REIMAGINING REPRODUCTIVE RIGHTS JURISPRUDENCE IN INDIA: REFLECTIONS ON THE RECENT DECISIONS ON PRIVACY AND GENDER EQUALITY FROM THE SUPREME COURT OF INDIA

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INTRODUCTION

In July 2018, twenty-year-old Sarita approached the Supreme Court of India seeking permission to terminate her twenty-five-week pregnancy.[1] Sarita was a domestic violence survivor and suffered from other health complications due to epilepsy. She had learned of her pregnancy at seventeen weeks and her petition stated that she had become pregnant as a result of her husband's refusal to use contraceptives. At twenty-one weeks, when she first approached the Bombay High Court, Sarita was just one week over the legal limit specified in the 1971 Medical Termination of Pregnancy (MTP Act), which permits

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[1] *See* Ritika Jain, *SC Says Abortion Amounts to Murder, Rejects 20-Year-Old Mumbai Woman's Plea*, THE PRINT (Jul. 16, 2018), https://theprint.in/india/governance/sc-says-abortion-amounts-to-murder-rejects-20-year-old-mumbai-womans-plea/83524/ [https://perma.cc/T36L-NFWR] [hereinafter Jain, *SC Says Abortion Amounts to Murder*]. Sarita's name has been changed to protect her identity.

termination of pregnancies on certain grounds up to twenty weeks.[2] When the court refused permission,[3] Sarita appealed to the Supreme Court, citing a recent Supreme Court decision—*Justice K.S. Puttaswamy (Retd.) v. Union of India*—which recognized the right to privacy as a fundamental right in India.[4] However, she was devastated when, at twenty-five weeks pregnant, the court issued a one-line order simply denying her permission for an abortion.[5] Troublingly, the two-judge bench stated that her request amounted to murder and that the "unborn child" should have been represented in court instead of Sarita.[6] The bench also questioned Sarita's competency to make decisions, claiming that if she had listened to the foetal heartbeat, she would have changed her decision, further implying that Sarita would ultimately come to "regret" having an abortion if she chose to reconcile with her husband in the future.[7]

Sarita's case stands in contrast to other landmark decisions by Indian courts. In the past decade, several groundbreaking judgments have recognized women's rights as decision-makers regarding their own reproductive lives. In cases on maternal health, contraceptive information and services, and abortion, the judiciary has recognized constitutional protections for women's right to reproductive health and autonomy and has even emphasized that women's right to life must be paramount in reproductive decision-making. Nevertheless, courts continue to understand abortion as a conditional right and have yet to recognize abortion as an essential element of pregnant persons' equality. This understanding of abortion is reflected in the framework of the MTP Act, which articulates exceptions to the criminalization of abortion in the 1860 Indian Penal Code (IPC) only on certain grounds and requires the approval of one to two registered medical providers for a termination.[8] The IPC is a colonial legislation and the criminal provisions on abortion have their roots in the 1861 British Offences Against the Person Act as well as an earlier

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[2] Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971).

[3] *See* Jain, *SC Says Abortion Amounts to Murder*, *supra* note 1.

[4] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

[5] *See* Jain, *SC Says Abortion Amounts to Murder*, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] Section 3(2) of the MTP Act stipulates that the approval of one registered medical practitioner is required where the length of the pregnancy is twelve weeks or less, and the approval of at least two registered medical practitioners is required where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks. Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971).

legislative prohibition on 'procurement of miscarriage.'[9] The judiciary has refrained from challenging the criminalization of abortion itself, creating serious barriers to access to safe abortion services for pregnant persons due to, *inter alia*, stigma and the chilling effect on providers' willingness to provide abortion care. However, the plurality opinion and several individual opinions in the *Puttaswamy* case recognized that reproductive rights fall within the ambit of the right to privacy,[10] building upon a 2009 decision on reproductive autonomy[11] as well as comparative law and international human rights law. In 2018, the Supreme Court of India followed this with two judgments on gender equality and autonomy: *Navtej Johar v. Union of India*[12] and *Joseph Shine v. Union of India.*[13] These judgments affirm the courts' constitutional obligation to strike down laws that reflect discriminatory stereotypes and infringe upon women's sexual autonomy, which encompasses the right to make reproductive choices. We argue that together these cases create a strong mandate to re-examine the gender stereotypes underlying the laws on abortion in India. On this basis, we call for a reevaluation of the "conditional right" approach to abortion under the MTP Act as well as the continued criminalization of abortion in India.

In the *Puttaswamy* decision, the Supreme Court, in a nine-judge bench decision, unequivocally recognized the right to privacy as a fundamental right, which emerges not

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[9] Sally Sheldon, *The Decriminalisation of Abortion: An Argument for Modernisation*, 36 OXFORD J. LEG. STUD. 334, 338 (2016). The 1861 Offences Against the Person Act (OAPA), §§ 58–60, which make abortion a punishable offence, were passed without any debate in Parliament. *Id.* These provisions were carried forward from an older statute where "procurement of miscarriage attracted a potential death sentence if the woman was 'quick with child' or a fourteen-year prison term or transportation where she was not." *Id.*; *see also* Siddhivinayak S. Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 REPROD. HEALTH MATTERS 114 (2004).

[10] The term 'plurality opinion' has been used by scholars to refer to Justice Chandrachud's opinion that he authored on behalf of himself and three justices (J. Kehar, J. Agrawal, and J. Nazeer). *See* Vrinda Bhandari & Renuka Sane, *Protecting Citizens from the State Post* Puttaswamy*: Analysing the Privacy Implications of the Justice Srikrishna Committee Report and the Data Protection Bill 2018*, 14 SOCIO-LEGAL REV. 143 (2018); Aparna Chandra, *Privacy and Women's Rights*, Econ. & Pol. Wkly. (Dec. 23, 2017), https://www.epw.in/journal/2017/51/privacy-after-puttaswamy-judgment/privacy-and-womens-rights.html [https://perma.cc/H9SB-D8XL]; Jyoti Panday, *Data Protection as a Social Value*, 52 ECON. & POL. WKLY. 62 (2017); Malavika Raghavan, *The Privacy Judgment and Financial Inclusion in India*, 52 ECON. & POL. WKLY. 58 (2017).

[11] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

[12] Navtej Johar v. Union of India, (2018) 10 SCC 1.

[13] Joseph Shine v. Union of India, (2019) 3 SCC 39.

only from the guarantee of life and personal liberty in Article 21 of the Constitution,[14] but also from varying contexts arising out of other facets of freedom and dignity.[15] Retired High Court judge K.S. Puttaswamy brought this case to the Supreme Court as a constitutional challenge to the 'Aadhaar' scheme, which mandated a biometrics identity-card for access to government services and benefits.[16] The judgment has since generated significant discussion amongst legal scholars and commentators in India about whether it might finally give rise to clear recognition by Indian courts of abortion as an absolute right for women and girls.[17]

Delving further into the concept of autonomy, the Supreme Court decisions in *Navtej Johar* and *Joseph Shine* unpack the notion of sexual autonomy and its link to reproductive autonomy. Notably, in *Navtej Johar* the Supreme Court of India struck down part of § 377 of the Indian Penal Code that criminalized same-sex relationships between consenting adults.[18] The court ruled that § 377 prevented LGBT[19] individuals from fully realizing their identity and violated their rights to life, health, liberty, dignity, and sexual autonomy. The decision recognized that any criminalization of a subgroup creates a chilling effect on access to healthcare services, emphasizing the inappropriateness of laws that "would have human beings accept a way of life in which sexual contact without procreation is an aberration and worse still, penal."[20] By recognizing that the Constitution protects human sexuality, which the state cannot

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[14] INDIA CONST. art. 21.

[15] *Puttaswamy*, 10 SCC at ¶ 320 (Chandrachud, J.).

[16] *Id.* at ¶ 4 (Chandrachud, J.).

[17] *See, e.g.*, Chandra, *Privacy and Women's Rights*, *supra* note 10; Arijeet Ghosh & Nitika Khaitan, *A Womb of One's Own: Privacy and Reproductive Rights*, ECON. & POL. WKLY. (Oct. 31, 2017), https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights [https://perma.cc/HPX8-9GZQ].

[18] *Navtej Johar*, 10 SCC at ¶ 253 (Misra, J.); *see also* PEN. CODE (1860), § 377 (concerning acts deemed "unnatural offences") ("Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.").

[19] LGBT is an acronym referring to lesbian, gay, bisexual, and transgender people. It is largely used as an umbrella term, though it does not accurately reflect the heterogeneity of gender and sexual minorities in India.

[20] *Navtej Johar*, 10 SCC at ¶ 417 (Chandrachud, J. concurring).

legitimize only in the form of "rigid, marital procreational sex,"[21] this decision raises important questions concerning the criminalization of abortion. We argue that such criminalization creates barriers to reproductive healthcare for persons who can become pregnant,[22] further restricting their ability to have non-procreative sex. In *Joseph Shine*, the court struck down § 497 of the IPC and decriminalized adultery.[23] Section 497 allowed husbands to prosecute men with whom their wives had sex, but did not allow wives to prosecute women with whom their husbands had sex.[24] The court held § 497 unconstitutional and violative of the fundamental right to sexual privacy and sexual autonomy.[25] The judgment specifically highlighted the archaic gender stereotypes concerning sexual autonomy that underlie this provision.[26]

In these decisions, the Supreme Court articulated how the right to privacy and the rights to equality and non-discrimination on the basis of sex and gender come together to create an obligation on states to eliminate laws that serve as barriers to healthcare and reflect discriminatory gender stereotypes. The significance of the Supreme Court's judgments in *Navtej Johar* and *Joseph Shine* for recognition of abortion as a woman's right in India should be understood to be on par with or even greater than that of *Puttaswamy*. We examine the importance of both of these cases, which affirm the courts' constitutional obligation to strike down laws that reflect discriminatory stereotypes and infringe upon sexual autonomy, in re-examining laws that restrict access to abortion in India. We also highlight the transformative potential of these decisions, especially for reproductive rights.

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[21] *Id.* at ¶ 478 (Chandrachud, J. concurring).

[22] We use the term 'persons' here in place of 'women and girls,' keeping in mind the fact that access to abortion services is crucial not only for cisgender women, but also for transgender, intersex, and gender-diverse persons as well as all adolescents. Adolescent refers to anyone between the ages of fourteen and eighteen, as defined by the Child and Adolescent Labour (Prohibition and Regulation) Act, No. 61 of 1986, INDIA CODE (1986).

[23] *Joseph Shine*, 3 SCC at ¶ 56 (Misra, J.); *see also* PEN. CODE (1860), § 497 ("Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.").

[24] PEN. CODE (1860), § 497.

[25] *Joseph Shine*, (2019) 3 SCC 39.

[26] *Id.* at ¶ 41 (Misra, J.).

Drawing on the arguments made by human rights and reproductive justice advocates globally, we argue that it is critical for Indian courts to incorporate a comprehensive equality-based analysis into their reproductive rights jurisprudence.[27] This analysis must reflect on the impact of gender, with caste and indigeneity, age, and socioeconomic status, among other factors, to meaningfully ensure reproductive rights for all women and girls. As recognized under the reproductive justice framework, the ability to enjoy reproductive rights in practice is intrinsically linked to one's material condition and social and other determinants of health—that is, factors such as social, economic, and physical environments that combine to affect the health of individuals and communities beyond just access to and use of healthcare.[28] This includes structural patterns of discrimination based on gender, race, class, and disability that impact individuals' ability to access sexual and reproductive health information, education, and services. These structural barriers also prevent persons who can become pregnant from making autonomous, meaningful decisions regarding their pregnancies, bodies, and lives. An equality-based analysis is necessary, as it allows the court to consider the stereotypes and gender norms underlying reproductive health laws. It also accounts for the financial and opportunity cost to women—specifically, marginalized groups of women—of laws, policies, and practices restricting reproductive health care and decision making.

Reproductive rights are an essential component of pregnant persons' autonomy, bodily integrity, and dignity. Importantly, without reproductive autonomy and health, pregnant persons face discriminatory interference with a wide range of human rights, including life, liberty, security, health, and freedom from torture and ill-treatment.[29] Courts across India have already recognized the right to health—interpreted to include women's rights to survive pregnancy and childbirth and to access reproductive healthcare[30]—as part of the state's obligations under the Constitution and as protected within the right to life. Moreover, there has been considerable progress in recognizing the reproductive rights of women and girls in India by notable Supreme Court and High

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[27] *See* Dipika Jain, *Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach*, 12 N.U.J.S.L. REV. 2 (2019) [hereinafter Jain, *Time to Rethink*].

[28] *See The Determinants of Health*, WORLD HEALTH ORGANIZATION, https://www.who.int/hia/evidence/doh/en/ [https://perma.cc/QDX2-9UQ4].

[29] *See* U.N. Human Rights Comm., 68th Sess., General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶¶ 19–20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); U.N. Comm. on the Elimination of Discrimination Against Women, 20th Sess., CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), ¶¶ 11, 21, U.N. Doc. A/54/38/Rev.1, chap. I (1999).

[30] *See, e.g.*, Laxmi Mandal v. Deen Dayal Harinagar Hospital, (2010) 172 DLT 9 (Del.); Jaitun v. Janpura Maternity Home, (2010) 172 DLT 9 (Del.).

Court decisions issued prior to the groundbreaking case of *Puttawsamy*. These judgments have respected a woman's "meaningful choice" in making reproductive health decisions.

Despite the significant impact of decisions around pregnancy, including abortion, on a woman's future life and enjoyment of her other human rights, the Indian judiciary has yet to clearly articulate the link between reproductive autonomy and gender equality.[31] *Puttaswamy*'s recognition of the right to reproductive choice is rooted within the constitutionally protected right to privacy. While the right to privacy has been the basis for ground-breaking judgments on reproductive rights globally, feminist legal theorists have voiced significant critiques as to the limits of privacy, specifically its potential to achieve reproductive autonomy and equality. We explore the applicability of these critiques in India, including concerns voiced by legal scholars regarding the limitations of the right to privacy as a tool for meaningful enjoyment of reproductive autonomy or gender equality as a whole.

The post-*Puttaswamy* decisions of *Navtej Johar* and *Joseph Shine* mark a shift in jurisprudence, with the Supreme Court relying on equality-based arguments to reject societal stigmatization and discrimination against the marginalized group in question. In both cases, the court set forth a framework to understand how the rights to privacy, equality, and non-discrimination on the basis of sex and gender intersect. This intersection of rights gives rise to an obligation of states to eliminate laws that reflect discriminatory gender stereotypes, including those pertaining to sexuality. Limits on the right to abortion indirectly or directly marginalize women by controlling their right to bodily autonomy and denying them privacy and equality. Hence, we argue that these cases demonstrate the potential success of arguments for reproductive rights based on equal citizenship.

