REVISITING PUTTASWAMY: A FEMINIST CRITIQUE- THE WOMAN QUESTION AND THE PHYSIOLOGICAL PARADIGM OF ABORTION IN PRIVACY

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ABSTRACT

The Supreme Court in the case of Justice K. S. Puttaswamy v. Union of India, placed the 'individual' in the heart of privacy, instead of 'walling off' the private space, thus recognizing the creation of the 'individual'. This essay seeks to analyse Justice Chandrachud's majority opinion in the Puttaswamy judgement from the lens of Feminism, discussing reproductive rights as a key aspect of decisional autonomy or intimate decision. It argues that Justice Chandrachud while trying to form a global perspective of decisional privacy in relation to abortion, ends up formulating a doctrine which lacks indigenous appeal as it is unable to engage with the 'voices of Indian women'. He upholds a highly contested physiological paradigm of abortion, by placing abortion in the private sphere, rather than as an integral condition for a decent life. This does not perpetuate the establishment of class divisions among women themselves. Further, the law of privacy protects the existing aggregation of power in the hands of man as women in India are influenced directly or indirectly by prevailing social forces and ethos or families and husbands. Thus, the law fails severely to contextualize the woman in question and instead ends up talking about an American middle class one.

I. INTRODUCTION

The Supreme Court in the case of *Justice K. S. Puttaswamy v. Union of India,*[1] [***Puttaswamy* judgment**] established the Right to Privacy as a fundamental right under Article 21, which formulates the Right to Life under the Indian Constitution. The most important tenet of this judgement is that all the nine judges unanimously place the 'individual' in the heart of privacy, instead of 'walling off' the private space, thus, recognizing this as a creation of the individual.[2] Reproductive rights in this light, form a key aspect of intimate decision or decisional autonomy.[3]

This essay seeks to analyse Justice Chandrachud's majority opinion in the *Puttaswamy* judgement from the lens of Feminism, primarily relying on the works of Katherine Bartlett, Nivedita Menon and Reva Siegel. It attempts to portray that Chandrachud while trying to form a global perspective of decisional privacy in relation to abortion, ends up formulating a doctrine which lacks indigenous appeal as it is unable to engage with "*voices of Indian women*".[4] He upholds a highly contested physiological paradigm of abortion, by placing abortion in the private sphere, thus, failing severely,

[1] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCALE 1 (India) [hereinafter Puttaswamy].
[2] Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment – II: Privacy, The Individual, And The Public/Private Divid*e, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (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/ [hereinafter Bhatia].
[3] Arijeet Ghosh and Nikita Khaitan, *A Womb of One's Own: Privacy and Reproductive Rights,* EPW (Oct. 31, 2017), http://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights.
[4] DAPHNE BARAK-EREZ, FEMINIST CONSTITUTIONALISM, GLOBAL PERSPECTIVE, HER-MENEUTICS: FEMINISM AND INTERPRETATION IN BAINES 85-97 (Barak-Erez & Kahana, 2012) [hereinafter Barak-Erez].

to contextualize the *woman* in question.[5] He ends up basing his opinion on an American- middle class white woman, forgetting to factor in the intersectionality and diversity found in Indian women, thus decontextualizing the paradigm of abortion in privacy.[6]

II. THE WOMAN QUESTION

Asking 'the woman question'[7] as suggested by Katherine Bartlett emphasizes on revealing how women are posited in the organization of society instead of emphasizing on the inherent characteristics of women.[8] It exposes the effect of legal principles and rules on women which simultaneously help finding interpretive alternatives that relocate the disproportionate social burdens,[9] thus demonstrating how social structures inherently personify norms which tacitly render women different and thus subordinate.[10]

Similarly, the theory of Cultural Feminism argues that the 'different voices' of women should be incorporated in the predominant constitutional discourse.[11] It urges for diversifying the notion of the 'global woman',[12] by incorporating voices that go beyond that of the middle-class, educated white woman's voice, analysing that gender is within the context of multiple identities.[13]

