UNVEILING PRIVACY FOR WOMEN IN INDIA[†]

Priyanshi Vakharia *

I. Introduction

On 24 August 2017, the Supreme Court of India, in the historic judgment of *Justice KS Puttaswamy* v. *Union of India (Puttaswamy)*, affirmed the fundamental right to privacy as a right solely belonging to the individual.[1] This exposition of privacy rested on the two components of consent and choice. A little over a year later, on 6 September 2018, the Supreme Court upheld the same principles of choice and consent in *Navtej Singh Johar* v. *Union of India*.[2] In doing so, the Supreme Court held that individual autonomy which occupied a significant space under privacy, encompassed self-determination, which in turn included sexual orientation and the declaration of sexual identity.[3] The Court established the necessary, if somewhat obvious, connection between the individualistic notion of privacy, and the right to decide, by oneself, one's sexual identity.

This connection is reflective of the leap of expansion privacy has taken in India. Privacy exists as an umbrella protection for various rights. At its center is the individual's independence, based on the twin tenets of consent and choice. Such independence extends to self-determination and the power to independently make choices pertaining to oneself. This connection can be applied to a variety of contemporaneous issues which strike at the very core of the constitutional morality of the country.

---

† This article reflects the position of law as on 24 February 2019.

* The author is a student of the Government Law College, Mumbai and is presently studying in the Third Year of the Five Year Law Course. She can be contacted at psvakharia2012@gmail.com.

1 *Justice KS Puttaswamy* v. *Union of India* AIR (2017) 10 SCC 1.

2 *Navtej Singh Johar* v. *Union of India* (2018) 1 SCC 791.

3 *Navtej Singh Johar* v. *Union of India* (2018) 1 SCC 791, para 149.

Women's liberty, their enfranchisement or, indeed, any credible empowerment, is meaningless without the shield of privacy. In this regard, the marital rape exception found in Indian penal law, the restriction on women's entry into places of religious worship mandated by personal or customary law, and the precarious position of women in public spaces against the current societal backdrop, all lend themselves as relevant contexts in which the privacy principle can be tested.

The purpose of this article is to use the privacy lens, as laid down in *Puttaswamy*, to read women's rights not only in terms of movements based on equality and liberty, but also as movements which can be defended on the basis of privacy. This article defends the validity of privacy against the counter arguments put forth by feminist legal scholars, Catharine MacKinnon[4] and Martha Nussbaum,[5] in warning against privacy rights for women. Both scholars argue that privacy as a concept does more harm than good for women, although they differ in their approaches to the same. MacKinnon uses equality as the basis to determine gender-sensitive issues while Nussbaum proposes that liberty is the constitutional mechanism of choice to address social and legal concerns.[6] Fundamentally, both believe that not only is privacy unnecessary in bolstering women's rights, but also it actively hampers the progress of women's rights. This article refutes arguments which challenge the relevance of privacy to women's rights. The author proposes that if equality and liberty are rights that an individual must

4 Catherine MacKinnon is the Elizabeth A Long Professor of Law at the University of Michigan Law School since 1990, and the James Barr Ames Visiting Scholar of Law at Harvard Law School since 2009. She addresses issues of sex equality, women's rights, and gender crime, specifically sexual abuse and exploitation, and has authored several books in this regard.

5 Martha Nussbaum is the current Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago. Her work is heavily influenced by the writings of Catharine MacKinnon and shows a cross-section between law, legal philosophy and psychology.

6 Martha Nussbaum, 'Is Privacy Bad For Women?', (2000) *Boston Review*, *available at* http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women (last visited 24 February 2019).

have access to, then privacy is the enabler through which she can access those rights.

The article suggests that privacy is essential to women's interests when understood from an individualistic perspective and applied accordingly. Part II addresses the primary assertion that privacy protects perpetrators harming women in the context of marital rape. Part III illustrates how privacy breaks down traditional power structures, using the example of women's restricted access to places of religious worship. Part IV deviates from strict legal theory and analyses social contexts to reiterate that the individual notion of privacy is best realised in public spaces. Part V concludes the article by promoting the idea that privacy is the necessary qualifier for the realisation of women's rights.