We first lay out the legal framework and jurisprudence of reproductive rights in India before the *Puttaswamy* decision. We then explore the benefits of having a constitutionally recognized right to privacy and how it can advance reproductive rights. We also examine the drawbacks of using a privacy-based analysis as a foundation for reproductive rights due to its vulnerability to restriction on grounds of compelling state interest. Further, this we engage with feminist critiques of privacy rights as well as equality-based approaches and argue for a framework that takes into consideration meaningful choice and structural barriers to the exercise of reproductive autonomy. We critically examine judgments from comparative and international law that have a strong basis in the right to equality to

[31] *See* U.N. WORKING GRP. ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE, WOMEN'S AUTONOMY, EQUALITY AND REPRODUCTIVE HEALTH IN INTERNATIONAL HUMAN RIGHTS: BETWEEN RECOGNITION, BACKLASH AND REGRESSIVE TRENDS (2017).

reflect on how recognition of reproductive rights as an issue of gender justice—beyond just individual choice—could strengthen Indian reproductive rights jurisprudence. In other words, we argue for a reimagination of reproductive rights within an equality framework. Finally, we conclude that the use of an equality-based framework could significantly benefit pregnant persons' right to reproductive autonomy.

I. Taking Stock of the Constitutional Framework on Reproductive Rights in India: Pre-*Puttaswamy*

In the last decade, the Supreme Court of India and several state High Courts have made important strides in recognizing the denial of reproductive rights as violations of pregnant persons' fundamental and human rights. In the past, women's reproductive autonomy had been undermined in two notable cases. It is important to understand the trajectory of this jurisprudence to examine why, despite the subsequent recognition of a right to reproductive autonomy by the courts, pregnant persons continue to face challenges in accessing reproductive health services.

In 2003 the Supreme Court heard *Javed v. State of Haryana*, in which petitioners challenged the constitutionality of a law that prohibited anyone with more than two living children from holding certain public offices in Haryana.[32] The court found that this law was not arbitrary and that the law's purpose was population control, which fell within the constitutional exception of "public order, morality and health."[33] Importantly, the court failed to recognize the significant barriers in accessing contraceptive information and services, especially for marginalized women and girls. The court rejected many submissions that showed how Indian women lack independence to make decisions about having children (the choice primarily being exercised by men) and are disparately impacted by the disqualification provisions of the election law. The decision thus justified the denial of reproductive autonomy in the name of population control. In 2007, the Supreme Court considered a case in which a married woman had terminated her pregnancy without her husband's consent and he subsequently filed for divorce on the

[32] Javed v. State of Haryana, AIR 2003 SC 3057.

[33] The Supreme Court has laid down the standard for arbitrariness in several cases involving a challenge under Article 14 (equal protection of the law) of the Constitution. In *E.P. Royappa v. Tamil Nadu*, (1974) 4 SCC 3, ¶ 85, the court stated that "[w]here an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law." This was affirmed in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. The Court also noted in *Shetty v. Int'l Airport Auth.*, (1979) 3 SCC 489, ¶ 21, that the principles of reasonableness and rationality are essential elements of non-arbitrariness. More recently, the Court has relied on "manifest arbitrariness" in decisions such as *Navtej Johar v. Union of India*, (2018) 10 SCC 1, ¶ 268.15 (Misra, J.).

grounds of mental cruelty.[34] The court agreed that a unilateral decision to terminate a pregnancy could amount to cruelty and granted the divorce.[35] Since then, there have been several significant progressive shifts in Indian reproductive rights discourse.[36] The Indian judiciary has recognized the denial of reproductive rights as a violation of fundamental and human rights. Part I highlights key judgements (prior to *Puttaswamy*) in the areas of maternal health, contraceptive access, abortion, and forced pregnancy in which the courts have intervened to delineate pregnant persons' legal reproductive rights.

In 2009, the Supreme Court recognized reproductive autonomy as protected under the Constitution in the landmark decision of *Suchita Srivastava*.[37] A nineteen to twenty year old woman with mild to moderate intellectual disabilities was raped while residing in a welfare institution run by the government and became pregnant as a result.[38] This was the first time the Supreme Court used the framework of reproductive rights to recognize the right of reproductive choice: "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India."[39] Prior to this, in 2008, Human Rights Law Network (a non-profit NGO) had filed petitions in several High Courts seeking accountability for pregnancy-related deaths. Many of these cases resulted in judicial recognition of women's right to survive pregnancy and childbirth as a fundamental right. One such case, involving a woman named Shanti Devi, came before the Delhi High Court in 2010.[40] The court, citing international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and International Covenant on Economic, Social and Cultural Rights (ICESCR), held that "no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background. This is where the inalienable right to

[34] Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511. The understanding of "mental cruelty" has evolved through case law, primarily in divorce cases. The Hindu Marriage Act, No. 25 of 1955, INDIA CODE (1955), lists cruelty as a valid ground for divorce. *Id.* at § 13(1); *see also* Kohli v. Kohli, AIR 2004 SC 1675.

[35] *Samar Ghosh*, 4 SCC at ¶ 101.

[36] APARNA CHANDRA & MRINAL SATISH, CTR. FOR REPROD. RIGHTS, SECURING REPRODUCTIVE JUSTICE IN INDIAN COURTS: A CASEBOOK 3–11 (2019).

[37] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

[38] *Id.* at ¶ 2.

[39] *Id.* at ¶ 11.

[40] Laxmi Mandal v. Deen Dayal Harinagar Hospital, (2010) 172 DLT 9 (Del.).

health which is so inherent in the right to life gets enforced."[41] Similarly, in 2012 the Madhya Pradesh High Court in *Sandesh Bansal v. Union of India* recognized that the "inability of a woman to survive pregnancy and childbirth" was a violation of her fundamental right to life under Article 21.[42] In 2013, the same court ruled that a woman's reproductive choices are essential to her personal liberty and that an incarcerated woman did not need permission from jail authorities to exercise her rights.[43]

In 2016, in the case of *Devika Biswas v. Union of India*, the Supreme Court issued a judgment in a public interest petition claiming that coercive and substandard sterilization procedures used by public healthcare professionals violated women's reproductive rights.[44] In this case, the court moved beyond the reproductive health framework and recognized women's autonomy and gender equality as core elements of women's constitutionally protected reproductive rights.[45] While holding that coercive sterilization practices violate a woman's fundamental and human right to health, the court emphasized the importance of a woman exercising "meaningful choice." That same year, the Bombay High Court clubbed several cases filed by pregnant incarcerated women and converted them into a public interest litigation (PIL).[46] The court specifically took note of gender discrimination in the debate around abortion rights, emphasizing that the burden of an accidental or unwanted pregnancy falls disproportionately on women.[47] The court also distinguished between an "unborn foetus," which had no human rights, and a pregnant woman, who has the sole right to decide how to proceed with her pregnancy and fertility.[48] The court held that § 3 of the MTP Act "bestows a very precious right to a pregnant woman to say no to motherhood" and directed all jail authorities in the state to

[41] *Laxmi Mandal*, 172 DLT at ¶ 50; *see also* Jaitun v. Janpura Maternity Home, (2010) 172 DLT 9 (Del.).

[42] Sandesh Bansal v. Union of India, (2012) Writ Petition 9061/2008 (Mad.), ¶ 22.

[43] Hallo-Bi @ Halima w/o Admin v. State of Madhya Pradesh, (2013) 1 MPHT 451 (Mad.).

[44] Devika Biswas v. Union of India, (2016) 10 SCC 726.

[45] *Id.* at ¶ 111.

[46] High Court on its Own Motion v. State of Maharashtra, (2016) SCC Online Bom 8426 (Bom.).

[47] *Id.* at ¶ 13.

[48] *Id.* at ¶ 15.

ensure that effective medical care and abortion access are provided to incarcerated women.[49]

The Supreme Court has ruled that spousal consent is not required for a woman to undergo an abortion.[50] This is in keeping with international human rights developments, as United Nations (UN) treaty monitoring bodies and experts have called on states to abolish barriers to abortion access such as spousal authorization.[51] The Court has also allowed for terminations beyond the twenty-week limit in the MTP Act in some cases, thereby recognizing that a woman's life and health are paramount and outweigh any consideration of foetal interests.[52] All these cases indicate a positive trajectory in the Supreme Court and High Courts on reproductive rights, specifically on abortion.

However, statutes such as the MTP Act continue to impede women's autonomy in accessing abortion at all stages of pregnancy by requiring medical provider authorization in all cases. The MTP Act exempts medical practitioners from criminal liability only if they terminate pregnancies under twenty weeks on the following grounds: (i) if there is risk of grave injury to the woman's mental or physical health (this includes trauma of unwanted pregnancy for rape survivors and pregnancies caused due to failure of any contraceptive method used by a married woman), (ii) if the foetus has severe "abnormalities."[53] For pregnancies that have advanced beyond twenty weeks, the law allows for termination only to save the life of the pregnant woman.[54] An amendment bill was introduced in 2014 to rectify some of these defects in the law, permitting abortions "on request" during the first twelve weeks, but legislators have stalled its progress due to

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[49] *See* Jain, *Time to Rethink*, *supra* note 27.

[50] Dogra v. Malhotra, CR No. 6337 and 6017 of 2011 (P & H).

[51] *See* CEDAW, General Recommendation No. 33 on Women's Access to Justice, ¶ 25(c), (61st Sess., 2015), U.N. Doc. CEDAW/C/GC/33 (2015); Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (SR Health), *Report on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 54–55, 57–60, U.N. Doc. A/64/272 (2009).

[52] Ms. X v. India, AIR 2016 SC 3525. Various High Courts have also allowed this. *See* Bhavikaben v. State of Gujarat, (2016) SCC Online Guj 9142 (Guj.); R v. State of Haryana, (2016) SCC Online P&H 18369 (P & H); Madhuben Arvindbhai Nimavat v. State of Gujarat, (2016) Special Criminal Application 3679/2016; *see also* ABORTION LAWS IN INDIA: A REVIEW OF COURT CASES (Dipika Jain et al. ed., 2016).

[53] Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971).

[54] *Id.*

fears that it would lead to increased gender-biased sex selection.[55] Abortion also continues to be criminalized under the Indian Penal Code, creating a chilling effect on access to abortion services and further stigmatizing abortion.[56] Further, the Supreme Court has yet to rule in pending litigation concerning extension of the gestational limits on abortion.[57] Recently, the MTP Amendment Bill 2020 was passed in the Lower House (Lok Sabha) of the Parliament.[58] Although it introduces a few important amendments, the Bill is not framed within a rights-based context and "continues to reflect the hetero-patriarchal, population-control and eugenic rationale of the state."[59] Finally, as one of us has argued elsewhere, since any sexual activity by adolescents under age eighteen is considered a sexual offense and providers are mandated to report all cases of child sexual offenses, there is an additional chilling effect on the request for and provision of reproductive health services to adolescents.[60]

It is clear that although the judiciary has been willing to uphold the right to reproductive autonomy in many cases, gaps still remain due to the convoluted legal framework regulating abortion in India. Courts have primarily addressed this right as a matter of life and personal liberty but have yet to robustly address abortion or reproductive autonomy as an issue of equality and non-discrimination. Part II examines

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[55] *See* Zeba Siddiqui, *A Matter of Choice: What the Right-to-Privacy Judgment Means for India's Abortion Law*, THE CARAVAN (Dec. 31, 2017), http://www.caravanmagazine.in/perspectives/right-to-privacy-judgement-abortion [https://perma.cc/MC9T-59DD]. On January 29, 2020, the Union Cabinet approved the Medical Termination of Pregnancy (Amendment) Bill 2020, to be introduced in the upcoming session of Parliament. Media reports state that the upper limit for termination has been increased to twenty-four weeks for certain "vulnerable categories of women" and the limit will not apply in cases where substantial foetal abnormalities have been detected, subject to diagnosis by a Medical Board. *See* Neetu Chandra Sharma, *Keeping Up with Medical Advancements, India Moves Towards Liberalization of Abortion Rules*, LIVEMINT (Feb. 2020), https://www.livemint.com/news/india/india-soon-to-have-liberal-abortion-rules-11580756559537.html [https://perma.cc/E9AZ-LA6J].

[56] PEN. CODE (1860), §§ 312–16.

[57] *See* CTR. FOR REPROD. RIGHTS, ENSURING REPRODUCTIVE RIGHTS: REFORM TO ADDRESS WOMEN'S AND GIRLS' NEED FOR ABORTION AFTER 20 WEEKS IN INDIA 18–19 (2018), https://reproductiverights.org/sites/default/files/documents/Post-20-Week-Access-to-Abortion-India-0218.pdf [https://perma.cc/VJJ8-EGV8].

[58] Dipika Jain, *Proposed Changes to Abortion Law Continue to Sideline Pregnant Persons*, THE WIRE (March 15, 2020), https://science.thewire.in/health/proposed-changes-to-abortion-law-continue-to-sideline-pregnant-persons/ [https://perma.cc/G97F-34WA].

[59] *See id.*

[60] *See id.*; Dipika Jain & Brian Tronic, *Conflicting Abortion Laws in India: Unintended Barriers to Safe Abortion for Adolescent Girls*, 4 INDIAN J. MED. ETHICS 310, 312 (2019).

the strengths and weaknesses of the *Puttaswamy* decision and assess whether a privacy-based approach will ensure a robust reproductive rights framework.

II. Understanding the Reproductive Rights Framework in India Post-*Puttaswamy*: What Has Been Gained? What Gaps Remain?

As mentioned in the Introduction, *Puttaswamy* came before a nine-judge bench of the Supreme Court as a constitutional challenge to the government's proposal to make the biometric "Aadhaar" scheme mandatory for accessing social welfare benefits.[61] The main issue before the Supreme Court was whether the right to privacy could be recognized as a fundamental right. As an eight-judge bench of the court in *MP Sharma v. Satish Chandra* had stated that the Constitution did not guarantee specific protection for the right to privacy,[62] a nine-judge bench was constituted to deliberate on the issue. The plurality opinion was issued by Justice Chandrachud on behalf of himself and three other judges, including then Chief Justice Kehar. The other five judges delivered separate but concurring opinions.

The plurality opinion relied on the constitutional guarantee of the right to life under Article 21 of the Constitution, reasoning that "the right to be let alone" is an integral part of the right to enjoy life.[63] Specifically, the court held that the right to life extended beyond survival or an animal existence to include the enjoyment of all facilities that make the right meaningful.[64] It also noted that dignity of human life is fundamental and an essential part of the constitutional culture.[65] The court recognized that non-intervention in

[61] *Puttaswamy*, (2017) 10 SCC 1.