Justice Chandrachud in the *Puttaswamy* judgment, clearly addresses 'the woman question' by dedicating an entire section of his judgement, with reference to the feminist critique of the privacy doctrine.[14] He incorporates this American white, middle-class voice by placing privacy in the individual, enshrining decisional privacy as a constitutional right. It makes interest of women in intimate privacy inviolable.[15]

This question has an important role to play in the arena of abortive rights of a woman. It empowers one to argue that a sweeping ban on the right to abortion after 20 weeks puts an inordinate burden on womankind.[16] While he addresses this issue he is unable to incorporate the diversity of women voices in his judgment.

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[5] Puttaswamy, at 201.
[6] Puttaswamy, at 199.
[7] Katherine T. Bartlett, *Feminist Legal Methods,* 103 HARV. L. REV. 829 (1990) [hereinafter Bartlett].
[8] *Id.*
[9] Barak-Erez, at 96.
[10] Bartlett, at 829.
[11] Barak-Erez, at 97.
[12] Monica Bahati Kuumba, *The Limits of Feminism: Decolonizing Women's Liberation/Oppression Theory,* 1 RACE GENDER & CLASS J. 85 (1994) [hereinafter Kuumba].
[13] Bartlett.
[14] Puttaswamy, at 198.
[15] Puttaswamy, at 199.
[16] Barak-Erez, at 97.

As the aim of asking this woman question is to problematize the notion of sisterhood and the assumption that there can be a commonality of interests and aims amongst all women. It is to argue that each feminist struggle is incomplete without its specific ethnic and historical context.[17] In plain words, "*the analysis and objective of western feminism cannot be applied abstractly and universally.*"[18] The tendency to assume a fixed definition of woman or a rigid standard for women's experiences that is homogenizing, exclusionary and oppositional and treating them as a single analytical category has serious implications.[19] While denying differences of class, race and sexual orientation amongst women, it simultaneously addresses only those oppressive practices that affect white, privileged upper-class women, which makes this unified concept of woman subject highly problematic.[20]

He falls hard, into this trope of what Adrienne Rich calls "*white solipsism*"[21] as he cites American authors on feminism like Anita Allen,[22] Catharine MacKinnon,[23] and Helen Nissenbaum.[24] Justice Chandrachud goes on to mention American landmark judgements like *Roe v. Wade*,[25] *Carey v. Population Services International*[26] and *Planned Parenthood v. Casey*.[27] He applies them prima facie with little or no analysis to check whether they are even applicable in the Indian context.

Cultural imperialism is predominant in his dialogue. Despite the fact that Indian feminism according to Kumari Jayawardena is not attributable to the imposition of feminist ideas by the West on the Third world, but rather, is indigenous to it[28]; Justice Chandrachud disregards Indians while trying to reach a global consensus, in attempting to evolve a paradigm of privacy that has global applicability. Thus, instead of demystifying the notion of the 'global woman' he upholds it.

In doing so, he misses the point in asking this woman question. He overlooks the woman subject of the Constitution, the voice of Indian women and their conception of privacy. What he formulates instead is foreign to the lived experience of Indian women. This does not suffice as it is essential to contextualize feminism. Any political struggle has to be seen in sync and context

[17] Floya Anthias and Nira Yuval-Davis, *Contextualizing Feminism: Gender, Ethnic and Class Divisions,* 15 FEM. REV. 62 (1983) [hereinafter Davis].
[18] Davis, at 62.
[19] Davis, at 62.
[20] Bartlett, at 829.
[21] *Id.*
[22] Puttaswamy, at 200.
[23] Puttaswamy, at 198-199.
[24] Puttaswamy, at 201.
[25] Roe v. Wade, 410 US 113 (1973).
[26] Carey v. Population Services, 431 US 678 (1977).
[27] Planned Parenthood v. Carey, 120 L. Ed 2d 67 (1992).
[28] Felicity A. Nussbaum, *(White) Anglo-American Feminism In Non-US/Non-Us Space*, 12 TULSA STUDIES IN WOMEN LITERATURE 263 (1993).

with other social structures existing in society. Women of subordinate groups often find it politically difficult and unsustainable to channelize their entire struggle against sexism perpetrated by the dominant majority men.[29] In the Indian Context, Dalit women are doubly affected by patriarchy. As they face both, Dalit patriarchy and Savarna patriarchy. Thus, the subjectivity of the woman in question should become an extremely important concern, when framing laws and policies for them.

