UNPACKING CHOICE: WHAT DOES FEMINIST THEORY HAVE TO RETHINK AFTER THE NEMO/NARI NIKETAN CASES?

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This article attempts to raise some critical questions for feminist theory and politics in relation to abortion and a woman's right to choose in cases of mental disability - questions which have come to light in the Nemo / Nari Niketan cases before the Punjab & Haryana High Court, and finally the Supreme Court.

I. INTRODUCTION

Increasingly over the three hundred years of its existence as the cornerstone of liberal philosophy, the 'individuated being' has percolated into our common sense so as to become one of the most dominant forms of modern self-imagination. The critique that most

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[1] The contours and concepts of liberalism as a political philosophy has varied greatly throughout history from the understanding of Thomas Hobbes (1588-1679) - who argued that individual liberties must be curtailed by the establishment of an all powerful (`Leviathan') sovereign in order to secure peace — through the understanding of 'representative government' formulated by John Stuart Mill (1806-1873) — upto the critique of utilitarianism as a part of liberal thought on the basis that all individuals are not merely means to desired ends but ends in themselves by John Rawls (1921-2002). As such, while the earlier understanding of liberalism was based on clearly demarcated public and private spheres, it has now come to be centred on the individual. *See generally* JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO THE CATEGORY OF BOURGEOIS SOCIETY (1991). All the values traditionally espoused by contemporary liberal thought — liberty, equality, justice, constitutionalism, democracy, and rights are premised on the idea of the individual. *See generally* DAVID HELD, **PouncAL** THEORY AND THE MODERN STATE: ESSAYS ON STATE, POWER AND DEMOCRACY (1998).

feminists have made of liberal philosophy is centred on the conception of the "individual" as being at the heart of liberal thought. Feminists have argued that this supposedly value-free conception of the individual — which is claimed to be one of the central tenets of liberalism, ordaining every individual with a space which is free from any form of infringement — is not really value-free. Liberalism's celebration of the ethics of reason and rationality, they argued, has essentially been the celebration of male values and ethics. As such, the feminist critique of this figure of the individual at the heart of liberal thought has exposed the unstated assumption that this individual is necessarily male.' Despite this, feminist theory has not been able to question the centrality of the liberal ethos and has not generally concerned itself with effectively displacing liberalism or liberalism's central tenet of the 'individuated being' itself, perhaps because feminist thought was itself based largely on liberal philosophy.

The task of generating a feminist theory has therefore been to create a system of knowledge that starts from the experiences of women but which is moulded within a larger liberal frame of thought. It is in this regard that the pregnant female body raises a fundamental question in relation to how the notion of the 'individual' is theorized in liberal thought as it creates a dichotomy as to whether a pregnant woman should be considered as a single individual or as two separate individuals with different legal rights and obligations. If individuals and their rights are truly the cornerstone of liberal philosophy, then it is not clear what it means for liberal thought when a question is premised both on the rights of a pregnant woman as an individual as well as those of her unborn foetus as a potential individual. This dichotomy is of course at the heart of the pro-choice/pro-life debate

[2] *See generally* SIIVIONE DE BEAUVOIR, THE SECOND SEX (1989); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988). These are foundational works of feminist thought. It should be noted however that focusing on this feminist critique of liberal thought requires us to regretfully ignore the works of socialist feminists whose criticisms of liberal thought came from Marxism. Rosalind Petchesky concedes that socialist feminists have also not been able to come up with an alternative socialist feminist morality of its own. *See* ROSALIND PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM (1990).

on abortion — a debate which only begs the question raised here but does not satisfactorily answer it.

This dichotomy is further complicated when we consider that it is premised on the notion of a rights-based discourse where an `individual' has independent legal rights including the right to choose by virtue of being an 'individual'. For the purposes of this article, it is considered that individuals who have independent legal rights are those whose legal rights may be protected by means of their being recognized as having *locus standi* to litigate on their legal rights either by themselves or through their representative, acting on their behalf and in their interests.' This of course leads to the question of how liberal theory would resolve the multi-pronged questions that the right to choose can pose through the pregnant body of a mentally disabled female — this article seeks to explore this dichotomy from a largely Indian perspective in general and in relation to the "Nemo" (Nati Niketan) cases in the Supreme Court of India and in the High Court of Punjab and Haryana in particular. As such, it needs to be clarified at the outset that the Nemo/Nari Niketan cases are intended only as a context or backdrop to discuss the implications of such questions for feminist politics in general and in India in particular. This case brings out the theoretical trouble regarding not only the right of a woman to choose but also about who can be a consenting individual. This being the case, this