[62] *See infra* notes 93–101.

[63] *Puttaswamy*, 10 SCC at ¶ 2 ("Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable."); *id.* at ¶ 168 ("Privacy postulates the reservation of a private space for the individual, described as the right to be let alone."); *id.* at ¶ 21 (Bobde, S.A., concurring) ("'Privacy' is '[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions.' The right to be in this condition has been described as 'the right to be let alone.'") (citing Pavesich v. New England Life Ins. Co. et al., 50 S.E. 68, 71 (Ga. 1905)).

[64] *Id.* at ¶ 2 ("The content of the expression 'life' under Article 21 means not merely the right to a person's 'animal existence.'").

[65] *Id.* at ¶ 95 ("The right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings.") (citing Francis Coralie Mullin v. UT of Delhi, (1981) 1 SCC 60).

an individual's life may be insufficient and that the state has positive obligations to create conditions for the exercise of the right to privacy.[66] The court further relied upon the principles of personal liberty as well non-discrimination to provide constitutional backing for the right to privacy.[67] The Supreme Court also found in Puttaswamy that privacy was an intrinsic aspect of the right to live with dignity.[68] The Supreme Court identified three core values to ground this right: autonomy, bodily integrity, and dignity.[69] By emphasizing these values, the court paved the way for a breakthrough in reproductive rights jurisprudence.

Importantly, the Supreme Court cited its decision in *Suchita Srivastava* to recognize that within the constitutional right to personal liberty under Article 21 lies the right of a woman to make reproductive choices, noting that this right was deduced "from a woman's right to privacy, dignity, and bodily integrity."[70] It also stated that privacy, at its core, includes the preservation of personal intimacies including sexual orientation.[71] By observing that LGBT individuals have the right to privacy and could not be subjected to harassment on account of their sexual orientation, *Puttaswamy* paved the way for the *Navtej Johar* judgment. However, it is necessary to bear in mind that there are still significant limits to privacy rights that underscore why it alone may not be sufficient to protect reproductive rights in India.

The next section will examine how the *Puttaswamy* decision has added to the reproductive rights movement by recognizing the importance of privacy rights in guaranteeing decisional autonomy and bodily integrity for women. The following section

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[66] *Id.* at ¶ 158 ("[The right to privacy] embodies both a positive and a negative freedom. The negative freedom protects the individual from unwanted intrusion. As a positive freedom, it obliges the State to adopt suitable measures for protecting individual privacy.").

[67] *Puttaswamy*, 10 SCC at ¶ 84 ("Primarily, it is in the guarantee of life and personal liberty under Article 21 that a constitutional right to privacy dwells."); *id.* at ¶ 149 ("The requirements of fairness and non-discrimination animate both the substantive and procedural aspects of Article 21."); *id.* at ¶ 27 (Chelameswar, J., concurring) ("The most basic understanding of the expression liberty is the freedom of an individual to do what he pleases.").

[68] *Id.* at ¶ 72–74.

[69] *Id.* (referencing Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1).

[70] *Id.* at ¶ 72 (citing Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1).

[71] *Puttaswamy*, 10 SCC. at ¶ 323 (Chandrachud, J.).

addresses the gaps that still remain when reproductive rights are grounded in privacy alone.

A. What Has Been Gained Post-*Puttaswamy*?

In *Puttaswamy,* the plurality opinion and two separate opinions by Justices Nariman and Chelameswar echo the Supreme Court's prior recognition of reproductive rights within Article 21 and frame women's decisions concerning continuation of pregnancy as privacy interests. The plurality opinion found that women's "intimate personal choices such as those governing reproduction" fall within decisional privacy.[72] Justice Nariman states that "the right to abort a foetus" falls within the realm of privacy interests, while Justice Chelameswar writes that "[a] woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy."[73]

The opinions in *Puttaswamy* are particularly promising because they have engaged with significant global feminist critiques. While the right to privacy has been the basis for groundbreaking judgments on reproductive rights globally, feminist legal theorists have voiced significant critique of the limits of privacy,[74] including specifically in achieving reproductive autonomy for women and girls. American feminist scholars have repeatedly expressed concern about the reliance of reproductive rights on privacy because privacy may be understood as a negative right, as demonstrated by the jurisprudence of the Supreme Court of the United States. The conceptualization of privacy solely as a negative right will likely fail to guarantee affirmative measures by the state to ensure that all women and girls can access reproductive health services in practice.[75] Some legal experts have also criticized the historical framing of privacy as adhering only to spaces and relationships, not individuals. Privacy rights thus fail to ensure that women's reproductive decision-making is respected within protected institutions/relationships such as the family or marriage, where their own preferences may differ from others with

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[72] *Id.* at ¶ 248 (Chandrachud, J.).

[73] *Id.* at ¶ 374 (Chelameswar, J., concurring).

[74] *See, e.g.*, RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 29 (2005); Patricia Uberoi, *Feminism and the Public-Private Distinction*, *in* THE PUBLIC AND THE PRIVATE: ISSUES OF DEMOCRATIC CITIZENSHIP (G. Mahajan & H. Reifeld eds., 2003); SUSAN M. OKIN, JUSTICE, GENDER AND THE FAMILY (1989); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE (1989).

[75] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93–102 (1987); Harris v. McRae, 448 U.S. 297 (1980).

power in those spaces.[76] However, other feminist perspectives (particularly of the second wave) see the right to privacy as creating a sphere of autonomy that would allow women to make independent reproductive decisions. Acknowledging the harms historically done to women under the guise of privacy, second wave feminists viewed the right to privacy as potentially emancipatory, since privacy is essential to personhood.[77]

This line of reasoning is in keeping with Justice Chandrachud's opinion in *Puttaswamy*, finding that the right to make reproductive choices is an integral component of the right to personal liberty. Justice Chandrachud draws on Anita Allen's work on 'unpopular privacy'[78] to define privacy as inclusive of distinct and separate sub-rights, such as the right to spatial control, decisional autonomy, and informational control.[79] Without privacy, Justice Chandrachud argues, an individual cannot make intimate personal choices (such as the choice to have or not have an abortion) without government interference.[80] Further, if the state were given unlimited access and control of reproductive information for all citizens, the choice to engage in socially stigmatized reproductive health decisions becomes more constrained due to the denial of confidentiality and fear of repercussion, thereby reducing women's access to important health services.[81]

There are scholars who have argued that the plurality opinion in the *Puttaswamy* decision authored by Justice Chandrachud has responded to these two feminist critiques by affirming that privacy situates privacy within individuals, not only spaces, and that

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[76] *See* Savina Balasubramanian, *Contextualizing the Closet: Naz, Law, and Sexuality in Postcolonial India*, *in* PERVERSE POLITICS? FEMINISM, ANTI-IMPERIALISM, MULTIPLICITY 135–58 (Ann Shola Orloff et al. eds., 2016). *Cf.* Martha C. Nussbaum, *Is Privacy Bad for Women*, BOS. REV. (Apr. 1, 2000), http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women [https://perma.cc/2C22-EJ73].

[77] *See* Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 16 (2008).

[78] ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? (2011).

[79] *Puttaswamy*, 10 SCC at ¶ 248 ("Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person.").

[80] *Id.* at ¶ 141 (Chandrachud, J.).

[81] *See, e.g.*, KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017).

this right creates positive as well as negative obligations on the state.[82] Anita Allen has countered critiques of privacy by arguing that human beings need privacy for their psychological well-being.[83] In particular, she advocates for the recognition of decisional privacy as integral to women's freedom—but only when there are no barriers to the exercise of their choice.[84] Responding to the feminist critique of the public/private distinction, Allen and Erin Mack state that it is now (in the modern world) impossible to make a sharp distinction between the two since so few aspects of our life are "wholly beyond public regulation."[85] Justice Chandrachud recognizes the historic power that privacy has played in obstructing women's rights and cautions that the right should not be used to allow gender-based violence or to further relegate women to domestic life.[86] However, he also notes the importance of privacy in order to safeguard the decisional autonomy of women, historically and presently, citing examples of historical perpetuations of state violence (*e.g.*, sterilization programs, drug testing) that invaded women's informational privacy and bodily autonomy.[87] Allen has similarly argued that medical confidentiality—as an aspect of the right of privacy—enables those who seek abortions to "exercise constitutionally protected liberties of autonomous medical decision making."[88]

Justice Chandrachud emphasizes that women have an inviolable interest in privacy and expressly states that "[p]rivacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state-imposed sterilization programmes or mandatory state-imposed drug testing for women."[89] He argues for safeguarding against the use of privacy as a tool to silence women to the domestic sphere as well as the

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[82] *See* Chandra, *Privacy and Women's Rights*, *supra* note 10; Pritam Baruah & Zaid Deva, *Justifying Privacy: The Indian Supreme Court's Comparative Analysis*, *in* THE INDIAN YEARBOOK OF COMPARATIVE LAW 2018 1 (Mahendra Pal Singh & Niraj Kumar eds., 2019).

[83] Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 472 (1987).

[84] *Id.*

[85] Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U.L. REV. 441, 446 (1990).

[86] *Puttaswamy*, 10 SCC at ¶ 140 (Chandrachud, J.).

[87] *Id.*

[88] ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE?, *supra* note 78, at 112.

[89] *Puttaswamy*, 10 SCC at ¶ 140 (Chandrachud, J.).

importance of privacy in protecting women's rights grounded in liberty.[90] Justice Chandrachud adds that several other constitutionally protected rights (such as equality, non-discrimination, and self-determination) intersect with and rely on the right to privacy. The ability to make decisions for one's self (*i.e.*, the right to self-determination) relies on privacy in order for persons to utilize their individual liberty without societal interference.[91] Additionally, the right to privacy protects intimate personal information related to gender, such as sexual orientation, marital status, etc.

The *Puttaswamy* judgment marks a paradigmatic shift in the court's understanding of fundamental rights.[92] It rejects the conceptualization of privacy as merely spatial and relational and represents a welcome move towards a more individualistic notion of privacy.[93] With its emphasis on autonomy and bodily integrity, it has the potential to transform the entire framework. However, abortions continue to be regulated by the MTP Act, which shifts decisional autonomy regarding abortion from women to their doctors.[94] This violates a woman's right to make reproductive choices and therefore violates the right to privacy and right to life.[95] While the decision holds significant promise for reproductive rights, its application remains to be seen.

Justice Chandrachud's response to the feminist critiques of privacy and his articulation of privacy rights as intersecting with other rights of equality and non-discrimination are extremely significant. Such a conceptualization of privacy affirms the state's positive obligation to ensure that all persons are able to exercise their rights meaningfully. This is particularly important for the right of persons who can become pregnant to make reproductive choices. The following section discusses the challenges remaining post-*Puttaswamy* in utilizing the privacy framework alone in advancing reproductive rights in India.

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[90] *Id.*

[91] *Id.* at ¶ 169.

[92] *See* Alok Prasanna Kumar, *The* Puttaswamy *Judgment: Exploring Privacy Within and Without*, 52 ECON. & POL. WKLY. 34, 34 (2017).

[93] *See* Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment - II: Privacy, the Individual, and the Public/Private Divide*, INDIAN CONST. L. & PHIL. BLOG (Aug. 28, 2017), https://indconlawphil.wordpress.com/2017/08/28/the-supreme-courts-right-to-privacy-judgment-ii-privacy-the-individual-and-the-publicprivate-divide/ [https://perma.cc/UCF3-8Y85].

[94] Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971).

[95] *See* Ghosh & Khaitan, *supra* note 17.

B. What Gaps Remain?

There are limitations on the right to privacy in the context of reproductive rights that remain post-*Puttaswamy*: (1) privacy is a fragile right, as it is not explicitly enumerated in the Constitution but has been conferred only through judicial interpretation; (2) the privacy-based approach privileges certain groups of people at the expense of the marginalized; and (3) the right to privacy is insufficient to examine the legitimacy and proportionality of state purpose in restricting reproductive healthcare and decision-making without an equality analysis. These restrictions are rooted in gender stereotypes concerning women's and girls' sexuality as only a function of their reproductive capacity; due to "patriarchal mindsets, women are relegated to the role of 'natural' caregivers."[96] Hence, it is particularly essential to ensure an equality-based analysis that guarantees even marginalized groups of women their reproductive autonomy. These limitations do not vitiate reliance on the right to privacy as a basis for reproductive rights—indeed, as articulated above, this right creates significant obligations to ensure women's and girls' reproductive autonomy. However, it is important to recognize that these limits exist, as they illustrate why it is essential that India's constitutional jurisprudence reflect that reproductive rights are crucial elements of gender equality, rather than rooted solely in privacy.

1. Privacy as a Fragile Right

While the *Puttaswamy* decision held that the right to privacy is recognized as a fundamental right, it remains unenumerated in the Constitution, and open to restriction by subsequent decisions of the Supreme Court. Privacy has been intensely litigated in India since the 1950s,[97] and the Supreme Court has held that there is no absolute right to privacy. In *M.P. Sharma v. Satish Chandra*[98] and subsequently in *Kharak Singh v. State of UP*,[99] the Supreme Court held that the Indian Constitution does not provide for a

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[96] Jain, *Time to Rethink*, *supra* note 27, at 13; *see also* OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, BACKGROUND PAPER ON THE ROLE OF THE JUDICIARY IN ADDRESSING THE HARMFUL GENDER STEREOTYPES RELATED TO SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: A REVIEW OF CASE LAW (2014), https://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf [https://perma.cc/WW4E-8JYD].

[97] *See* Nupur Chowdhury, *Privacy and Citizenship in India: Exploring Constitutional Morality and Data Privacy*, 11 N.U.J.S.L. REV. 2 (2018).

[98] M.P. Sharma v. Satish Chandra, (1954) 1954 SCR 1077.