II. Privacy Protects Perpetrators and Disillusions Intimacy in the Context of Marital Rape

A. Protecting Perpetrators and Disillusioning Intimacy

Catharine MacKinnon pits the idea of privacy against women's emancipation. The notion of marital privacy has long been a source of oppression for women and has resulted in the subordination of women within the family sphere.[7] In the Indian context, MacKinnon's reflection seems apt, '… it is not the women's privacy that is being protected here, it is the man's.'[8] Given the rise of domestic violence rates in the country, MacKinnon's justification that '… privacy provides a veneer for male domination'[9] is a valid concern as domestic violence and sexual inequality in marriages persist.

7 *See* Elizabeth Schneider, 'The Violence of Privacy' (Summer 1991) 23 *Connecticut Law Review,* 973-999.

8 Catharine MacKinnon, 'Toward a Feminist Theory of the State' (1991) *Harvard University Press* as quoted by Nussbaum, 'Is Privacy Bad For Women?', (2000) *Boston Review*, *available at* http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women (last visited 24 February 2019).

9 *Ibid*.

MacKinnon's concern arises from the more common conception of privacy. Privacy is seen as spatial control which asserts the creation of private spheres into which intrusion by State and statute is deemed inappropriate.

The essence of MacKinnon's argument is that privacy insulates patriarchal domination. Marriage, in the purely traditional, heterosexual sense of the word, enjoys spatial privacy. It is the privacy granted to the marital home and the institution of marriage which MacKinnon opposes. In 2016, the National Crime Records Bureau found that cruelty by the husband and his family accounted for 32.6 per cent of all crimes committed against women and that such cruelty formed the most sizeable bracket for crimes against women.[10] Consider this statistic before the application of privacy to a marriage, rather than to the persons married. The blanket refusal to interfere in marital relationships under the garb of privacy is problematic because when the institution of a marriage is held above the choice and consent of the partners in that marriage, unpleasant things start to happen.

B. Understanding Marital Rape

Section 375 of the *Indian Penal Code, 1860* (IPC) does not recognise rape as a crime within the confines of a marriage. This arises from a colonial sense of subservience in which spousal consent in a marriage is presumed. In many parts of the country, sexual privilege is won from a marriage association by men who do not care for the consent of the women they marry. This stems from the traditional, patriarchal notion that sexual intercourse is a right that men receive in a marriage. This characterisation, in itself, demeans a married woman's right to choose her sexual partner, and has been interpreted as a violation of the right to equality and equal protection of the law under article 14 of the *Constitution of India*, as well as the right to life and personal liberty under article 21.[11]

---

10 National Crime Records Bureau, 'Crime in India' (2016) *National Crime Records Bureau, available at* http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf (last visited 24 February 2019).

11 *T Sareetha* v. *T Venkata Subbaiah* AIR 1983 AP 356 (*T Sareetha*).

The definition of rape as presented in section 375 requires that sexual intercourse committed must either be against a woman's will or without her consent.[12] The Supreme Court of India explained that the phrase 'against her will' indicated that such intercourse was done by a man to a woman despite her resistance and opposition, while the phrase 'without her consent' implied an act of reason following deliberation.[13] Consent must be complete, active, and voluntary in a relationship between a man and a woman. Section 90 of the IPC states that consent given under the fear of injury or misconception of fact is no consent at all.[14] Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent.[15] This requirement of proactive consent is in tandem with the recommendation found in the Verma Committee Report, that the definition of rape should require the existence of a lack of 'unequivocal and voluntary agreement', an approach sanctioned by the *United Nations Convention for the Elimination of all Forms of Discrimination Against Women*.[16] The association of a marriage cannot render void the very consent on which sexual relations are based. The importance of consent has been long recognised by the IPC. On a purely fundamental basis, then, the marital rape exception clashes with the exposition of consent as described by the IPC. Thus, even before the *Puttaswamy* judgment crystallised the individualistic notion of privacy, courts have recognised the necessity of sexual privacy.[17]

12 Justice Verma Committee, 'Report of the Committee on Amendments to Criminal Law' (2013), *available at* http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf (last visited 24 February 2019) (Verma Committee Report).

13 *State of UP* v. *Chottey Lal* (2011) 2 SCC 550, para 13.

14 *The Indian Penal Code, 1860*, section 90.

15 *State of HP* v. *Mango Ram* (2000) 7 SCC 224, para 12.

16 Verma Committee Report *supra* n. 12, 73, para 10.

17 *See T Sareetha*.

Any challenge to the marital rape exception can be scrutinised in two ways–as a violation of equality under articles 14 and 15, and as a threat to life and personal liberty under article 21.