An element of this subjectivity is the origin of the law on abortion in India. Nivedita Menon argues that the right for abortion in India arose as a measure of population control rather than as an achievement of feminist politics.[30] Thus the right to abortion should not be mistaken to be a revolutionary achievement of a progressive Indian state.[31] Further the politics of abortion plays out differently for Indian women in their personal lives.

The right to abortion grants women an agency to abort. However this agency should not be conflated with free will. When abortion is placed under the doctrine of decisional privacy, many social factors influencing their decision are ignored. For instance, the fact that women often do not have control over their bodies, as the real control lies with men is ignored. Here, the decisions of such women are not based on free will, but rather determined by the constraints placed by the patriarchal society they live in and by their families on the basis of sexual division of labour.[32] Menon argues that access to legal and safe abortion should not fall under right to privacy. Had Justice Chandrachud considered this Indian voice he might have opined differently on abortion rights being placed under decisional privacy.

Here historical materialism becomes an appropriate and dynamic theoretical framework to analyse the conditions of colonized or Third World women. It allows for and acknowledges the dialectical relationships existing between the multiple causes of and solutions to the oppression of such women.[33] It places class, national and gender liberation in a global context viewing them as interconnected parts of a whole. It calls for a thorough examination of the distinct historical development and material reality of each situation,[34] by treating multiple oppressions as interactive combinations instead of mere add-ons.[35] Thus it allows for the correction of the errors of

[29] Davis, at 62.
[30] NIVEDITA MENON, RECOVERING SUBVERSION FEMINIST POLITICS BEYOND THE LAW 72-3 (1st ed. 2004).
[31] *Id.* at 71.
[32] Nivedita Menon, *Abortion as A Feminist Issue – Who Decides, And What?,* KAFILA (May 11, 2012), https://kafila.online/?s=Abortion+As+A+Feminist+Issue.
[33] Kuumba, at 85.
[34] *Id.*
[35] *Id.*

reductionist and universalist characteristic of other theoretical methods to the woman question.[36] Justice Chandrachud's opinion lacks in such analysis.

An analysis of such unique historical development is extremely important when making cross cultural references, comparing and analysing their condition. Material conditions that are in essence, the structural circumstances and actual state within which the women are situated, play a significant role in shaping social reality.[37] Justice Chandrachud while making reference to American decisions of privacy should have analysed those decisions better by giving more weightage to the difference in the social construction in India and America. He should have considered that whereas America is plagued by the issue of race, India still struggles with caste. Caste has a different role to play in the Indian society and the effects on women due to caste are different when compared to class. The economic disparity between various sections of society in India is vast and it might play a role in the free will of an Indian woman when seeking abortion.

Women as a diverse subject of the law should be constructed in tandem with their complicated interactions between culture, class, religion and other ideological frameworks and institutions. A critical combination of women's varied social conditions should be considered as these multiple social forces are connected and interdependent,[38] giving the woman subject intersectionality and diversity. This requires the creation of diverging modes of answering the woman question since different kinds of social changes are required to emancipate women from their subjugated status in society.[39]

For example, Nalini Karkal brings attention to the fact that in India specifically, the right to abortion is less of a right in its intrinsic sense.[40] In juxtaposition, it is used to regulate population because husbands refuse to use contraception by force. Thus women while exercising their choice are not exercising their free will in reality they are influenced directly or indirectly by prevailing social forces and ethos or families and husbands or by factors like economic constraints, stigma of illegitimacy and so on. However, while analysing the exercise of a woman's free will one needs to tread cautiously so that we do not deprive their agency.[41]

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] MENON, *supra* note 30, at 91.
[41] MENON, *supra* note 30, at 98.