[99] Kharak Singh v. State of U.P., (1962) 1964 SCR (1) 332.

fundamental right to privacy.[100] In *Govind v. State of MP*,[101] the court recognized for the first time an "explicit constitutional right to privacy."[102] However, while it noted that "family, marriage, motherhood, procreation and child rearing as activities that deserve to be protected as private,"[103] the decision also stated that even if privacy were a fundamental right, it would still be subject to restrictions based on compelling public interest. *Maneka Gandhi*[104] clarified that the state could deprive someone of their personal liberty in accordance with a procedure established by law, as long as that procedure was just, fair, and reasonable.[105] Then, in *Rajagopal v. State of Tamil Nadu*,[106] the court built on its *Govind* jurisprudence to recognize individual autonomy as the basis for privacy rights.[107] Although it noted that the right to privacy is not enumerated in the Constitution, it is a right inferred from Article 21.[108] The court in *Puttaswamy* also relied on individual liberty, operationalized through the ideas of dignity and autonomy,[109] to conceptualize privacy. It is important to note that the *Puttaswamy* decision overrules both *M.P. Sharma* and *Kharak Singh*. Yet, as the court itself notes, privacy is still not an absolute right. A year after *Puttaswamy*, a five-judge bench of the Supreme Court delivered a judgment in a case challenging the constitutionality of the Aadhaar Act, 2016. In the Aadhaar judgment,[110] the court upheld the Act and found that it passed the 'legitimate state interest' test: The intrusion of privacy through collection of biometric

[100] *See* Baruah & Deva, *supra* note 82, at 1–2.

[101] Govind v. State of MP, (1975) 2 SCC 148.

[102] Chowdhury, *Privacy and Citizenship in India*, *supra* note 97.

[103] *Id.*

[104] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[105] *See* Mahendra P. Singh, *Decriminalisation of Homosexuality and the Constitution*, 2 N.U.J.S.L. REV. 365, 365–66 (2009).

[106] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

[107] Chowdhury, *Privacy and Citizenship in India*, *supra* note 97.

[108] *Id.*

[109] *See* Mariyam Kamil, Puttaswamy*: Jury Still Out on Some Privacy Concerns?*, 1 INDIAN L. REV. 190, 197 (2017).

[110] K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.

data was reasonable in proportion to the aim of the Act—delivery of social entitlements.[111]

Privacy is grounded in Article 21 of the Constitution, which guarantees the right to life and liberty *except* when a procedure established by law takes away that right (*e.g.*, the death penalty). In addition, privacy is protected under Article 19, which raises questions about the standard of review necessary in order for the state to impose limitations on the right.[112] As demonstrated above, privacy jurisprudence in India suggests that the right is derogable when there is compelling state interest.[113] This is also reflected in United States jurisprudence following *Roe v. Wade*, where state interest in protecting prenatal life has been considered a legitimate ground to restrict access to abortion.[114] As noted by Veronica Undurraga, human rights jurisprudence is increasingly recognizing that restrictive abortion laws cannot be justified under the guise of compelling state interest in protecting prenatal life.[115] There is clear evidence from the World Health Organization that such laws do not reduce the incidence of abortion—meaning that they are ineffective as a means to advance prenatal life—and, conversely, increase the risks of unsafe abortion to women.[116] Despite this, Indian cases continue to cite *Roe* as the landmark decision on abortion rights. The Gujarat High Court in *Ashaben v. State of Gujarat*, for example, notes that the U.S. Supreme Court in *Roe* held that the "State can regulate abortion procedure during the second trimester 'in ways that are reasonably related to maternal health' and in the third trimester, demar[cating] the viability of the fetus."[117] Justice Chandrachud also refers to *Roe* in his *Puttaswamy* opinion, noting how the right

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[111] Chowdhury, *Privacy and Citizenship in India*, *supra* note 97. It is important to note Justice Chandrachud's dissent in the Aadhaar judgment: He found that the Act was disproportionate to the objective and the collection of biometric information infringed upon the right to privacy. *Id.*

[112] *See id.* at 197.

[113] *See* Gautam Bhatia, *State Surveillance and the Right to Privacy in India: A Constitutional Biography*, 26 NAT'L L. SCH. INDIA REV. 127, 152 (2014).

[114] Roe v. Wade, 410 U.S. 113 (1973).

[115] Veronica Undurraga, *Criminalisation Under Scrutiny: How Constitutional Courts are Changing Their Narrative by Using Public Health Evidence in Abortion Cases*, 27 SEXUAL & REPROD. HEALTH MATTERS 41, 46 (2019).

[116] *See id.* at 47.

[117] Ashaben v. State of Gujarat, 2015 SCC OnLine Guj 6198 (Guj.) at ¶ 24.

to privacy as enumerated in *Roe* extends to a woman's right to abortion but must be balanced against the state's interest in regulating abortions.[118]

Reflecting on the reproductive rights jurisprudence of the U.S. Supreme Court, Neil and Reva Siegel have noted that, despite clear constitutional protection of unenumerated rights in the Ninth Amendment of the U.S. Constitution, privacy continues to have limited "political authority" relative to other enumerated fundamental rights, including the right to equality.[119] Some have looked to *Roe* as an example of the fragility of the right to privacy; *Roe* is fraught with several constitutional ailments that have undermined the decision's credibility and effectiveness over the years. Rather than being exemplary of how a right to privacy fares over time, *Roe* is seen by constitutional experts as a problematic, inconsistent, and vague decision.[120] Some legal scholars have also argued that *Roe* is an inadequate judicial attempt at legislating from the bench—the Court overstepping its duties and taking on the role of the legislature.[121] Further, critics have argued that the Court did a poor job of grounding the right to privacy within tenable constitutional jurisprudence.[122] In addition, significant resources have been employed by anti-abortionist/pro-life campaigns in the United States to slowly wear away at the fabric of the decision.[123] As it is, the decision in *Roe* does not reflect the potential strength of the right to privacy.

Justice Nariman in the *Puttaswamy* case grounds his argument in the rights enumerated in Articles 19 and 21 of the Indian Constitution.[124] He states that constitutional challenges to statutory provisions dealing with aspects of privacy would continue to be put to the balancing test, *i.e.*, the provisions would be tested on whether

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[118] *Puttaswamy*, 10 SCC at ¶ 134 (Chandrachud, J., concurring).

[119] Neil B. Siegel & Reva Siegel, *Equality Arguments: Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 169 (2013).

[120] *See* Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969 (2014).

[121] *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade *(1973)*, 82 YALE L.J. 919, 926 (1973).

[122] *See id.*

[123] *See* Scott Lemieux, *Yes,* Roe *Really is in Trouble*, VOX (May 15, 2019), https://www.vox.com/2019/5/15/18623073/roe-wade-abortion-georgia-alabama-supreme-court [https://perma.cc/DRH7-UAPR].

[124] *Puttaswamy*, 10 SCC at ¶ 33–34 (Nariman, J., concurring).

public interest and the reasonableness of restrictions outweigh the right to privacy.[125] Moreover, his opinion expressly notes that "compelling grounds of public interest" would allow for private information to be disseminated for statutory purposes.[126] Justice Bobde similarly states that privacy is not an absolute right and restrictions may be put in place to protect legitimate state interests.[127] He opines that the three components of privacy (physical, personal information, choice) can be grounded in Articles 19(1)(d)–(e) and 19(1)(a)–(c) read with Article 21.[128] However, it is important to note that the Constitution itself lays down reasonable restrictions that can be placed on Article 19, including "security of the State, friendly relations with foreign States, public order, decency or morality."[129] This implies that the guarantee of the right to privacy is not the same as that of the right to equality—it has the potential to be overturned or substantially weakened based on what the state considers to be a reasonable restriction. While both judges conclude that there is an inalienable right to privacy, their articulation of compelling state interests that may potentially restrict privacy weakens its status as a fundamental right and renders it vulnerable to assault in subsequent judgments.

This vulnerability is particularly concerning given that in a recent case from August 2019, *Sinha v. State of UP*, the Supreme Court reiterated that the right to privacy could be restricted on the ground of "compelling public interest."[130] In *Sinha*, the court specifically referenced the *Puttaswamy* judgment and observed that "the right to privacy cannot be construed as absolute."[131] Thus, even in a post-*Puttaswamy* world, a right to abortion that is grounded solely within the right to privacy may be vulnerable to curtailment in the future, especially given the erroneous moral framing of the issues by some.[132]

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[125] *Id.* at ¶ 26 (Nariman, J., concurring).

[126] *Id.* at ¶ 60 (Nariman, J., concurring).

[127] *Id.* at ¶ 86 (Bobde, J., concurring) ("In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.").

[128] *Id.* at ¶ 81.

[129] INDIA CONST. art. 19.

[130] Sinha v. State of UP, (2019) 8 SCC 1 at ¶ 24.

[131] *Id.*

[132] Even decisions of the Supreme Court are open to review. For example, in September 2018, a five-judge bench of the Supreme Court in *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC OnLine Ker 5802 ("Sabarimala Judgment"), stated that a temple's practice of excluding women was unconstitutional and

2. Privacy as the 'Right Kind of Privacy'

Feminist scholars have criticized the right to privacy as ill-suited to accomplish gender equality. The 'right kind of privacy,' as Ratna Kapur notes, refers to the privacy accorded to actions conducted within the "heterosexual, marital family, between a husband and wife, and within the boundaries of Indian (with the contemporary meaning of 'Hindu') culture."[133] One feminist critique argues that the public-private divide leads to the suppression of women as, historically, women were not allowed to fully participate in the public sphere (*e.g.*, politics, work) and were relegated to the private world of home and family.[134] The isolation of women in the private world of domesticity increased their vulnerability to familial violence and abuse.[135] Some of these concerns have been addressed by the *Puttaswamy* judgment, specifically in Justice Chandrachud's opinion, which engages with feminist critiques of privacy and frames it as a positive right.[136] However, despite Justice Chandrachud's opinion centering the individual as the bearer of the right to privacy, concerns remain that without an intersectionality analysis, the right to privacy ultimately leads to deprivation of marginalized persons' rights in the name of ensuring the rights of the more privileged. In the context of reproductive rights, concerns remain that judicial perspectives on the legitimacy of restrictions on reproductive

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violated the fundamental right to freedom of religion as well as the right to equality. The judgment is currently under review by a nine-judge bench. *See* Scroll Staff, *Nine-Judge SC Bench to Begin Hearing Sabarimala Review Pleas From today*, SCROLL (Jan. 2020), https://scroll.in/latest/949668/nine-judge-sc-bench-to-begin-hearing-sabarimala-review-pleas-from-today [https://perma.cc/L9MX-ZDWN]. With the nomination of Brett Kavanaugh to SCOTUS, many feared that *Roe v. Wade* could be overturned due to his "record of being anti-women's healthcare, anti-reproductive healthcare, anti-healthcare, anti-rights." *See* Jamie Ducharme, Roe v. Wade *"Could Well Be Overturned" With Kavanaugh on the Court, Planned Parenthood President Says*, TIME (Apr. 2019), https://time.com/5574385/leana-wen-time-100-gala/ [https://perma.cc/Q5RP-8U93]; Dylan Matthews, *Brett Kavanaugh Likely Gives the Supreme Court the Votes to Overturn* Roe*. Here's How They'd Do It*, VOX (Oct. 2018), https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump [https://perma.cc/5V76-8V4H]; Irin Carmon, *Yes, Conservatives Will Try to Undo* Roe v. Wade*. The Only Question is How*, WASH. POST (July 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/07/02/yes-conservatives-will-try-to-undo-roe-v-wade-the-only-question-is-how/ [https://perma.cc/2F5W-CKAX]. However, if the right to abortion in *Roe* had been grounded in equality rather than privacy, it would be much harder to uphold the constitutionality of restrictions to abortion access.

[133] RATNA KAPUR, EROTIC JUSTICE: LAW AND NEW POLITICS OF POSTCOLONIALISM 35 (2005).

[134] *See* FEMINIST LEGAL THEORY FOUNDATIONS (D. Kelly Weisberg ed., 1993).

[135] *See* Naomh Gibson, *Intimacy, Confidentiality, and Power: Kiss and Tell as a Feminist Critique of Privacy Law*, 3 I.A.L.S. STUDENT L. REV. 7, 9 (2015).

[136] *Puttaswamy*, 10 SCC at ¶ 245–50.

autonomy may still be shaped by the notion of "good" abortions—occurring within the context of rape or marriage—versus "bad" abortions, occurring as a result of what is perceived to be "irresponsible decision-making."

The artificial public/private distinction, according to Kapur, continues to shape the ways in which the law intervenes in intimate relationships.[137] Only certain forms of sexuality, such as those situated within private conjugal spaces, are culturally accepted and legitimized. Thus, the private space is "both a space of cultural production and a re-inscription of sexual norms that are consistent with women's sexual purity and honour."[138] Nivedita Menon argues that the law actively constructs a private sphere, and then defines it as a space exempt from the values of justice and equality.[139] This is illustrated by the Delhi High Court decision in *Harvinder Kaur v. Harmander Singh*.[140] The court expressly stated in *Harvinder* that neither Article 21 nor Article 14 have any space in the privacy of the home and married life.[141] The judgment reveals how the law maintains a sphere of privacy by restraining itself from entering the private, domestic sphere.[142] The right to privacy has often been inadequate in "protecting the interests and safety of women" in the domestic realm.[143] The construction of privacy rights has been used as a "justification for not criminalizing domestic violence," as it would make private acts publicly and legally legible, thus drawing the gaze of the public into the bedroom.[144]

The feminist critique of public/private distinction has itself been challenged, however, such as in the context of domestic violence reforms and mandatory arrest policies in the United States which "publicize the private, makes the home a place subject to public purview, and ensures that privacy is no longer a justification or, excuse for male

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[137] KAPUR, *supra* note 133, at 32.

[138] *Id.* at 33.

[139] NAISARGI N. DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 180 (2012); *see also* NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).

[140] Harvinder Kaur v. Harmander Singh Chaudhry, AIR 1984 SC 66 (Del.).

[141] *Id.* at ¶ 45 ("[I]ntroduction of constitutional law in the home is most inappropriate . . . In the privacy of the home and married life neither Article 21 nor Article 14 has any place.").

[142] *See* Nivedita Menon, *Abortion and the Law: Questions for Feminism*, 6 CAN. J. WOMEN & L. 103, 117 (1993).

[143] Gibson, *supra* note 135, at 9.

[144] *Id.*

violence."[145] These policies strip women of their agency and autonomy; state interventions that aim to eradicate abuse from women's lives very often reproduce this abuse by silencing women's voices.[146] Further, as Jennifer Nash argues, that the problematization of privacy without an "intersectionality analysis" has "led some feminists to ask that women relinquish something not all women have: An entitlement to privacy."[147] Black women, for example, have never been able to exercise privacy rights in the same way that white women have. Nash goes on to state that the "private can function as a critical space of empowerment and safety", arguing that the feminist critique of privacy has relied on the experiences of a particular subject—white women—and has not accounted for the experiences of women of color.[148]

We acknowledge that "the private" can function as a site for personal and political empowerment,[149] especially for those communities that have historically been denied the ability to exercise their agency. Nevertheless, privacy has functioned as a tool of gender subordination, as an "ideology that enables male violence against women with little, or no, legal, social, or cultural recourse."[150] The demand for a private sphere, free of any state intervention, leaves women vulnerable to a discourse that places the responsibility for violence as well as the burden to end it on women themselves. For example, women are seen as complicit in sex-selection practices, dowry demands, etc., and are educated to advocate against them; the role of men remains largely unaddressed.[151] The responsibility of the state to curb such practices is thus subsumed by the exclusive focus on women.