The marital rape exception is an infringement of the right to equality and equal protection, and of the right to life and personal liberty where the bizarre distinction between married and unmarried women is used as a pre-qualifier for addressing rape. As a result the challenge to marital rape can be put to test against the standards of arbitrariness[18] and unreasonableness.[19] The classification of women based on their marital status, acting as a prerequisite to qualify for rape, is an unreasonable standard to hold. Rape does not depend on a woman's marital status. Consider the stringent standards to which domestic violence is held,[20] consent plays no part there, for it is irrational to believe that any woman would willingly concede to abuse and violence. In the same vein, it is irrational to conclude that a married woman would willingly consent to forced sexual intercourse. Therefore, it is necessary that the marital rape exception be abolished.

A marital rape exception cowers behind the argument that a marriage union is formed on the underlying principle of presumed consent. However, there is no waiver of sexual rights that a woman is conscripted to sign at the time of her wedding. The argument that

18 The doctrine of arbitrariness put forth in *EP Royappa* v. *State of Tamil Nadu* 1974 AIR SC 555, suggests that from a positivistic point of view, arbitrariness is antithetical to equality. When an act is arbitrary it is implicitly unequal according to both political logic and constitutional law and so violates article 14. The marital rape exception is shown to be inherently arbitrary, and therefore is unequal.

19 Unreasonableness can be tested *via* the doctrine of reasonable classification postulated in *State of West Bengal* v. *Anwar Ali Sarkar* AIR 1952 SC 75. The doctrine of reasonable classification finds that a legislative classification may be reasonable when it is found on some intelligible differentia and when such differentia has a rational relation to the object of the legislation. The marital rape exception differentiates between rape survivors on the basis of their marital or non-marital status which bears no rational relation to the aim of the State in progressive modern-day India.

20 *The Protection of Women from Domestic Violence Act, 2005* contains significantly deep provisions which offer protection to victims of violence within the family. The Act outlines a detailed procedure in terms of judicial recourse and constitutional remedies available to such victims in breaking the chain of violence.

the withholding of sexual consent by the wife would effectively lead to the breakdown of a marriage union[21] is an exaggerated extreme. Consent is not and cannot be interpreted as a one-time waiving of choice. If it is assumed to be so, as the marital rape exception does, it is unerringly arbitrary and unreasonable. The marital rape exception fails to provide a rational nexus between the horror married women endure in terms of non-consensual sex, and the larger State concern of corrupting the institution of marriage.

The second way of addressing a challenge to the marital rape exception is solely viewing it as a challenge to the right to personal life and liberty under article 21 of the *Constitution*. According to the majority opinion in *Puttaswamy*, violations of privacy under article 21 must satisfy the proportionality standard.[22] The Supreme Court opined: 'An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.'[23] The Court further held:

> 'The concerns expressed on behalf of the Petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State: (i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference.'[24]

---

21 PTI, 'Criminalising Marital Rape Will Threaten the Institution of Marriage, Centre Tells Delhi HC' (2017) *The Wire, at* https://thewire.in/gender/criminalising-marital-rape-will-threaten-institution-marriage-centre-tells-delhi-hc (last visited 24 February 2019).

22 The proportionality standard arose from the Wednesbury principle of reasonableness in English law. The proportionality standard is a common test of review to keep State infringement of individual rights under check. It requires that the measure to be enacted *via* legislation or executive action is likely to achieve its ends and cause as little harm as possible.

23 *Puttaswamy* (Dr DY Chandrachud, J), para 3(H), in section T. Conclusions.

24 *Puttaswamy* (Sanjay Kishan Kaul, J), para 71.

Of the three requirements of the proportionality standard, it may be construed that the State has its evidence for legality–there certainly is the existence of a law, ie exception 2 of section 375 of the IPC which sanctions the idea that marital rape in not punishable. The question that arises is with regard to the other two prongs: necessity and proportionality. The legitimate State aim, so to speak, is to safeguard the sanctity of the marital institution.[25] In democratic 21st century India, there is little, if nothing, to justify such an absurdly outdated State aim. Further, the preservation of the institution of marriage cannot come at the cost of the safety and autonomy of the individuals in a marriage. The proportionality standard applied in this context does not draw a rational nexus between the object of protecting marital relationships and the method adopted of dismissing marital rape as a private affair which is above constitutional questioning.