III. THE DEFICIENCIES OF THE PHYSIOLOGICAL PARADIGM & THE ROLE OF SOCIAL FORCES

With specific reference to reproductive regulation like abortion in physiological paradigms, it has been observed that the Court typically reasons it to be a form of state action that primarily concerns itself with the physical facts of sex than that of the more important social question of gender. In regulations regarding pregnancy, a real physical difference between the sexes can nevertheless be sexually discriminatory, as it can reinforce traditional assumptions about gender roles.[42] This is another trap that Justice Chandrachud falls into, while following the footsteps of the American Jurisprudence on privacy and abortion. The American Court emphasises on the contentious physiological paradigm in both equal protection and privacy law.[43]

Social forces have a powerful part to play in shaping the physiological process of reproduction. They define under which circumstances a woman becomes pregnant including the fact that whether her participation in intercourse was voluntary enough.[44] Social forces and circumstances do not only determine whether a woman has actual access to tools of preventing and terminating a pregnancy but also whether that option is acceptable for her to exercise. They also regulate the quality of health care accessible to woman and her child during and after pregnancy. Social relations govern the primary caregiver for a child once child is born. It makes human reproduction not merely a physiological process like digesting and dying but also a social process governed by culture.[45]

Institutional practices and ideological norms affecting reproduction play a dominant part in defining women's status, the deprivations to which they are exposed, the dignity they are rendered and the degree of autonomy they are permitted or dependency they must suffer. These observations, feminist critical thought and anthropological findings do not inform the reasoning of privacy governing women's reproductive rights. Instead, Justice Chandrachud in his judgement ends up emphasizing the physiological character of women's reproductive role.[46] This results in social relations being upheld by the body politic, finding constitutional justification in this organization of the female. It further curtails the judicial scrutiny of such social norms and practices that affect reproduction and its regulation.

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[42] Reva Siegel, *Reasoning From The Body: A Historical Perspective On Abortion Regulation And Questions Of Equal Protection*, 44 Stan. L. Rev. 261 (1992) [hereinafter Siegel].
[43] *Id.* at 265.
[44] Siegel, at 267.
[45] Siegel, at 267.
[46] Puttaswamy, at 201.

As Nivedita Menon puts it – "*is abortion ever a positive choice?*"[47] This portrays the lack of choice or free will in terms of cultural and socio-economic constraints which renders this choice of abortion an empty one.[48] Women often have abortions for multifarious reasons like to avoid the stigma of illegitimacy or because they are not economically capable of raising another child. Other times because her career does not allow her.[49]

Consequently the opinion in *Roe v. Wade* incorporated decisions about motherhood essentially as a private dilemma to be resolved in the sphere of privacy by a woman and her doctor, completely ignoring social organization of motherhood in the woman's problem.[50] Similarly, Justice Chandrachud fails to incorporate the class-caste dynamic in his majority opinion when he opines that decisional autonomy comprehends intimate personal choices such as those governing reproduction[51] and when he concludes that privacy includes, at its core, the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.[52] He further obscures the extent of the role of the community in regulating a woman's reproductive choices.

Reva Siegel writes that, Roe's decision to terminate her pregnancy, is criticised due to the patriarchal perceptions of the right to abortion. Abortion is perceived to be legitimate if it is used as a feminine instrument of convenience, where the burden of motherhood cannot be borne by any other social actor. This exempts men and the society from its responsibility in shaping the conditions of pregnancy.[53] In the Indian context, this right has been complexly constituted being reactionary in nature to cultural and political elements in society. This makes legal sanction precarious.[54]