Privacy was taken up as an argument by the petitioners in the 2009 *Naz Foundation* case, in which the Delhi High Court held that § 377 of the Indian Penal Code, insofar as it

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[145] Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 314–15 (2005).

[146] *Id.* at 315.

[147] *Id.* at 319.

[148] *Id*. at 325–26.

[149] *Id*. at 328.

[150] *Id.* at 303 (giving an overview of the conventional feminist position on privacy as a notion that reifies female subordination); *see also* Nash, *supra* note 145, at 304 ("[T]he private is a space of injury, a primary locus of female subjugation, and a stronghold of patriarchal control.").

[151] *See* KAPUR, *supra* note 133, at 48.

criminalized consensual sexual relations between adults, was unconstitutional.[152] The petitioners claimed that Article 21 of the Constitution protected a "zone of privacy" that included intimate relations, and thus asked for adult consensual sex in private to be excluded from the purview of § 377.[153] This approach, however, has since been critiqued—especially for its failure to consider that decriminalizing same-sex relations only in private would have little impact on the larger 'queer community' that relied on public spaces. Section 377 did not impact all queer groups equally or in the same way, especially working-class gay men, non-English-speaking persons, and Hijras, who are least likely to have access to private homes or hotels.[154] Ashley Tellis calls the privacy-based approach a "blatantly casteist and classist demand" and notes how this approach meant that the initial argument for a complete repeal of § 377 eventually moved to a more palatable "reading down."[155]

The idea of privacy as the "right to be let alone" is essentially a placeholder for a 'sacrosanct sphere' that is free to be filled up by the interpretation of judges.[156] This approach is rooted in individualism and "results in an uneven distribution of justice by working in favor of those who are already advantaged."[157] The law discursively constructs the public and the private, and legal claims are decided according to this construction.[158] This leaves room for reproductive rights grounded in privacy to be subject to limitations based on the patriarchal and paternalistic imaginations of the judges. When the law protects privacy, it only protects the "right kind of privacy."[159] The risk is that while privacy and choice may be upheld for non-marginalized women, those same rights will be seen as justifiably encroached without an equality analysis that

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[152] Naz Found.Foundation v. Gov't of NCT of Delhi, WP(C) No.7455/2001 (2009) (Del.).

[153] *See* Saptarshi Mandal, *Right to Privacy in* Naz Foundation*: A Counter-Heteronormative Critique*, 2 N.U.J.S.L. REV. 525, 532 (2009).

[154] *See* JYOTI PURI, SEXUAL STATES: GOVERNANCE AND THE STRUGGLE OVER THE ANTISODOMY LAW IN INDIA 143 (2016).

[155] Ashley Tellis, *Disrupting the Dinner Table: Re-thinking the 'Queer Movement' in Contemporary India*, 4 JINDAL GLOBAL L. REV. 142, 145 (2012).

[156] *See* Pritam Baruah, *Logic and Coherence in* Naz Foundation*: The Arguments of Non-Discrimination, Privacy and Dignity*, 2 N.U.J.S.L. REV. 505, 517 (2009).

[157] *See* PURI, *supra* note 154, at 144.

[158] *See* Mandal, *supra* note 153, at 526.

[159] *See id.* at 528.

recognizes that policies that disproportionately burden women and particularly marginalized subgroups of women are improper. There are those who insist, for example, that the state may justifiably invade poor women's privacy "to ensure that a woman's child will be born into a healthful environment and that the woman will properly parent the child once born."[160] This argument also then extends to monitoring women and their existing family units and constraining their reproductive decisions, pursuant to the state interest in "protecting" children.[161] It is worth re-examining, then, whether a privacy-based argument alone is useful for advancing a reproductive rights framework.

3. Privacy as Insufficient without Equality Rights

In *Puttaswamy*, Justice Chandrachud's opinion identifies privacy as a subset of liberty and states that some liberties can only be exercised in a private space. But decisional autonomy, *i.e.*, the 'right to choose,' as an integral aspect of the right to privacy and personal liberty is not freely accessible and can only be realized with a host of other conditions.[162] Reproductive justice activists like Loretta Ross and Dorothy Roberts have emphasized that a focus on individual rights, such as a right to abortion located within a right to privacy, does not adequately address oppression on multiple axes.[163] Reproductive justice is rooted in "the belief that systemic inequality has always shaped people's decision[-]making around childbearing and parenting, particularly vulnerable women."[164] From this vantage point, the insistence on a woman's right to choose cannot be pursued through private initiatives or resources; a liberal individualist defense of reproductive rights is inadequate.[165]

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[160] BRIDGES, *supra* note 81, at 5.

[161] *See id.*

[162] Sushmita Pati & Rajarshi Sen, *Unpacking Choice: What Does Feminist Theory Have to Rethink after the Nemo/Nari Niketan Cases*, 4 J. INDIAN L. & SOC'Y 54, 79 (2012).

[163] *See* Loretta J. Ross, *Reproductive Justice as Intersectional Feminist Activism*, 19 SOULS 286 (2017); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

[164] Ross, *supra* note 163, at 291 (noting that a reproductive justice movement, by its intersectional nature, also necessarily includes transmen, transwomen, and gender-nonconforming individuals).

[165] *See* Sumi Madhok et al., *On Reproductive Justice: 'Domestic Violence,' Rights and the Law in India*, 16 CULTURE, HEALTH & SEXUALITY: INT'L J. RES., INTERVENTION & CARE 1231, 1239 (2014).

Justice Ruth Bader Ginsburg has also emphasized that the focus on privacy and decisional autonomy results in a fractured framework in which decisions around abortion, pregnancy, and women's sexuality are seen distinctly, rather than as part of a broader context in which women's and girls' gender-based differences are disregarded and minimized.[166] According to Justice Ginsburg, this results in an approach that fails to "acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue."[167] She emphasizes the need to look at reproductive rights, particularly around abortion, as both about individual autonomy as well as equality.[168] Dorothy Roberts has also argued that a focus on individual autonomy alone advances gender essentialism that forces women of color to fragment their experiences in order to make cognizable legal claims.[169]

The benefits of liberal democratic rights often do not extend beyond the interests of privileged groups that are drawn towards these rights.[170] Of course, members of marginalized groups may also strike what Amalia Sa'ar terms a "liberal bargain"—they may attempt "to materialize whatever limited benefits they may extract from their disadvantaged position in the liberal order."[171] As a long-term strategy, however, the recognition of liberal, private rights does not sufficiently address structural inequalities that prevent individuals from exercising their rights. The liberal order makes individuals the bearers of rights but fails to fulfill their material needs.[172] These rights claims treat groups as homogenous, assuming, for example, that all women across classes and cultures are the same.[173] The "material and ideological specificities that constitute a

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[166] *See* Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 67–71 (2013).

[167] *Id.* at 69.

[168] *Id.* at 67–71.

[169] Roberts, *supra* note 163, at 1424.

[170] *See* Gopal Guru, *Liberal Democracy in India and the Dalit Critique*, 78 SOC. RES.: INT'L Q. 99, 99 (2011).

[171] Amalia Sa'ar, *Postcolonial Feminism, the Politics of Identification, and the Liberal Bargain*, 19 GENDER & SOC'Y 680, 681 (2005).

[172] *See* Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies*, 13 INDIA INT'L CTR. Q. 185, 186 (1986).

[173] *See* Chandra T. Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 2 BOUNDARY 333, 337 (1984).

particular group of women as 'powerless' in a particular context" are left unquestioned.[174] Moreover, the compounded effects of class and caste hierarchies in India condemn "those at the bottom to a doubly-reinforced structural trap."[175] An individualized absolute right to abortion in this context is meaningless without dismantling the structural barriers that prevent women and girls from accessing abortion and other reproductive health services.

Studies in India have found that caste and economic status are major determinants of access to healthcare, including reproductive healthcare services.[176] Dalit and Adivasi women face "triple discrimination" due to the degree to which caste is embedded in public health services.[177] Women in rural areas also face challenges in accessing abortion services. Shanti Devi's death and the subsequent Delhi High Court case on maternal health exemplify these findings.[178] Shanti was a landless migrant from Bihar and belonged to a scheduled caste community.[179] In 2008, while pregnant, she suffered a fall and was taken first to a hospital nearby, then forced to go a different hospital in Delhi, fifty-five kilometers away.[180] While she was reassured that she would receive free medical treatment due to her socioeconomic status, Shanti had to endure a long period of waiting upon arrival and was then taken to a private hospital where staff demanded that she pay for the treatment.[181] She was then brought back to the government hospital where doctors removed the dead fetus and discharged her, despite her weak physical

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[174] *Id.* at 338.

[175] Gopal Guru & Anuradha Chakravarty, *Who Are the Country's Poor? Social Movement Politics and Dalit Poverty*, *in* SOCIAL MOVEMENTS IN INDIA: POVERTY, POWER, AND POLITICS 135, 136 (Raka Ray & Mary F. Katzenstein eds., 2005).

[176] *See* Linda Sanneving et al., *Inequity in India: The Case of Maternal and Reproductive Health*, 6 GLOBAL HEALTH ACTION 1, 3 (2013).

[177] *See* Parisa Patel, Mahua Das & Utpal Das, *The Perceptions, Health-Seeking Behaviours and Access of Scheduled Caste Women to Maternal Health Services in Bihar, India*, 26 REPROD. HEALTH MATTERS 114, 115 (2018).

[178] Laxmi Mandal v. Deen Dayal Harinagar Hospital, (2010) 172 DLT 9 (Del.).

[179] *See* Jameen Kaur, *The Role of Litigation in Ensuring Women's Reproductive Rights: An Analysis of the Shanti Devi Judgement in India*, 20 REPROD. HEALTH MATTERS 21, 24 (2012).

[180] *Id.* at 24.

[181] *Id.*

condition.[182] The court intervened, ordering the hospital to readmit Shanti, but she still did not receive any follow-up care or counseling.[183] Shanti eventually became pregnant again and died soon after delivery.[184] Adivasi women also face numerous hurdles in accessing healthcare. In 2016, Amita Kujur, an Adivasi girl and rape survivor, first approached the District Hospital in Jashpur, Chhattisgarh, and then the Chhattisgarh Institute of Medical Sciences to terminate her twelve-week pregnancy.[185] Amita was well within the twenty-week gestational limit in the MTP Act but was made to obtain unnecessary documents such as a reference letter and first information report (FIR) copy in order to proceed with termination.[186] She eventually petitioned the court but was twenty-one weeks pregnant at this point. Fortunately, the court granted an order in her favor, as she was a rape survivor and did not want to continue with the pregnancy.[187] As one of us has previously argued, for Dalit and Adivasi women and girls, a range of social and legal issues impede access to abortion and other reproductive health services.[188] Shanti and Amita's cases make evident the need for an equality-based approach to reproductive rights that factors in the material circumstances and lived experiences of women who experience marginalization on multiple axes.

One of us has argued elsewhere that locating reproductive rights within the framework of Articles 14 and 15(1) of the Constitution will ensure that they are robust and meaningful.[189] Article 14 guarantees to all persons "equality before the law" and "the equal protection of the laws."[190] Article 15(1) states that "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of

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[182] *Id.*

[183] *See id.*

[184] *See id.*

[185] *See* Jain, *Time to Rethink*, *supra* note 27.

[186] *Id.*

[187] SAMA—RESOURCE GROUP FOR WOMEN AND HEALTH, FROM THE MARGINS TO THE CENTRE: A STUDY ON THE HEALTH INEQUITIES AMONG THE TRIBAL COMMUNITIES IN SELECTED DISTRICTS OF CHHATTISGARH, JHARKHAND AND ODISHA 147 (2018), https://nhrc.nic.in/sites/default/files/SAMA%20Final%20Report.pdf [https://perma.cc/4REQ-GCQX]; Amita Kujur v. State of Chhattisgarh & Ors., WP(C) 976/2016 (CG).

[188] *See* Jain, *Time to Rethink*, *supra* note 27.

[189] *See id.*

[190] INDIA CONST. art. 14.

birth or any of them."[191] Despite the enumeration of several prohibited grounds of discrimination, Indian jurisprudence on equality rights, especially with regard to Article 15 of the Constitution, has largely foreclosed the route to recognition of intersectional discrimination.[192] However, it is crucial that the legal basis for adjudicating discrimination claims account for diverse experiences, based on more than one of the grounds listed in Article 15(1). This approach is extremely important to advance reproductive rights in India, where people have multiple identities due to the structures of caste, class, gender, and religion. Such an approach would also take into consideration gender minorities and not restrict the reproductive rights discourse to women. It is important to briefly mention here the Supreme Court's decision in *National Legal Services Authority v. Union of India*, which held that transgender[193] persons have the right to self-determination and legal recognition of their gender identity.[194] Discrimination claims rooted in Articles 14 and 15(1) must necessarily include those who are "beyond the confines of the gender binary."[195] Moreover, caste-based discrimination in particular is embedded in public health services.[196] Shreya Atrey highlights the reductionist turn in jurisprudence, in which courts have largely interpreted Article 15(1) in an isolated way to consider only those claims where sex alone is the basis for discrimination.[197] Atrey discusses a 1951 judgment of the Calcutta High Court that refused to declare a provision discriminatory, as it was based on sex *and* property considerations.[198] In so holding, the court failed to consider how socioeconomic status, property ownership, and poverty amplify women's subordinate position "to entrench their

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[191] INDIA CONST. art. 15.

[192] *See* Shreya Atrey, *Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15*, 16 EQUAL RTS. REV. 160, 161 (2016).

[193] The term 'transgender' has multiple meanings depending on the region, culture, or nation in which it is used. In the South Asian context, 'transgender' does not accurately describe this diversity. However, this is the term that the judgment uses.

[194] Nat'l Legal Services Auth. v. Union of India, AIR 2014 SC 1863.

[195] Jain, *Time to Rethink*, *supra* note 27.

[196] *See* Sobin George, *Reconciliations of Caste and Medical Power in Rural Public Health Services*, 54 ECON. & POL. WKLY. 43 (2019).

[197] Atrey, *supra* note 192, at 167.