In order to substantiate a privacy claim under article 21, it is important to consider the origins of the marital rape exception. Exception 2 of section 375 arose as a product of the coverture rules that originated in 18th century English law, which followed the legal doctrine of yesteryears, marking husband and wife as one entity. The legal, political, sexual and economic rights of the wife were subsumed by those of her husband to the extent that the wife was considered a 'dependent', incapable of independent existence.[26] In this respect, the presumption of consent was effectively invalid for women. In that pre-suffragette political climate where men and women fell into two very distinct categories with unimpeachable boundaries, the State felt itself justified in withholding from the domestic, house-bound and family-oriented women of the time, political, social and economic rights

25 Maanvi, 'Here's Why Our Govt Thinks Marital Rape Shouldn't Be a Crime', (2017) *The Quint, at* https://www.thequint.com/voices/women/marital-rape-delhi-high-court-government-submission (last visited 24 February 2019).

26 Sir William Blackstone, *Commentaries on the Laws of England* (Oxford, England Clarendon Press 1765–1769) Book 1, Chapter 15: Of Husband and Wife, *available at* https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-115/ (last visited 24 February 2019).

that concerned daily functioning in the outside world. In 18th century England, because women were confined to the domestic sphere, it was the legitimate aim of the State to ensure their dependency on their male counterparts. This umbrella protection of the coverture rules may have rendered the State aim of 18th century England legitimate, however, it is strange to presume that this can possibly be applicable to modern day India. Having adopted the constitutional ideals of equality and liberty, women have become independent and capable of giving consent. In 21st century India, any extension of the coverture rules is hard to justify. Women are no longer 'dependants'. They are independent (if not always equal) citizens under law.

To effectively address MacKinnon's concern that privacy is not in the best interests of women, duly imported to the instance of the marital rape exception, it is important to reassert the individualistic notion of privacy that the *Puttaswamy* judgment propounds. Spatial control is defined in the judgment as, '… the creation of private spaces.'[27] The Court held that in creating a private sphere for oneself, one chose the space surrounding oneself and actively controlled it enough to warrant safeguard from unwanted intrusion. This effectively earmarks privacy as attributable to the individual; it is at the individual's discretion to create a space of solitude for herself in a way that she sees fit. Such an individualistic notion of privacy cannot be used to the detriment of women in a marriage.

Even before the *Puttaswamy* judgment crystallised the individualistic notion of privacy, courts have recognised the necessity of sexual privacy. The High Court of Andhra Pradesh first broke open this shell of spatial privacy in its powerful judgment in *T Sareetha* where the Court held that section 9 (restitution of conjugal rights) of *The Hindu Marriage Act, 1955*[28] unfairly and grossly vitiated the privacy

27 *Puttaswamy* (Dr DY Chandrachud, J), para 141.

28 *The Hindu Marriage Act, 1955*, section 9.

of a woman by compelling her to reciprocate marital obligations against her express consent. Holding that sexual intercourse, like marital cohabitation, was a choice that was to be actively and deliberately exercised by a woman throughout her marriage, the Court acknowledged that any compulsion to the same was an infringement of a woman's right to privacy.[29]

An extension of the arguments that confront the restitution of conjugal rights finds footing in a more expansive movement concerning the marital rape exception.[30] When section 375 refuses to recognise non-consensual sex between a married pair (where the wife is not a minor and above the age of 18) as rape, the reasoning ultimately stems from the presumption that it is the marital home that merits non-intrusion. This is evidenced by the written submissions of the Union of India in the marital rape exception proceedings underway before the High Court of Delhi.[31] The State argued that the introduction of a marital rape exception throws into question the institution of marriage as a whole.[32]

This preservation of the marital sphere is echoed from the verdict of the High Court of Delhi in *Harvinder Kaur* v. *Harmandar Singh Choudhry* (*Harvinder Kaur*), which protected the spatial construct of marital privacy when it likened the introduction of constitutional law in the home to letting loose a bull in a china shop, to the detriment of the institution of marriage and all that it stood for.[33] The apex court eventually confirmed the judgment of the Delhi High Court, effectively overruling the decision in *T Sareetha*.[34]

29 *T Sareetha*, para 31.

30 *RIT Foundation* v. *Union of India* Writ Petition (Civil) 284 of 2015 is a petition filed in the High Court of Delhi which challenges the validity of the marital rape exception in the IPC.