[3] There has been much debate as to what kind of entities can be right-holders with one of the most contentious areas being whether young children and the mentally disabled can properly be regarded as being legal right-holders. It has for example been argued that any theory of rights which could not accommodate the rights of children would be deficient to that extent, and that therefore it must be considered that all those whose interests are protected by law — whether these interests are protected by means of them being capable of litigating on their own behalf or through a representative — are to be considered as right-holders. *See* Neil MacCormick, *Children's Rights: A Test-Case for Theories of Rights,* in NEIL MACCORM ECK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 154 (1982). On the other hand, there are those who argue that this distorts the concept of a right since children and the mentally disabled lack the relevant control of the legal machinery, and that therefore the relevant rights should be seen as belonging only to those who can bring legal action on their behalf. *See generally* CARL WELLMAN, REAL RIGHTS (1995).

article would not enter into a detailed legal analysis of the decisions but would attempt only to consider the implications of such questions for feminist politics, namely, what effect such a conundrum may have on the feminist understanding of a woman's right to choose in general and in circumstances of disability in particular.

The cases themselves were centred around the interpretation of Section 3 of the Medical Termination of Pregnancy Act, 1971 *(hereinafter* the "MTP Act") and concerned a young mentally retarded woman (referred to in the cases as "Nemo") who had conceived a child as a result of being raped by the guards of a protection home in Chandigarh and had refused to abort the child against the advice of her doctors. Apart from the violence of rape, the factor that complicated the matter was the question of consent or choice — to what extent can a mentally retarded woman 'consent' in the context of abortion in the understanding of Indian law. Ultimately, the Supreme Court ruled in favour of Nemo allowing her to keep her child, overruling the decision of the Punjab and Haryana High Court to terminate Nemo's pregnancy. Though the Supreme Court's decision settled the questions of law raised in this particular case admirably, it does little to settle the overarching philosophical and theoretical questions that arose as a result.

As we have clarified previously, however, this article is limited to the questions this case raises for feminist theory and politics in relation to abortion and a woman's right to choose in cases of mental disability. This article commences with a brief introduction to the various concerns that the issue of abortion rights raises for feminist thought in general (see Part II — Abortion and Feminist Thought: Privacy and the Pro-Choice/Pro-Life Debate), before considering how the evolution of abortion rights in India has raised new and different concerns in this regard (see Part III - Abortion Rights in India). With this theoretical background in place, we summarize how the Supreme Court has considered the specific issue of abortion rights in cases of mental disability in the Nemo/ Nari Niketan case (see Part IV — The Nemo/Nari Niketan Cases). Finally, we discuss the issues this raises for feminist thought (see Part V — A Few Conundrums for Feminist Theory).

II. ABORTION AND FEMINIST THOUGHT: PRIVACY AND THE FRO-CHOICE/FRO-LIFE DEBATE

In this part, we will briefly consider some of the critical questions that the issue of abortion rights raises for feminist thought in general. At the outset, we have already noted the dichotomy that the pregnant female body raises in terms of whether it should be considered as a single individual with one set of rights or as two separate individuals with separate and different sets of rights; this dichotomy becomes further complicated in feminist theory when we look at the standard pro-life position on abortion.

The debate on abortion in the West in general, and especially in the United States of America, is generally encapsulated in the pro-choice versus pro-life positions. While the pro-life position - which is usually based on moral or religious grounds and opposes any legal right to abort, on the basis of the argument that the human embryo/foetus is a legal person and enjoys the right to life — is usually regarded as a conservative stand, the pro-choice position — which argues that women should have the right to freely choose whether to abort the foetus — is generally regarded as the standard liberal and feminist position. Since this article attempts to address how the issue of abortion raises critical questions for feminist theory, we will attempt to critically understand the pro-choice position as articulated in several registers.[4]

Kristin Luker used testimonies from American pro-life and pro-choice activists to draw neat divisions between them on the basis of their social class and their understanding of the status of the 'embryo'.[5] Her narrative is so neatly drawn that it seems that there is

[4] It should be noted that our focus on raising critical questions for the pro-choice position alone (and not for both the pro-choice and pro-life positions) should not be considered as our support for the pro-life position but is due merely to the fact that this article concentrates on raising critical questions for feminist thought on abortion.