[198] Mahadeb v. Dr. BB Sen, AIR 1951 Cal 563; *see also* Atrey, *supra* note 192, at 168.

sex-based disadvantage and create new forms of disadvantage."[199] This trend has continued in other cases, including Supreme Court decisions.[200]

For instance, the Supreme Court in *Dattatraya Motiram More v. State of Bombay* held that only discrimination occurring on *one* of the grounds mentioned in Article 15(1) would be impermissible.[201] Similarly, in *Air India v. Nergesh Meerza*,[202] the court was persuaded by Air India's arguments that the discriminatory conditions it imposed on female flight attendants were permissible, as they did not make distinctions on the ground of "sex" only.[203] The court relied on precedent which stated that Article 15(1) does not "prohibit the State from making discrimination on the ground of sex coupled with other considerations."[204] Such a reading of non-discrimination provisions limits the possibility of recognizing intersectional discrimination.[205] However, the recent *Navtej Johar* decision indicates a shift in equality jurisprudence. In his separate opinion in that case, Justice Chandrachud writes that a formalistic interpretation of Article 15 would render its guarantee against discrimination meaningless.[206] He specifically discusses the intersectional nature of sex discrimination and how it is not divorced from the social, economic, and political contexts or isolated from other varied identities.[207] Justice Chandrachud also notes that a discriminatory act that is grounded in and perpetuates stereotypes about a certain class of groups—the class being constituted by the grounds enumerated in Article 15—will not survive constitutional scrutiny.[208]

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[199] Atrey, *supra* note 192, at 168.

[200] *See* Atrey, *supra* note 192, at 170.

[201] Dattatraya Motiram More v. State of Bombay, AIR 1953 Bom 311.

[202] Air India v. Nergesh Meerza, (2008) 3 SCC 1.

[203] The Air India Employees Service Regulations required female flight attendants to retire from service if any one of the following conditions was met: (1) attaining the age of thirty-five, (2) marriage within four years of service, or (3) first pregnancy. *See* Atrey, *supra* note 192, at 171.

[204] *Id.* at 167.

[205] *Id.* at 173.

[206] *Navtej Johar*, 10 SCC at ¶ 36 (Chandrachud, J., concurring).

[207] *Id.*

[208] *Id.* at ¶ 41.

Kalpana Kannabiran argues that we must adopt a holistic, cross-sectoral, and intersectional approach to enrich the scope of non-discrimination, and that such an approach will involve a "shift that forces a re-examination of a range of materials hitherto inadequately explored in constitutional jurisprudence and legal research on non-discrimination."[209] Not all women who undergo abortion are positioned equally. Their lived experiences place them in "indeterminate grey zones" between the two oppositions of "pro-life" and "pro-choice."[210] The liberal celebration of "choice" fails to consider that not all choices are made freely. Many women seek abortions due to structural issues that adversely impact their ability to raise children.[211] A study conducted in four villages of Tamil Nadu found that factors such as domestic violence, superstitious beliefs about the month of conception, and the threat of losing employment influenced women's decision to abort.[212] Abortions allowed these women to "negotiate the harsh realities of work and the increasing control over their sexuality in the workplace and at home."[213]

As championed by the liberal feminist movement, particularly in the United States, the rhetoric of choice advocates the "right to control the biological body and its reproductive resources."[214] Choice, therefore, symbolizes women's control over their reproductive destiny.[215] However, arguments focusing on decisional autonomy without a discussion of how poverty and other structural forms of discrimination may impede the right to autonomy have long faced criticism. Our choices are shaped by the "constellation of personal, institutional[,] and social relationships that constitute our individual and collective identities."[216] In other words, our choices must be placed in the contexts in which we live, and this includes structures such as capitalism, patriarchy, white

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[209] KALPANA KANNABIRAN, TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION 337 (2012).

[210] Pati & Sen, *supra* note 162, at 60.

[211] *See id.* at 63.

[212] *See* S. Anandhi, *Women, Work and Abortion: A Case Study from Tamil Nadu*, 42 ECON. & POL. WKLY. 1054, 1055–56 (2007).

[213] *Id.* at 1059.

[214] Anindita Majumdar, *The Rhetoric of Choice: The Feminist Debates on Reproductive Choice in the Commercial Surrogacy Arrangement in India*, 18 GENDER TECH. & DEV. 275, 281 (2014).

[215] *See id.* at 282.

[216] Nancy J. Hirschmann, *Freedom, Power and Agency in Feminist Legal Theory*, *in* THE ASHGATE COMPANION TO FEMINIST LEGAL THEORY 51, 55 (Margaret Davies & Vanessa Munro eds., 2013).

supremacy, and caste. Our freedom is as socially constructed as the external conditions that enable or restrain it.[217] Ultimately, then, the ability to make reproductive choices is not limited to laws and policies specifically regarding reproductive health services; rather, broader issues of economic or social injustice can also constrain decisional autonomy.

For example, class "plays a key role in mediating the operation of the ideology of motherhood."[218] While middle and high-income women may be criticized for engaging in paid work instead of being stay-at-home mothers, low-income women often have little choice but to work outside of the home. Marginalized women are concerned not only with challenging restrictive abortion laws but also coercive measures such as sterilization that constrain their freedom to make reproductive choices.[219] Hence, legal recognition of women's reproductive rights is insufficient without adequate state and social structures to provide women with the practical ability to access these rights and exercise this freedom. Full exercise of autonomy requires that choices be meaningful, not limited by discrimination or lack of opportunities. A comprehensive analysis of autonomy that accounts for the compounded discrimination resulting from various structures of oppression is essential to prevent violations arising from restrictions that disproportionately impact marginalized women and girls. In India and globally, the unequal impact of a non-comprehensive approach to reproductive rights has catalyzed support for the reproductive justice movement, which, in turn, reflects the recognition in human rights law that those most marginalized must be central in the analysis of autonomy.

III. Equality: What Has Been Gained? What Comes Next?

Courts in several parts of the world, including India, have recognized reproductive rights without grounding them primarily in equality and non-discrimination. Doing so, however, is essential to ensuring that autonomy guaranteed by law is achieved in practice, and particularly for the most marginalized subgroups of women and girls. Restrictions on reproductive rights are a threat to the recognition of women's whole personhood. In India in particular, recognizing reproductive rights as essential to equality is critical, since abortion restrictions in India are often introduced on the pretext of

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[217] *See id.* at 57.

[218] Susan B. Boyd, *Motherhood and Law: Constructing and Challenging Normativity*, *in* THE ASHGATE COMPANION TO FEMINIST LEGAL THEORY 267, 270 (Margaret Davies & Vanessa Munro eds., 2013).

[219] *See id.* at 272.

preventing sex selection. This fails to acknowledge that barriers to reproductive rights, specifically restrictions on abortion and monitoring of pregnant women, actually contribute to the low status of women and girls. Thus, they perpetuate rather than curtail son-preference and gender-biased sex selection.

Women and girls face significant barriers to achieving equal social and economic status where reproductive rights are denied, due in part to the disproportionate burden women and girls face in childbearing and child-rearing and the impact of these responsibilities on their education and employment opportunities.[220] As stated by the UN Working Group on Discrimination against Women and Girls in Law and in Practice, "[t]he decision as to whether to continue a pregnancy or terminate it, is fundamentally and primarily the woman's decision, as it may shape her whole future personal life as well as family life and has a crucial impact on women's enjoyment of other human rights."[221] Underlying many restrictions on reproductive rights are discriminatory stereotypes about women and girls' primary role in society as mothers and caregivers and the "natural" course of women and girls' lives as including reproduction. UN treaty monitoring bodies and the Special Rapporteur on the right to health have affirmed that criminal laws and other restrictive policies affecting sexual and reproductive health, including parental and spousal consent requirements, disproportionally burden women and reinforce stereotypes about their roles as procreators.[222] Addressing stereotypes in the reproductive rights context requires the elimination of legal barriers that compel pregnancy based on stereotypical notions of motherhood or exclude unmarried women from contraceptive policies on the assumption that only married women are or "should be" sexually active.[223]

Furthermore, as recognized under international law, the discriminatory deprivation of reproductive rights violates women's ability to enjoy their other human rights beyond privacy, including their rights to life, health, and freedom from torture and ill treatment.

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[220] *See* U.N. Comm. on the Elimination of Discrimination Against Women, 13th Sess., General Recommendation No. 21: Equality in Marriage and Family Relations, ¶ 21, U.N. Doc. A/49/38 (1994).

[221] *See* U.N. WORKING GRP. ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE, *supra* note 31.

[222] *See* Special Rapporteur, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 16–17, 24, U.N. Doc. A/66/254 (Aug. 3, 2011).

[223] *See* Rebecca Cook et al., *Unethical Female Stereotyping in Reproductive Health*, 109 INT'L J. GYNECOLOGY & OBSTETRICS 255, 256 (2010).

Human rights bodies have also recognized that women's right to non-discrimination in enjoyment of the right to life is violated, for example, where governments fail to protect women from arbitrary and preventable losses of life related to pregnancy and childbirth, which are risks only women face.[224] Similarly, states discriminatorily violate women's right to health where "a health-care system lacks services to prevent, detect and treat illnesses specific to women."[225]

An equality-based approach not only looks at formal (*de jure*) equality, but substantive (*de facto*) equality. Realizing substantive gender equality requires addressing the historical roots of gender discrimination, gender stereotypes, and traditional understandings of gender roles that perpetuate discrimination and inequality. The right to non-discrimination requires that states take measures to eliminate discrimination on multiple axes.[226] Treaty monitoring bodies have established that states should take extra efforts to ensure that women from marginalized groups—including adolescents, rural women, women from certain castes or tribes, refugees, internally displaced people, migrants, and women with disabilities—have access to sexual and reproductive health information and contraceptives.[227]

Courts in India have yet to situate reproductive rights within the equality framework, but signs of receptiveness to this approach can be found in the Supreme Court's decision

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[224] *See* U.N. Human Rights Comm., 68th Sess., General Comment No. 28, *supra* note 29, at ¶ 19.

[225] *See* U.N. Comm. on the Elimination of Discrimination Against Women, 20th Sess., CEDAW General Recommendation No. 24, *supra* note 29, at ¶ 11.

[226] *See* U.N. Comm. on the Elimination of Discrimination Against Women, 30th Sess., General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures at ¶ 12, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004); U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economics, Social and Cultural Rights), ¶¶ 30–31, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

[227] *See* U.N. Comm. on the Rights of the Child, General Comment No. 20: Implementation of the Rights of the Child During Adolescence, ¶¶ 39, 60, U.N. Doc. CRC/C/GC/20* (Dec. 6, 2016); U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 34: On the Rights of Rural Women, ¶ 37, U.N. Doc. CEDAW/C/GC/34 (March 4, 2016); U.N. Comm. on the Elimination of Discrimination Against Women, 65th Sess., Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Switzerland, ¶¶ 38–39, U.N. Doc. CEDAW/C/CHE/CO/4-5 (Nov. 18, 2016); U.N. Comm. on the Rights of Persons with Disabilities, General Comment No. 3 (2016): On Women and Girls with Disabilities, U.N. Doc. CRPD/C/GC/3 (Sept. 2, 2016).

in *Devika Biswas v. Union of India*,[228] described in Part I. In its decision concerning abuse and coercion within sterilization camps under population policies, the Supreme Court of India acknowledged that the women targeted by incentive schemes for sterilization were often the most economically and socially disadvantaged.[229] The court stated, "the policies of the Government must not mirror the systemic discrimination prevalent in society but must be aimed at remedying this discrimination and *ensuring substantive equality*."[230] While this is an important step forward, the court stopped short of invoking Articles 14 or 15 of the Constitution on equality and non-discrimination. However, as this section discusses, there is growing momentum after *Joseph Shine* and *Navtej Johar* to recognize reproductive rights as essential to women and girls' equal status and rights.

A. What Have We Gained Post-*Joseph Shine* and *Navtej Johar*?

In *Joseph Shine*, the court relied on the principle of substantive equality to hold that the adultery provision deprived women of their agency.[231] The court further acknowledged sexual autonomy as being intrinsic to a dignified human existence.[232] Since the law recognized the ability to make sexual choices only in men, it was held to be discriminatory.[233] The court went on to express that the principles of dignity and autonomy are crucial to substantive equality.[234] It would appear, then, that any discrimination grounded in patriarchal notions would violate Articles 14–18 of the Constitution (*i.e.*, the Equality Code). In particular, Justice Chandrachud's opinion questions the "social mores which are antithetical to constitutional morality" and the oppressive values that find their way into legal structures.[235] Justice Chandrachud notes

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[228] Devika Biswas v. Union of India, (2016) 10 SCC 726.

[229] *Id.* at ¶ 112.

[230] *Id.* (emphasis added).

[231] Kunika, *Patriarchy Hit Hard as Supreme Court Rules for Gender Equality*, THE CITIZEN (Sept. 28, 2018), https://www.thecitizen.in/index.php/en/NewsDetail/index/7/15124/Patriarchy-Hit-Hard-as-Supreme-Court-Rules-for-Gender-Equality [https://perma.cc/KXJ7-FMV7].

[232] Joseph Shine v. Union of India, 3 SCC at ¶ 36 (Chandrachud, J., concurring).

[233] *Id.* at ¶ 53 (Misra, J.).

[234] *Id.* at ¶ 48 (Chandrachud, J., concurring).

[235] *Id.* at ¶ 1 (Chandrachud, J., concurring).

that § 497 regards individuals as gendered citizens and assigns roles to them based on existing gender stereotypes.[236] In so doing, the law operates an unequal world for women. The judgment also challenges paternalistic notions that allow the law and its interpreters to treat men and women differently with the justification that it is in the best interest of women.[237] The Indian judiciary's acceptance and reinforcement of benevolent patriarchy has meant that stereotypes about gender have gone unquestioned for a long time. Thus, the court finally noted that when patriarchal structures are entrenched in society, it is imperative to intervene and ensure that women are entitled to the equal protections of the Constitution.

The salience of the Court's decision in *Joseph Shine* is clear when juxtaposed against its recognition in *Navtej Johar* of the right to sexual autonomy as including the freedom to have non-procreative sex.[238] The recognition of this right of all individuals, including women, necessarily entails the recognition of reproductive rights and specifically the right to abortion on request.[239] Like *Joseph Shine*, *Navtej Johar* acknowledges that many in our society are still discriminated against due to stereotypes and parochial mindsets around sexuality and gender.[240] The Court notes that these stereotypes are premised on assumptions about gender roles that often discriminate against women.[241] Treatment of a particular class of persons based on their perceived special attributes or qualities and in the 'public interest' would violate the guarantee of equality. The Court rejects the stereotypical underpinnings of its previous decisions where the entire burden of family planning and welfare of all members of the household have been left to women.[242] It goes on to hold that if "any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex," it would be unconstitutional.[243] Furthermore, the Court in *Navtej Johar* made it clear that the freedom to make choices regarding contraception, childbearing, and family relationships is inherent in the notion

[236] *Id.* at ¶ 2 (Chandrachud, J., concurring).