IV. ABORTION – PUBLIC OR PRIVATE?

While analysing society, the dichotomy of public and private spheres become extremely important. In this dichotomy, some feminist legal scholars have accredited private sphere as the space of family and home. State is connoted to be public.[55] However, private sphere is inextricably political and is not simply physiological or natural.[56] This dichotomous separation is often the cause of

[47] Nivedita Menon, *Sexuality, Caste, Governmentality: Contests Over 'Gender' In India*, 91 Fem. Rev. 94 (2009).
[48] MENON, *supra* note 30, at 95.
[49] MENON, *supra* note 30, at 95.
[50] Siegel, at 273.
[51] Puttaswamy, at 201.
[52] Puttaswamy, at 263.
[53] Siegel, at 274.
[54] MENON, *supra* note 30, at 71.
[55] Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) [hereinafter Higgins].
[56] Raia Prokhovnik, *Public and Private Citizenship: From Gender Invisibility To Feminist Inclusiveness*, 60 FEM. REV. 84 (1998).

women's oppression. The solution does not lie in abandoning the distinction but identifying that the two spaces should not be allowed to be oppositional, exclusivist or rejectionist. This makes them not only crucially interconnected but also mandates that liberal laws of justice need to be applied in the sphere of abortion.[57]

The courts have as a matter of fact been coy about viewing state responsibility in the private space basing on the argument of state complicity in private subordination,[58] focusing on the protection of familial privacy. This has culminated in undermining women's liberty by placing them beyond the reach of legal guarantees.[59] Justice Chandrachud however enables the State to act upon the violence women face in the domestic sphere.[60] Instead of protecting the patriarchal control of women's choices and patriarchal domination of women's inner and public lives,[61] he recognizes the power dynamics in the Indian patriarchal society, making it explicitly clear that the doctrine of privacy cannot be used to shield family honour.[62] He is able to analyse that privacy can be either used as a tool for emancipation of women or as a weapon causing oppression.[63] His analysis recognizes this imbalance; however his solution of placing the choice of abortion under decisional privacy is inconsistent with his recognition. The most significant trouble with the law on privacy is that it assumes that women are equal to men in the private domain.[64] It presumes that women enjoy formal equality whereas the ground reality dictates that various societal pressures disable them from enjoying any right equally.

The solution for this is by placing abortion in a public sphere instead of the private one. As Gayatri Spivak puts it, the fabric of the public sector is woven by the thread of the private. This weaves a unique public potential to the private sector, as it is the texture or the weave of public activity, thus, making the private and public interwoven.[65] This also means that the reversal of private-public hierarchy by feminists goes beyond a mere reversal by displacing opposition itself.[66]

Catherine MacKinnon in her book, 'Toward a Feminist Theory of the State', ends the chapter *Abortion: On Public and Private,* by making a poignant statement that privacy law keeps some men

[57] *Id.,* at 84.
[58] Siegel, at 270.
[59] CATHERINE MACKINNON, ABORTION: ON PUBLIC AND PRIVATE TOWARDS A FEMINIST THEORY OF THE STATE 187 (1989) [hereinafter Mackinnon].
[60] Puttaswamy, at 199.
[61] Higgins, at 1657.
[62] Puttaswamy, at 198.
[63] Bhatia.
[64] MacKinnon, at 191, 194.
[65] MENON, *supra* note 30, at 11.
[66] *Id.*

out of the bedrooms of other men."[67] This emphasizes her notion of the idea of privacy embodying a vivid tension between the public and the private. In her opinion, the American Liberal State resolves this distinction by creating a threshold of state intervention which ends where home begins which means staying out of sexuality.[68]

The State fails to acknowledge that women's bodies have not ever been theirs. MacKinnon, argues that for women there has never existed anything called a private space to begin with thus they cannot lose something like privacy, which they never had in the first place. On the basis that the State is male, the right of privacy is a right of men, to be let alone to oppress women".[69]

However, according to Bartlett,[70] the MacKinnon's theory is a perfect example of feminist standpoint epistemology falling short of encapsulating the ground realities, obscuring the importance of differences in categories of women; thus, neglecting the fact that factors other than patriarchy victimize women.[71] Isolating gender as the sole basis for oppression of women by obscuring factors like that of material conditions, it further reinforcing other forms of oppression like abortion in physiological paradigms.