31 Maanvi *supra* n. 25.

32 Maanvi *supra* n. 25.

33 *Harvinder Kaur* v. *Harmandar Singh Choudhry* AIR 1984 Delhi 66, para 34.

34 *Smt Saroj Rani* v. *Sudarshan Kumar Chadha* AIR 1984 SC 1562.

This *prima facie* categorisation of marriage as a sphere that must be so preciously protected, is untenable when the *Puttaswamy* judgment determines that privacy is a right that must be afforded to the individual, not to her marital association.

C. Privacy, Marital Rape and Beyond

The primary argument of the State in defending the marital rape exception is the destabilisation of the institution of marriage that is likely to ensue if marital privacy were to be acknowledged.[35] The State asserts that women's rights are protected well enough by existing legislation. The argument that existing legislation does not necessitate the removal of the marital rape exception simply because it risks upsetting the institution of marriage carries down from the same rationale used in *Harvinder Kaur*. The definition of privacy is no longer the preservation of a physical sphere. Privacy exclusively belongs to the individual. Ultimately, because individuals stand independent of the associations they may form, the privacy they exert must also be independent.

The petition against the marital rape exception, currently *sub judice* before the High Court of Delhi, effectively objects to the lack of individual privacy in a marital association.[36] The petition raised objections to the 'legal rape' that the exception to section 375 permits, while pointing out the unconstitutionality of the categorisation of rape victims. Rape victims who share no marital relationships with their assailants are afforded full protection under sections 375 and 376 of the IPC. The privacy of their bodies and identity is upheld to the

35 Maanvi *supra* n. 25.

36 The written submissions of the Petitioner in *RIT Foundation* v. *Union of India* Writ Petition (Civil) 284 of 2015 can be found at: Akanksha Jain, 'Marital Rape: Married, Married But Separated, & Unmarried-Classifying Rape Victims Is Unconstitutional: Petitioners Submit Before Delhi HC [Read Written Submissions]', (2018) *LiveLaw, at* http://www.livelaw.in/marital-rape-married-married-separated-unmarried-classifying-rape-victims-unconstitutional-petitioners-submit-delhi-hc-read-written-submissions/ (last visited 24 February 2019).

fullest. Rape victims who may be the judicially separated wives of their assailant husbands can hold their rapists accountable, with a prison sentence ranging from two to seven years if the conviction is upheld.[37] The criminalisation of rape cannot come with the categorisation of classes of rape victims because this reiterates the non-individualistic idea of privacy. The rationale is that unmarried or married but separated women are not part of a functional marital relationship so they do not attract the privacy that is traditionally afforded to the institution of marriage.

The petitioners before the High Court of Delhi take MacKinnon's primary concern and repackage it in a slightly different, but significantly more alarming way: the provision of a marital rape exception protects men against misuse of the law by their wives.[38] The petitioners contend that such an object effectively disentitles the vast majority of women, who face marital rape at the hands of their husbands, from proper legal recourse.[39] The bodily integrity of one partner in a marriage cannot suffer at the potential cost of misuse to the other partner. This anomaly in the law exists to the disadvantage of women in marriages. The High Court of Gujarat has observed that it is time to jettison the idea of 'implied consent' in a marriage as all women, irrespective of marital status, must have bodily autonomy. However, the Court simultaneously held that since a wife cannot initiate proceedings against her lawfully wedded husband under section 376 of the IPC, marital rape cannot be punishable.[40]

Given that the *Puttaswamy* judgment outlines the contours of privacy in terms of consent and choice, from this particular lens alone, the continuation of a marital rape exception in Indian jurisprudence is alarming. A marital rape exception absurdly denies a married woman agency over her own body precisely because she has entered into a

37 *The Indian Penal Code,1860*, section 376A.

38 Jain *supra* n. 36.

39 Jain *supra* n. 36.

40 *Nimeshbhai Bharatbhai Desai* v. *State of Gujarat* 2018 SCC OnLine Guj 732.

marital association. Unlike MacKinnon's and Nussbaum's concerns, privacy will not be a bar to women's welfare, when the right to privacy is accorded to each individual woman.

