution. Misra, CJI in the case of *Navtej Johar v. Union of India* has held "*[A]rticle 19(1)(a) which protects the fundamental right of freedom of expression including that of LGBT persons to express their sexual identity and orientation, through speech, choice of romantic/sexual partner, expression of romantic/sexual desire, acknowledgment of relationships or any other means*".

The Supreme Court in *NALSA v. Union of India*⁹ has stated that "*Self-identified gender can be expressed through dress, words, action or behavior or any other form...subject to the restrictions contained in Article 19(2) of the Constitution.*"

VI. CONCLUSION

The body of a woman has remained a problematic aspect in the Indian context for decades. The severe split between the hearts and minds of the women and their mental, emotional and physiological needs has led to their personal spaces being hindered along with perpetual violation of their sexual and bodily autonomy.

In order to obtain some sort of semblance and integration between the minds and bodies of women, there is an urgent yet basic need to challenge the present social construction and conditioning especially around a few pressing areas viz. Women's bodies are only for begetting, women only need to work towards the satisfaction and enjoyment of men, women's sexual

⁷ *Suchita Shrivastava v. Chandigarh Administration* (2009) 14 SCR 989, (2009) 9 SCC 1.

⁸ *Joseph Shine v. Union of India* (2019) 3 SCC 39, AIR 2018 SC 4898.

⁹ *National Legal Services Authority v. Union of India* AIR 2014 SC 1863.

autonomy is threatening towards the dominant male social order, women's bodies are the storehouse for the honor of men and a community's shame/ respect/ idealism is linked to its women alone.

Despite several movements that have claimed the rights towards sexual autonomy of women, several areas still need to be additionally traversed and examined:

1. A specific and inclusive education curriculum in schools and colleges, especially in rural areas, on awareness about bodily integrity and its areas needs to be developed for adolescent girls and adult women, with a framework that would cover all aspects of sex education.
2. An orientation of a strong research sector in the Indian context should be built and the country's policy makers as well as other professionals, who have for long chosen to systematically ignore the issues related to the bodily integrity of women need to be informed about the same.
3. There is an urgent need to harmoniously work with the more reformist and liberal facets of religion so that they enable and support the issues relating to the sexual autonomy of women and not take this inherent freedom as a blow or an attack to their structured social set-up.
4. Further research needs to be initiated on the manner in which heightened awareness can be yielded to change the common and prevalent mindset that associates women's bodies as merely their physical role. A body needs to be seen as an assimilated whole where the mind and the body are in a single spectrum.
5. It is high time that affairs and matters of all forms of sexuality should be a part of the progress agenda of the country and not further cast aside by considering it a less important matter. For this, comprehensive analysis and investigation studies need to be taken up. Organizations specializing in the development sector and similar human rights bodies and agencies need to be involved in a proactive manner so that they begin to directly approach and address sexuality issues since they have by far, mostly neglected to perform their duties.
6. Strategic and programmatic arbitrations as well as Women Empowerment Schemes such as the Mahila Samakhya, One Stop Center Scheme, SWADHAR Greh, Mahila Shakti Kendras (MSK), etc. launched by the Ministry of Women and Child Development need to be supported and mirrored. This will enable and empower women, educationally and financially, across all strata to identify and protect their power and govern their own

bodies and minds without any outside agency.

There is an urgency for women to redraft, revise, and redo the chart of their own bodies in order to construct healthy and safe spaces for themselves which would enable them to encounter a renewed sense of self as nobody can help the person who does not want to be helped. Self-respect for their own bodies would thereby allow the women to put an end to the manipulation and degradation, which is essential for their as well as the country's well-being.