[5] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 144 (1983).

virtually no place for any grey zones in the abortion debate. Luker's average pro-choice woman is an educated, middle-class woman, while a pro-life woman is a much less educated, church-going, conservative woman. This attempt to divide the debate into neat and uncomplicated binaries often has the effect of essentialising the rival positions into two often extremist camps thus further complicating the terms on which the issue can be evaluated. For example, Susan Himmelwelt describes how pro-choice activists have ended up describing the foetus as a 'clump of tissues' or a 'bunch of cells' in order to make a claim for abortion rights.' Adopting such a position has often led to completely obscuring a host of sentiments which women undergoing abortions experience. This is evident from Ruth Fletcher's case study of Irish women who chose to undergo abortion. As abortions are banned in Ireland, the contours of the pro-choice versus pro-life dispute created such strict boundaries between the two positions that pro-choice activists could neither sympathize with the choices made by women who underwent abortions nor understand the emotions such as guilt, loss or pain that these women suffered.'

This seems to indicate that the feminist movement as a whole must consider a different set of questions which may not have been resolved by the pro-choice versus pro-life debate but the answers to which may in fact have been hampered thereby. While the pro-choice movement has been associated with a perception of abortion as a straightforward procedure which a woman undertakes in pursuit of control of her reproductive capacity with little or no consideration for the foetus, the understanding of abortion that is connected with the pro-life movement is one of an evil act where the woman is responsible for the killing of an innocent unborn child, resulting in her feeling guilt and remorse. The lived experiences of women who have to choose whether or not to undergo abortion often places them

[6] Susan Himmelwelt, *More Than AWoman's Right to Choose,* 29 FEMINIST REVIEW 49-50 (Summer, 1988).

[7] Ruth Fletcher, *Silences: Irish Women and Abortion,* 50 FEMINIST REVIEW, 44- 66 (Summer, 1995).

in indeterminate grey zones between the two oppositions and do not neatly fit within the terms of either discourse. This often renders women very inadequate in terms of expression of their own sentiments and experiences in a political space. Both the standard pro-choice and pro-life positions therefore fail to look at the multiplicity of women's experiences and responses, and thus attempt to box women's experiences as well as their solutions. The liberal celebration of pro-choice as the sole vehicle of women's free choice, consent and agency may not, therefore, be a testimony of free choice. Thus, the question of free choice or consent raises critical questions for the standard feminist pro-choice position on abortion. This is further complicated, as we shall now see, by the fact that the standard feminist pro-life position on abortion is based on the right to privacy.

In America, the landmark 1973 Supreme Court judgment in the case of *Roe v. Wade,'* which struck down various state-level laws banning abortion, granted women the right to choose to undergo an abortion but also allowed states the right to restrict and thereby control this choice, thus limiting women's procreative choices.' Although the Supreme Court held that the *"light to privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnamyr* ° it rejected the claim that women should have *"an unlimited right to do with* [her] *body as* [she] *please[d]"*[il] on the grounds that the *"light of personal privacy ... is not unqualified and must be considered against important state interests in regulation"*.[12] The Supreme Court went on to hold that a *"pregnant woman cannot be isolated in her priva91'*[13] arguing that the state has an *"important and legitimate interest in protecting the potentiality of human life"* .[14] Subsequently, states began to use the latitude afforded by the judgment

[8] Roe v. Wade, 410 US 113 (1973) (hereinafter "Roe v. Wade").

[9] Frances Olsen, *Unraveling Compromise,* 103 HARV. L. REV. 40 (November, 1989).

[10] Wade, supra note 8, at 153.

Wade, supra note 8, at 154.

[12] Wade, supra note 8, at 159.

[13] Wade, supra note 8, at 162.

[14] Wade, supra note 8, at 163.

to legislate on abortion to restrict it by regulation; such regulations included the requirement of parental involvement in abortions by minors and restrictions on late-term abortions; most importantly, the 1976 Hyde Amendment barred the use of certain federal funds (in particular, Medicaid) to pay for abortions. Based on the rationale outlined in *Roe v. Wade,* the courts ruled that this did not necessarily constitute governmental interference in the exercise of the constitutionally guaranteed right to abortion since the right to privacy merely guarantees that the state will not interfere with one's right to choose to abort but does not necessarily guarantee state support for such abortions."