[237] *Id.* at ¶ 52 (Chandrachud, J., concurring).

[238] *Navtej Johar*, 10 SCC at ¶ 57 (Chandrachud, J., concurring).

[239] *See* Jain, *Time to Rethink*, *supra* note 27.

[240] *Navtej Johar*, 10 SCC at ¶ 5.

[241] *Id.* at ¶ 37 (Chandrachud, J., concurring).

[242] *Id.* at ¶ 40 (Chandrachud, J., concurring).

[243] *Id.* ¶ 41 (Chandrachud, J., concurring).

of autonomy.[244] The Court ruled that individuals have sovereignty over their bodies and that their exercise of the right to self-determination hinged on the ability to make decisions about their lives and bodies.[245] *Navtej Johar* is grounded in the ideals of autonomy, liberty, equality for all, dignity, and privacy. As Justice Misra's opinion explicitly notes, "equality is the edifice on which the entire non-discrimination jurisprudence rests."[246]

Through both these cases, the Supreme Court has established that the Constitution can be interpreted to challenge hegemonic power structures and safeguard equal citizenship rights for women. As noted previously, the privacy framework in *Puttaswamy* cannot be disregarded. After all, a woman's individual bodily autonomy must be ensured. However, *Navtej Johar* and *Joseph Shine* have opened up possibilities for an equality-based approach which address inherent and problematic weaknesses in the privacy framework. These cases have relied on the concept of substantive equality, which is crucial when considerations of meaningful choice come into the picture, in order to extend the equal protection of the Constitution to historically disadvantaged groups.

B. Towards A Gender Transformative Approach to Reproductive Rights

Legal developments grounded in the notions of gender equality and sexual autonomy would result in significant benefits for all women. Feminists who work on reproductive rights issues must necessarily recognize the difficulties of guaranteeing reproductive rights without framing them within the gender justice paradigm. There is a need to recognize that ensuring reproductive justice is essential to the reproductive rights movement by taking into consideration the complex interrelationships and interdependencies of various rights,[247] including equal citizenship. The liberal understanding of freedom exists in a reality that is far different from the reality of those who are marginalized. Choice is not "free" when one is not a full citizen in relation to political and economic issues.[248] In Brazil, for example, black and indigenous women are

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[244] *Id.* ¶ 121 (Chandrachud, J., concurring).

[245] *Id.* at ¶ 149 ("Under the autonomy principle, the individual has sovereignty over his/her body.").

[246] *Navtej Johar*, 10 SCC at ¶ 240.

[247] *See* Madhok et al., *supra* note 165, at 1237.

[248] *See* Ivone Gebara, *The Abortion Debate in Brazil: A Report from an Ecofeminist Philosopher Under Siege*, 11 J. FEMINIST STUD. RELIGION 129, 130 (1995).

the most negatively impacted by abortion restrictions.[249] Indigenous women are similarly disproportionately affected across Latin America, as they are more likely to live in rural and marginalized areas with limited access to health care.[250] Reproductive justice must be tied to larger issues of equality and social justice, thus addressing "questions of inequality, justice[,] and systemic oppression within which reproductive rights are denied or rendered ineffective."[251]

However, the equality-based argument is not without critique. Women and men are not similarly situated; erasing biological realities constitutes a "disservice to women, who, throughout human history, have been denigrated because of their physical differences from men."[252] Erika Bachiochi argues that equal protection arguments assume the wombless male body as normative, thereby promoting cultural hostility toward pregnancy and motherhood.[253] Doing so discounts the fundamental biological reality of pregnancy.[254] Bachiochi acknowledges that if abortion rights were to be litigated under the Equal Protection Clause instead, the "burden of proof would shift from the plaintiff (who currently must show a restriction poses an undue burden) to the [s]tate (which would need to show that a restriction was substantially related to an important governmental interest)."[255] In addition, if abortion were an issue of equality, then any economic or geographic restraint would involve equality and therefore be removed and rectified by the state.[256]

Critics have framed the equality analysis as fallible in practice, because "men and women are not similarly situated with regard to pregnancy," and therefore the Equal

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[249] *See id.* at 131.

[250] *See* Heather Wurtz, *Indigenous Women of Latin America: Unintended Pregnancy, Unsafe Abortion, and Reproductive Health Outcomes*, 10 PIMATISIWIN: J. ABORIGINAL & INDIGENOUS COMMUNITY HEALTH 1 (2012).

[251] Madhok et al., *supra* note 165, at 1237.

[252] Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 893, 950 (2011).

[253] *Id.* at 893.

[254] *Id.* at 895.

[255] *Id.* at 897.

[256] *See id.*

Protection Clause, as currently understood, is not triggered.[257] Jennifer Hendricks shares similar concerns. Hendricks understands that there may be a necessity to ground liberty rights in a legal tradition that is formed upon male experience, but due to the need for comparison, "equality arguments undermine the long-term goal of developing a theory of liberty based on female experience rather than defining women's liberty as a derivative of men's."[258] Women's experiences are devalued when their experiences are forced to fit within the parameters of existing legal categories.[259] Moreover, the push for an equality-based analysis may result in the subordination of women's specific interests to greater common goals, as has historically been the case in Argentina, Chile, Uruguay, and Nicaragua.[260]

In addition, gender equality claims, depending on who makes them, respond to the needs and politics only of certain groups of women. Do all women share a common vision of equality?[261] It is essential to question which men 'women' want to be equal to, when men themselves are not equals in a white supremacist, capitalist, patriarchal—and, in India, casteist—social structure.[262] Romani feminist scholars such as Alexandra Oprea have critiqued anti-discrimination legislations that privilege gender but do not address race, sexuality, or class.[263] Historically, violent state-led reforms have often been cloaked in the rhetoric of equality and modernity, especially for indigenous groups around the world. In the Czech Republic and Bulgaria, for example, Romani and Muslim women's decision-making around childrearing, morality, dress, and attire, etc., became the subject of state-sponsored policies such as forced sterilization.[264] Thus, for many Romani women

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[257] *Id.* at 907.

[258] Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L.L. REV. 329, 330 (2010).

[259] *See id.* at 331.

[260] *See* Gillian Kane, *Abortion Law Reform in Latin America: Lessons for Advocacy*, 16 GENDER & DEV. 361, 363 (2008).

[261] *See* bell hooks, *Feminism: A Movement to End Sexist Oppression*, *in* FEMINIST THEORY: FROM MARGIN TO CENTER 18 (1984).

[262] *See id.*

[263] *See* Miglena S. Todorova, *Race and Women of Color in Socialist/Postsocialist Transnational Feminisms in Central and Southeastern Europe*, 16 MERIDIANS: FEMINISM, RACE, TRANSNATIONALISM 114, 131 (2017); Alexandra Oprea, *Intersectionality Backlash: A Romani Feminist's Response*, 2 ROMA RTS. J. 21 (2009).

[264] *See* Todorova, *supra* note 263, at 122.

discussion of gender inequalities is challenging because it can "easily fuel majority biased representations of Roma culture as 'oppressive' and 'backward.'"[265] Similarly, for the Mapuche women in Chile, gender is inseparable from other parts of their identity, including their indigeneity. They argue that gender norms and expectations operate differently within Mapuche culture and they are reluctant to align with nonindigenous or global women's movements.[266]

True equality entails a non-derivative theory of women's liberty, which "requires that reproductive rights be theorized without reducing pregnancy to component parts and shoehorning it into doctrines developing without women in mind."[267] Pregnancy is a unique, complex, but ultimately unitary experience, and a woman's right to liberty during such a time should be unitary as well.[268] Hendricks maintains that equality can only be violated when there are differences in treatment toward a similarly situated man.[269] To make the argument compelling, one must rely on a higher level of abstraction, "arguing, for example, that women and men must be accorded equal liberty or status as citizens, which requires a further explanation why liberty demands control over pregnancy."[270] Yet the end result of using comparisons that are drawn this far afield is to revert the discussion back to liberty, rather than equality.[271] In turn, there is a "ratchet of equality analysis" needed to "translate this aspect of women's fundamental rights into something that resembles men's experiences."[272] Furthermore, formal equality-based claims are usually invoked when there is a distinction in the treatment between women and men.

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[265] Angéla Kóczé, *Missing Intersectionality: Race/Ethnicity, Gender, and Class in Current Research and Policies on Romani Women in Europe*, *in* CENT. EUROPEAN UNIV. POLICY STUDIES SERIES (2009), https://cps.ceu.edu/sites/cps.ceu.edu/files/cps-policy-study-missing-intersectionality-2009.pdf [https://perma.cc/7JNH-D5LJ]; *see also* Alexandra Oprea, *Re-envisioning Social Justice from the Ground Up: Including the Experiences of Romani Women*, 1 ESSEX HUM. RTS REV. 29 (2004).

[266] *See* Patricia Richards, *The Politics of Gender, Human Rights, and Being Indigenous in Chile*, 19 GENDER & SOC'Y 199, 212 (2005).

[267] Hendricks, *supra* note 258, at 331.

[268] *See id.*

[269] *See id.* at 338.

[270] *Id.*

[271] *See id.*

[272] *Id.*

The demand to be equal "presupposes a point of comparison."[273] The "actual status of one sex in the status quo," *i.e.*, the status of men, is universalized and there is a desire to aim for this universal standard.[274] In the context of reproductive rights, and particularly the right to abortion, gender equality claims are challenging because men are not considered an appropriate comparator to pregnant women.[275] Further, the abstraction and gender-neutral universalization of concepts such as 'reproductive freedom' distorts the "reality of the feminine individuals subsumed under it."[276] Luce Irigaray, for instance, proposes that women demand articulation of unique rights because "pregnancy and childbearing are uniquely female experiences" and should be recognized as such.[277] Equality arguments must not fail to recognize women's unique position in the reproductive process and the political importance of sexual difference.[278] This failure to "accommodate women's special needs" undermines feminist campaigns for maternity benefits and other rights which affect women's access to the labor market.[279] However, centering (cisgender) women in the demand for abortion and other reproductive rights excludes all gender-diverse persons from the movement and impedes their ability to access reproductive healthcare services.

At the international level, at least one human rights body has skirted the assertion that equality arguments for reproductive rights require a male comparator. As will be discussed below, the Human Rights Committee specifically found violations of the right to non-discrimination where the law grants extensive post-abortion care in the case of spontaneous abortion (*i.e.*, miscarriage) but denies the same care to women who induce abortion and therefore defy gender stereotypes promoting motherhood as women's

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[273] LUCE IRIGARAY, JE, TU, NOUS: TOWARD A CULTURE OF DIFFERENCE 12 (Alison Martin trans., 1993).

[274] Serene J. Khader, *When Equality Justifies Women's Subjection: Luce Irigaray's Critique of Equality and the Fathers' Rights Movement*, 23 HYPATIA 48, 51 (2008).

[275] *See* Joanna N. Erdman, *The Gender Injustice of Abortion Laws*, 27 SEXUAL & REPROD. HEALTH MATTERS 1 (2019).

[276] Khader, *supra* note 274, at 62.

[277] *Id.* at 69–70.

[278] *See* Roberta Guerrina, *Equality, Difference and Motherhood: The Case for a Feminist Analysis of Equal Rights and Maternity Legislation*, 10 J. GENDER STUD. 33, 35 (2001).

[279] *Id.*

natural role.[280] As Joanna Erdman argues, the recognition of restrictive abortion laws as gender discrimination based on the perpetuation of gender stereotypes rather than on a male (or any) comparator promotes a shift beyond substantive equality and to gender justice.[281]

If gender "as a ground of discrimination is not tied to any identity characteristic or group category" and is treated as a set of social norms,[282] then it is possible to have a more robust and inclusive discrimination analysis. This analysis advances a structural understanding of gender discrimination that focuses on inequalities created among varying classes of women and gender-diverse persons in circumstances where access to abortion is restricted. A structural understanding of discrimination would also allow for transgender, intersex, and gender-diverse persons to be included within the reproductive rights movement. As the reproductive justice movement in the United States has recognized, "reproductive oppression is experienced not only by biologically defined women."[283] Centering the argument solely around women would exclude individuals whose identities fall beyond the gender binary.[284] An equality-based approach that treats gender as a social norm would make it possible to challenge abortion laws that create discriminatory distinctions between any groups of persons, and not just between women and men.

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[280] *See* U.N. Human Rights Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 17, 2016) [hereinafter U.N. Human Rights Comm., Article 5(4)].

[281] *See* Erdman, *supra* note 275, at 3.

[282] *Id.* at 4.

[283] Ross, *supra* note 163, at 291.

[284] *See* Jain, *Time to Rethink*, *supra* note 27.

C. International and Comparative Approaches to Equality-Based Recognition of Reproductive Rights

Despite concerns about using equality arguments to advance reproductive rights and women's autonomy, cases such as *Lakshmi Dhikta v. Nepal*,[285] *Mellet v. Ireland*,[286] and other decisions by the CEDAW Committee and the Inter-American Court of Human Rights rely strongly on equality jurisprudence to uphold the agency of women. These decisions provide a counterweight to privacy-only framings of reproductive rights by articulating how state failure to ensure reproductive autonomy reflects and exacerbates gender discrimination. Further, they often involve marginalized subgroups of women, leading to strong articulations of the heightened obligation of the state to ensure substantive equality in situations of compounded discrimination. These decisions will be discussed below to examine what equality-based jurisprudence has to offer the reproductive rights discourse.

1. Supreme Court of Nepal

Prior to 2002, the Criminal Code in Nepal strictly prohibited abortion in all circumstances, even if the woman's life was in danger.[287] Efforts to liberalize the law began in the 1970s; in 2002, the Nepalese Parliament amended the National Code,[288] granting a right to terminate pregnancy on request prior to twelve weeks and, beyond that, on grounds such as rape, incest, foetal abnormalities, and threat to life.[289] In the 2009 *Lakshmi Dhikta* decision, the Supreme Court of Nepal affirmed that abortion was a right and ordered the state to ensure that all women had access to safe and legal abortion.[290] In a case concerning a poor, rural woman who was forced to carry her pregnancy to term because she was unable to afford the cost of an abortion, the Supreme Court of Nepal set

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[285] *See* CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta v. Government of Nepal / *Amici (Supreme Court of Nepal)*, https://reproductiverights.org/case/lakshmi-dhikta-v-government-of-nepal-amici-supreme-court-of-nepal [https://perma.cc/DQP3-8DGC] [hereinafter CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta Case].