III. Privacy Restores Traditional Power Structures in the Context of Women's Restricted Entry in Places of Religious Worship

A. Privacy Restores Traditional Power Structures

MacKinnon's concern with privacy is '… the problem with anything private is getting it perceived as coercive'.[41] She expands her objection to male domination of women to a more generalised inference of a direct clash between the personal and the political.[42] She argues that because of the distinction in the public and private spheres of privacy, the personal or private sphere is given a sort of sanctity or protection which others are unwilling to invade.[43] Nussbaum illustrates MacKinnon's claim with parallels to early contraceptive use and homosexual sodomy.[44] Contraceptive use in the privacy of the home was protected but distributing contraceptives on the street among students and young people was not, until an American court ruled otherwise.[45] Similarly, homosexual sodomy was protected between gay couples in the privacy of their homes, but didn't enjoy the same protection in clubs, or bars, or places of public interaction where gay people might meet and engage with one another.[46]

The point is simple–privacy strengthens traditional hierarchies by protecting higher ups from accountability with regard to their

41 Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* Cambridge, Massachusetts, and London, England Harvard University Press 1987, 100, *available at* https://www.feministes-radicales.org/wp-content/uploads/2010/11/Catharine-MacKinnon-Feminism-Unmodified.-Discourses-on-life-and-law.pdf (last visited 24 February 2019).

42 *Infra* n. 47.

43 MacKinnon *supra* n. 41.

44 Nussbaum *supra* n. 6.

45 *Eisenstadt* v. *Baird* 405 US 438 (1972) (United States).

46 Nussbaum *supra* n. 6.

treatment of the individuals lower down the chain of power. MacKinnon's argument is that the personal is political and ultimately cannot hide behind a privacy shield.[47]

Consider MacKinnon's argument in the context of the controversy surrounding the entry of women into the precincts of religious places of worship. For centuries, custom has dictated that it is 'unholy' for women to enter the *sanctum sanctorum* of temples, *havelis*, mosques or *dargahs* because of the perceived notion of impurity that a menstruating woman brings with her.[48] Limiting women and their choice to worship is not only a direct infringement of their right to practise their respective religions, but also disregards any decisional autonomy they may have. Religion, like contraceptive use or homosexual sodomy, is a self-regarding act despite the collectivistic culture it has in India. Religion is often as personal as a self-regarding act can be, and yet it is corrupted into a treacherous, hierarchical order that demeans women.

MacKinnon's argument, when applied to the present facts, is that the privacy apparently afforded to religion and its practice shores up a hierarchy that is disadvantageous to women. This hierarchy serves to exclude women from entering religious spaces while they are menstruating. However, in light of the *Puttaswamy* judgment, privacy weakens such a power structure. The idea of bodily privacy assails the very presumption on which religious fanatics base their case: menstruation makes women impure. Upholding menstruation as an unquestionable aspect of a woman's bodily privacy puts it beyond the purview of the hierarchical culture of a religious organisation.

---

47 MacKinnon shapes this argument around the popular slogan which was used as a rallying feminist cry in the 1970s. The concept 'the personal is political' seems to have its origins in Carol Hanisch's 1970 essay, *The Personal is Political.*

48 *See* the written submissions of the Petitioners in *Indian Young Lawyers Association & Anr.* v. *State of Kerala & Ors.* Writ Petition (Civil) No. 373 of 2006 in Mehal Jain, 'Sabarimala Women's Entry [Day-1] Restrictions On Entry Of Women Nowhere Connected With Religious Practices In The Temple, Submits Petitioner [Read Written Submissions]', (2018) *LiveLaw, at* http://www.livelaw.in/sabarimala-womens-entry-day-1-restrictions-on-entry-of-women-nowhere-connected-with-religious-practices-in-the-temple-submits-petitioner-read-written-submissions/ (last visited on 24 February 2019).

B. The Courts on Temple Entry

The issue of restricting women's right to access the inner sanctums of religious places of worship is intersectional. It encompasses the personal laws of the respective religions it stems from and also involves constitutional law. Finally, it includes the question of how these laws affect women and the exercise of the right to religion. The privacy standard is a nuanced argument in the entire spectrum of issues related to temple entry. The privacy standard focuses on whether, and if so, where, religious obligations impinge upon the individual rights of women. Indian jurisprudence with regard to the temple entry ban rests largely on the decisions of courts in *Dr Noorjehan Safia Niaz & Anr.* v. *State of Maharashtra & Ors.* (*Haji Ali Dargah*),[49] *Smt Vidya Bal & Anr.* v. *State of Maharashtra & Ors.* (*Shani Shingnapur Temple*)[50] and *Indian Young Lawyers Association & Ors.* v. *State of Kerala & Ors.* (*Sabarimala Temple*).[51] The issue of denial of women's access to places of religious worship necessitates the fulfilment of the privacy requirement as postulated by the *Puttaswamy* judgment. However, there are two more criteria to be considered. First, is the public character of religious institutions. Second, is the enforcement of fundamental rights against the State.[52] The horizontal protection that the State offers to women is crucial in opposing hierarchical structures that have stood for centuries. Religion is one such all too common hierarchical structure. Bodily integrity is an unimpeachable right belonging to the individual woman. It outweighs the power