The lack of state support for abortions — while justified by the privacy rationale of *Roe v. Wade* — rendered abortion an expensive choice thus placing practical limitations on a woman's right to choose without calling into question the theoretical right to choose granted to women by the judgment. Catherine Mackinnon has therefore argued that the decision in *Roe v. Wade* was disappointing precisely because it made abortion a right within the right to privacy." This clearly meant that this right was premised on individual choice and therefore the individual would be completely responsible for undergoing abortions without any state support. Feminists have in general criticised the privacy doctrine on the grounds that it reinforces the structures that perpetuate the powerlessness of women by relegating women's problems to the realm of the private and therefore outside the purview of public discourse or state action/support.[17]

[15] *See* Beal v. Doe, 432 US 438 (1977); Maher v. Roe, 432 US 464 (1977); Harris v. McRae, 448 US 297 (1980); Rust v. Sullivan, 500 US 173 (1991).

[16] CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1987); CATHERIN MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 184 (1989).

17 We are referring to the long standing critique that second-wave feminism has made regarding the sharp distinction between the private and the public spheres since it is in the private sphere that inequalities are perpetuated. *See generally* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988). One of the most powerful slogans used by the second-wave feminists of the 1960s was that the "personal is political".

Having seen how the standard feminist position on abortion itself raises critical questions for feminist thought, it is clear that feminist theory must concern itself with the question of whether feminists should continue to argue for abortion rights along the lines of a woman's right to choose as a part of her right to privacy while at the same time recognizing the historicity of the concept of privacy which in practice often acts to the disadvantage of women. More importantly, the question is how feminists are supposed to argue that child-bearing and child-rearing are both individual (inasmuch as it is only the woman concerned who can choose whether or not to undergo abortion as a part of the woman's right over her own body and as such a part of her right to privacy) as well as social (in as much as child-bearing and child-rearing are not simply the responsibility of the woman but also of the state, family and social set-up of which she is a part). This would of course affect how feminists, liberal or radical, think about the questions of procreation, contraception and child-rearing which are so deeply caught between the two terrains.

III. ABORTION RIGHTS IN INDIA

In the Indian context, the issue of abortion gets further convoluted owing to the peculiarities of South-Asian socio-political dynamics where — as Nivedita Menon argues — "pro-choice becomes anti-women".[18] Based on her reading of the parliamentary debates on the Medical Termination of Pregnancy Bill, Menon argues that abortion rights in India followed a very different trajectory than it did in the West since abortion was introduced in India as a policy of population control due to concerns over India's increasing population rather than for the protection of the rights of women over their own bodies.' Since abortion and birth control were introduced more as techniques of population control rather than to protect the rights of women,'

[18] "Abortion: Where Pro-Choice is Anti-Women" is the title of the chapter on Abortion in NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 66 (2004).

[19] *Id.* at 71.

[20] *Id.* at 72-81.

they were more or less indiscriminately applied without having anything to do with a woman's right over her own body.' This is in stark contrast to the trajectory of the abortion debate in the West, where (as we have previously seen) the pro-choice position arose in opposition to a conservative discourse whereby abortion was considered immoral as a foetus was considered to be a life in its own right. As such, in India, the pro-choice discourse coincides with the statist agenda of population control which might prove to be dangerous for feminist politics.

This is especially difficult in India where the problem of female foeticide makes it difficult for feminist politics to reconcile with apparently freely made choices to abort female fetuses. Himmelweit argues that the right to choose becomes extremely fallacious when we see cases where women themselves with no external pressure decide to abort female foetuses or foetuses which may be born with certain disabilities.' Himmelweit asks whether we decry these as choices which are not free enough or do we argue for the right to life of the female foetus. Even if we are to agree that the right to choose in the truest sense of the term in any case remains largely unavailable to women in India, treating a woman as someone without agency or with no idea as to what is her 'real will' (as in the case of female foeticide) is a dangerous proposition. For many women therefore, the choice to undergo abortion is clearly because of structural issues. Often it becomes extremely difficult for women, especially poor working-class women, to bring up children as pregnancy might mean loss of livelihood for them. This is evident from S. Anandhi's case

[21] Very evidently there is a class angle to the way these population control policies are implemented. The huge uproar over injectable contraceptives Net-en and Depo Provera during the 1980s is an example of how these contraceptives were being experimented on lower-class women. Nandita Shah and Nandita Gandhi give a detailed explanation of how several employment guarantee programmes and relief work programmes were used, directly or indirectly, to introduce family-planning programmes. See NANDITA SHAH AND NANDITA GANDHI, ISSUES AT STAKE: THEORY AND PRACTICES IN THE CONTEMPORARY WOMEN'S MOVEMENT (1992).

[22] Susan Himmelweit, More than 'a Woman's Right to Choose'?, FEMINIST REVIEW 41 (Summer 1988).