[286] *See* U.N. Human Rights Comm., Article 5(4), *supra* note 280.

[287] *See* Shyam Thapa, *Abortion Law in Nepal: The Road to Reform*, 12 REPROD. HEALTH MATTERS 85, 85 (2004).

[288] The National Code of Nepal (Muluki Ain), 1963, was a comprehensive statute containing both criminal and civil codes and procedures. It was replaced in 2018 by separate Criminal and Civil Codes.

[289] *See* Thapa, *supra* note 287.

[290] *See* CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta Case, *supra* note 285.

forth a vision of transformative equality that emphasized the need to address the various barriers women face in accessing reproductive health services.[291] Melissa Upreti notes that the court expressly rejected traditional, century-old conceptions which subordinated women to merely the roles of mothers and caregivers.[292] Upreti argues that the judgment embodies a model of equality envisioned in CEDAW—a model that acknowledges the "hierarchical relationships between men and women in the distribution of power and rights" and obligates states to address the causes of inequality.[293] This also ties into the principles of decisional autonomy and privacy, as a transformative equality approach recognizes and promotes women's ability to make decisions about their lives and bodies and be able to live with dignity. Giving due consideration to the profound impact of pregnancy on women's lives—particularly their liberty and potential risks to health—the court acknowledges that men are never forced into such conditions.[294] Additionally, the court rules that the state must take positive steps to provide equality of access to health services for women.[295] *Lakshmi Dhikta* is a landmark judgment for both its explicit stance against forcing women to carry unintended pregnancies to term and recognition that the denial of a right to abortion compromises women's bodily integrity.[296]

2. U.N. CEDAW Committee

While *Lakshmi Dhikta* dealt with the issue of women being compelled to carry unwanted pregnancies to term, in *Alyne da Silva Pimentel Teixeira v. Brazil*, the CEDAW Committee examined the discrimination that resulted in the death of a pregnant Afro-Brazilian woman.[297] The Committee held that Alyne died because of pregnancy-related

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[291] *Id.*

[292] Melissa Upreti, *Toward Transformative Equality in Nepal: The* Lakshmi Dhikta *Decision*, *in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVE 279, 289 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., 2014).

[293] *Id.* at 281 (quoting Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 5, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010)).

[294] *See* CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta Case, *supra* note 285; Upreti, *supra* note 292, at 289.

[295] *See* CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta Case, *supra* note 285; Upreti, *supra* note 292, at 295–98.

[296] *See* Upreti, *supra* note 292, at 288.

[297] Comm. on the Elimination of Discrimination Against Women, Comm'n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).

complications due to the state's failure to ensure appropriate medical treatment and provide timely emergency obstetric care as required under the CEDAW Article 12 obligation to ensure health care without discrimination.[298] The Committee found that Alyne had been a victim of compound discrimination.[299] The Committee cited a prior Concluding Observations to Brazil expressing concern about the reproductive rights of Afro-Brazilian women and held that in failing to ensure her access to timely and appropriate maternal health services, Brazil had discriminated against her not only on the basis of her sex, but also on her status as a woman of African descent and her socioeconomic position.[300]

The nature of such gender discrimination was also addressed in *L.C. v. Peru*, in which the CEDAW Committee found that the Peruvian government engaged in wrongful gender stereotyping in violation of CEDAW Article 5 where the government failed to prevent the denial of essential health services to L.C., a thirteen-year-old girl who became pregnant following a sexual assault and who then tried to commit suicide.[301] The suicide attempt caused serious spinal injury, but L.C. was denied emergency surgery necessary to prevent permanent injury to her spine because she was pregnant.[302] Her request for an abortion in order to have the surgery was also denied.[303] As a result, L.C. is now quadriplegic.[304] The Committee held that L.C.'s doctors' decision to postpone L.C.'s surgery due to her pregnancy was affected by the gender stereotype that "understands the exercise of a woman's reproductive capacity as a duty rather than a right,"[305] and that this was "influenced by the stereotype that protection of the f[o]etus should prevail over the health of the mother."[306] The Bombay High Court took a similar approach in 2016 in

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[298] *Id.* at ¶ 7.3.

[299] *Id.* at ¶ 7.7.

[300] *Id.*

[301] L.C. v. Peru, Comm. on Elimination of Discrimination Against Women, Commc'n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (November 25, 2011).

[302] *Id.* at ¶ 2.4.

[303] *Id.* at ¶ 2.5–2.9.

[304] *Id.* at ¶ 2.11.

[305] *Id.* at ¶ 7.

[306] *Id.* at ¶ 8.

holding that the potential rights of the foetus could not take precedence over the rights of the pregnant woman.[307]

In 2015, the CEDAW Committee released a report based on an in-country special inquiry that found the Philippine government accountable for grave and systemic violations of women's rights arising from its failure to strike down Executive Order 003, a city ordinance that effectively banned access to contraceptives.[308] The Committee also addressed violations of women's rights stemming from the criminalization of abortion without any clear exceptions and the abuse of women seeking post-abortion care.[309] The Committee stated that such laws and policies discriminatorily interfere with women's right to health and clarified that state parties are still responsible for eliminating such discrimination even where health services have been decentralized.[310] Further, the Committee found that Executive Order 003 "incorporated and conveyed stereotyped images of women's primary role as child bearers and child rearers,"[311] which "contributed to the belief that it was acceptable to deny women access to modern methods of contraception."[312]

3. Human Rights Committee

Patriarchal mindsets that have historically relegated women to the "natural" role of child rearers have placed them in an extremely vulnerable position, which prevents them from exercising their reproductive rights.[313] Highlighting this systemic discrimination, the U.N. Human Rights Committee in *Mellet v. Ireland* relied on principles of equality between men and women to address barriers to abortion access.[314] The *Mellet* decision

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[307] *See* High Court on its Own Motion v. State of Maharashtra, (2016) SCC Online Bom 8426 (Bom.); *see also supra* Part I.

[308] Comm. on the Elimination of Discrimination Against Women, Summary of the Inquiry Concerning the Philippines Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 45, U.N. Doc. CEDAW/C/OP.8/PHL/1 (April 22, 2015).

[309] *Id.* at ¶ 33.

[310] *Id.* at ¶ 19.

[311] *Id.* at ¶ 43.

[312] *Id.*

[313] *See* Jain, *Time to Rethink*, *supra* note 27.

[314] *See* U.N. Human Rights Comm., Article 5(4), *supra* note 280.

recognized that the denial of abortion targets women specifically because it puts them in a situation of vulnerability in which men are not placed.[315] In her concurring opinion, Sarah Cleveland argues that the Irish legal system imposes a disproportionate burden on women and subjects them to gender-based stereotypes, thus reducing them to reproductive instruments.[316] In making this argument, Cleveland's opinion compares the state's treatment of pregnant women who miscarry as compared to those who terminate a pregnancy.[317] She points to the robust health and support services offered to women who miscarry and the stark contrast of the state's actions in forcing women who need a termination to travel to another country.[318] This framing responds to Bachiochi's critique of equality[319] by eschewing the comparison of women and men and recognizes that this disparate treatment is rooted is social expectations that value maternity. Forcing women to be caregivers, regardless of the circumstances, infringes on their right to gender equality. Moreover, Cleveland states that the reproductive biology of women has been "one of the primary grounds for de jure and de facto discrimination" against them.[320] Even purported gender-neutral laws exclusively burden women when they fail to account for the unique circumstances that women alone are faced with. Other concurring opinions in the decision also expressly recognize that an objective differentiation cannot be made for women simply due to their reproductive capabilities; this would be discriminatory and a violation of equality rights.[321]

4. Inter-American Court of Human Rights

The issue of gender stereotyping and denial of women's agency also came up in the case of *I.V. v. Bolivia*, in which the Inter-American Court of Human Rights found that the Bolivian government had violated its obligation to respect and guarantee the right to non-

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[315] *Id.* at ¶ 7.11.

[316] Sarah Cleveland, *Individual Opinion of Committee Member Sarah Cleveland (Concurring)*, *in* U.N. Human Rights Comm., Article 5(4), *supra* note 280.

[317] *Id.* at ¶ 2 (Cleveland, concurring).

[318] *Id.*

[319] *See* Bachiochi, *supra* note 252.

[320] Cleveland, *supra* note 316.

[321] U.N. Human Rights Comm., Article 5(4), *supra* note 280.

discrimination.[322] In this case, I.V., a Peruvian refugee, was sterilized without her consent in a public hospital following a caesarean section.[323] I.V. was only informed that doctors had performed a tubal ligation several days later.[324] The court recognized that non-consensual sterilization reflects the historical limitation of women's reproductive rights on the basis of negative gender stereotypes of women as having a predominantly reproductive function[325] and the harmful stereotype that I.V., as a woman, was unable to make reproductive decisions responsibly, leading to "an unjustified paternalistic medical intervention" restricting her autonomy and freedom.[326] The court also stressed the particular vulnerability to forced sterilization faced by certain women based on other characteristics, such as socioeconomic status, race, disability, or HIV status.[327]

In all the above decisions, the denial of women's reproductive rights was understood within the context of equality and discrimination, particularly due to persistent gender stereotypes that place an extraordinary burden of childcare on women. The case law described provides valuable insights into the possibilities that equality jurisprudence offers to uphold the decisional autonomy and bodily integrity of women. Both *Lakshmi Dhikta* and *Mellet* relied on the principle of equality between men and women and the disproportionate burden placed on women during pregnancy that places them in a unique position of vulnerability.[328] Both these decisions highlighted the social and legal conception of women as child bearers and caregivers which reinforces their subordination and is thus a violation of their right to equality.[329] The decisions by the CEDAW Committee as well as the Inter-American Court of Human Rights also discussed the negative gender stereotyping that contributes to discrimination against women and acts as a major barrier to accessing reproductive health services. Each of these cases note that

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[322] I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329 (Nov. 30, 2016).

[323] *Id.* at ¶ 68.

[324] *Id.*

[325] *Id.* at ¶ 243.

[326] *Id.* at ¶ 246.

[327] *Id.* at ¶ 247.

[328] *See* CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta Case, *supra* note 281; U.N. Human Rights Comm., Article 5(4), *supra* note 280.

[329] U.N. Human Rights Comm., Article 5(4), *supra* note 280.

women are often reduced to their reproductive capacities and barred from exercising their agency, especially when it concerns their bodies.[330]

Nevertheless, the equality argument gives reproductive rights advocates "another ground for the right, which could appeal to a justice who is uncomfortable with the liberty analysis," yet who may also be uncomfortable with government "control of reproduction and enforcement of motherhood that rests" on traditional paternalistic stereotypes and only reinforces socioeconomic inequality.[331] The equality argument accomplishes three major goals: (1) it places abortion restrictions in their correct heteropatriarchal historical context; (2) it allows abortion restrictions to be evaluated as a form of "caste-enforcing" regulations, discerning between the regulation of reproduction to further oppress women as opposed to regulation that promotes the equality of women; and (3) it shifts the lens from the physical aspects of pregnancy to the longer term impact of pregnancy and parenthood on women's rights to equal citizenship.[332] Equality arguments insist that abortion restrictions which reflect traditional gender stereotypes "are suspect"[333] and violate constitutionally guaranteed rights. When the right to abortion is placed solely within a privacy framework, it reinforces the presumption that pregnancy and childrearing a woman's private responsibility. Hence, even when privacy offers a basis for recognition of a right to abortion, it is still fundamentally problematic in how they reinforce such stereotypes. However, within the equality and gender justice framework—laid out in Articles 14 and 15 of the Indian Constitution—the right to abortion becomes a matter of equal citizenship rights and is, therefore, less vulnerable to restrictions.

CONCLUSION

The constitutional framework of privacy and equality in India holds significant transformative potential for reproductive rights to create a movement premised on the

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[330] Dipika Jain is currently working on a separate, single author piece examining judicial narratives around motherhood. *See also* CTR. FOR REPROD. RIGHTS, Lakshmi Dhikta Case, *supra* note 285; U.N. Human Rights Comm., Article 5(4), *supra* note 280; I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329 (Nov. 30, 2016).

[331] *See* Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. L.J. GENDER 377, 403 (2011).

[332] *See id.* at 407–08.

[333] Siegel & Siegel, *supra* note 119, at 164.

rejection of discriminatory gender stereotypes and embrace of people's sexual as well as reproductive autonomy. The growing jurisprudence on sexual autonomy in India recognizes that non-procreative sex is not a legitimate site of state restriction. However, it stops short of recognizing that an equality approach means ensuring that women, by virtue of their reproductive capacity, require reproductive autonomy to realize the right to sexual autonomy. Together, *Puttaswamy*, *Navtej Johar*, and *Joseph Shine* set India on the path towards an equality-based reimagination of reproductive rights. This reimagination breaks free from the problematic framing of women's decisions around pregnancy as a threat to state authority and interest, and instead recognizes the affirmative obligations of the state to ensure reproductive autonomy as a matter of non-discrimination and equal citizenship. Further, these cases have great promise in taking an approach that accounts for the social and material factors, including structural forms of discrimination, to ensure reproductive autonomy in practice for *all* persons, including the most marginalized.

While there are limits to both privacy and equality arguments for reproductive rights, international and comparative case law illustrates innovative approaches to unite these arguments. They can successfully counter claims that abortion restrictions are justified by a legitimate state interest in prenatal life, as well as critiques of equality arguments based on the lack of a male comparator. They also confront narrow understandings of the scope of state obligations that deny positive obligations to ensure reproductive rights. Perhaps, most notably, these judgments of the Supreme Court allow for an articulation of reproductive rights that rejects the essentialization of gender and the naturalization of gender differences. They do so by focusing on the illegitimacy of criminal laws which are rooted in patriarchal and heteronormative stereotypes and conceptions of gender. In particular, *Navtej Johar* and *Joseph Shine* render suspect state interventions aimed at restricting decision-making related to sexuality on the basis of socially constructed gender norms. By challenging the origin and purpose of restrictions on sexual autonomy through the lens of gender and reproduction, these two judgments also illustrate that assessments of the legitimacy of the right to privacy must include a fuller understanding of state purpose or interest that encompasses the perpetuation of patriarchal power structures and gender norms. Where this is the state's purpose, such restrictions must, at a minimum, be struck down. In the context of reproductive rights, the task that remains is to articulate that restrictions on abortion and reproductive autonomy are part of a broader colonial moral framework aimed at preserving heteropatriarchal power structures through control of sexuality and reproduction.