V. CONCLUSION

Rosalind Pollack Petchesky argues that women should have abortion rights as one in the public sphere instead of a private class privilege like privacy. The law of privacy according to her protects the existing aggregation of power in the hands of man.[72] Women in India are influenced directly or indirectly by prevailing social forces and ethos or families and husbands.

Making abortion an individual privacy right evades the more complicated socio-cultural realities that might cause hindrance for women to obtain safe and legal abortions even though the legal right in privacy might be available to them.[73] The right to abortion under privacy sashays pregnancy and child bearing as an individual and personal physiological paradigm. The portrayal of abortion in privacy as a private choice rather than an integral condition for a decent life simply serves not only to perpetuate but also establish class divisions among women themselves. In such a society fragmented by class, leaving individuals to their own private resources to secure a right would exactly mean exclusion for those who lack the resources.[74]

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[67] MacKinnon, at 194.
[68] *Id.*
[69] *Id.*
[70] Bartlett, at 829.
[71] *Id.*
[72] ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 295 (9th ed. 1992).
[73] *Id.*
[74] *Id.*, at 295.

When courts are unable to analyse the situation from the standpoint of women, it pushes them to take recourses which are illegal and unsafe. This affects women from rural areas and urban slums as they do not have access to any form of prenatal care before the expiry of 20 weeks[75] as codified in the Medical Termination of Pregnancy Act, 1971.[76] The number of abortions that take place discreetly evading the laws are ten times more than the legal ones.[77]

As Menon argues, the creation and recognition of women as subject should not be the just the starting point of feminist politics, it instead should be understood as the goal of feminist politics. The woman question in the *Puttaswamy* judgement becomes integral in this dialogue of placing the right of abortion in the right of privacy by analysing the contested realm of private in the lives of the woman in question. Justice Chandrachud by dismissing the voice of Indian women even after asking 'the woman question' on abortion in his formulation of the doctrine of Privacy upholds the highly contested physiological paradigm of abortion practiced in the American Jurisprudence, failing severely to contextualize the woman in question.

As suggested by Elizabeth Spelman, while writing about this woman it is recommended that the woman about whom the writer means to talk about be explicitly named.[78] It seems that Justice Chandrachud while wanting to talk about an Indian woman ends up basing his doctrine of the prototype of an American-middle class white woman, devoid of the intersectionality and diversity found in the Indian woman subject. Asking this woman question should ideally create diverging modes of answering the woman question, as different kinds of social changes are required to emancipate women from their subjugated status in society.[79] I conclude on the note that emphasis needs to be supplied on the social organization of motherhood in the "woman's problem" when answering this question.

[75] § 3(2), Medical Termination of Pregnancy Act, No. 34 of 1971: For the termination of pregnancy before 12 weeks, the opinion of one medical practitioner is required. However, when the length of the pregnancy exceeds 12 weeks upto 20 weeks, the requirement of two medical practitioners to consent of the abortion is mandated. The latter has been proved to be cumbersome for women living in rural areas, where often times the second practitioner is not available. This is slated to be changed by the Medical Termination of Pregnancy (Amendment) Bill, 2020 wherein the consent of a single medical practitioner will be required upto 20 weeks, however when the abortion is to be undertaken between 20 to 24 weeks, the consent of two medical practitioners will be required.

[76] Priyanka Borpujari, *India's 20-Week Abortion Limit Questioned After Birth Of Unwanted Baby*, NEWS DEEPLY (Jul. 13, 2017), https://www.newsdeeply.com/womenandgirls/articles/2017/07/13/indias-20-week-abortion-limit-questioned-after-birth-of-unwanted-baby.

[77] *Id.*

[78] Bartlett, at 829.

[79] Kuumba, at 85.