---

49 *Dr Noorjehan Safia Niaz & Anr.* v. *State of Maharashtra & Ors.* (2016) 5 AIR Bom R 660.

50 *Smt Vidya Bal & Anr.* v. *State of Maharashtra & Ors.* Public Interest Litigation No. 55 of 2016 (High Court of Bombay).

51 *Indian Young Lawyers Association & Ors.* v. *State of Kerala & Ors.* 2018 (13) SCALE 75.

52 Gautam Bhatia, 'Haji Ali Dargah: Bombay High Court Upholds Women's Right to Access the Inner Sanctum', (2016) *Indian Constitutional Law and Philosophy, at* https://indconlawphil.wordpress.com/2016/08/26/haji-ali-dargah-bombay-high-court-upholds-womens-right-to-access-the-inner-sanctum/ (last visited 24 February 2019).

structure that religion may defend. In this regard, the horizontal effect of fundamental rights ensures that hierarchical structures do not impinge upon the bodily integrity of women by determining their days of worship based on their menstrual cycles.

The High Court of Bombay held:

> 'Once a public character is attached to a place of worship, all the rigors of articles 14, 15 and 25 would come into play and [the Trust] has no right to discriminate entry of women into a public place of worship under the guise of 'managing the affairs of religion' under article 26…'[53]

The public character of the *dargah* does not merit the protection of article 26(b) of the *Constitution.* To the contrary, it requires that the fundamental rights enshrined in articles 14, 15 and 25 are actively upheld.[54] Moreover, the Court found that these rights cannot be enforced against religious institutions (in this case, the Dargah Trust), unless the State is also impleaded in the infringement of fundamental rights.[55]

> '… It [is] the Constitutional responsibility of the State to ensure that the principles enshrined in the articles 14 and 15 of the Constitution are upheld. The State would then be under a constitutional obligation to extend equal protection of law to the petitioners to the extent that it will have to ensure that there is no gender discrimination.'[56]

Consider the issue of restriction of women's right of entry to places of public religious worship from a claim that it infringes the right to privacy under article 21.[57] This merits the compelling State interest–

---

53 *Haji Ali Dargah*, para 50.

54 *Haji Ali Dargah*, para 51.

55 *Haji Ali Dargah*, para 51.

56 *Haji Ali Dargah*, para 20.

57 The standard of strict scrutiny comprises two parts: one, the compelling State interest which is required for any legislation or executive action curtailing the exercise of a fundamental right and two, the narrow tailoring of the law, which ensures that the legislation in question is construed in the strictest terms.

narrow tailoring standard, put forth for assessing claims under article 21. In an attempt to prove the existence of a law under article 13 of the *Constitution*, the Dargah Trust failed to provide substantial examples to support their claim that the proximity of women to the grave of a male saint was considered a sin in Sharia law.[58]

Similarly, the High Court of Bombay in the *Shani Shingnapur Temple* case held that the fundamental right of women to enter places of worship could not be encroached upon by any authority or individual. The Court affirmed that the *Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956*, which prescribes a six month prison term for those restricting the entry of women into a temple, must be upheld.[59] The State of Maharashtra assured the Court that the government was duty bound to prevent any discrimination against women in this respect and to take proactive steps to ensure the fundamental rights of women were protected.[60] Two years after the delivery of the verdict, the State of Maharashtra approved a proposal to take control of the management of the Shani Shingnapur temple and to take it upon themselves to frame an Act for the same.[61]

Given the delicate socio-cultural climate in India, religious denominations are treated with special care under article 25 of the *Constitution.* However, this care cannot outweigh the individual integrity of women who are a part of these denominations. Article 25(1) of the *Constitution* provides: all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.[62] In the *Sabarimala Temple* case,[63] menstruating women were prohibited from entering the Sabarimala Temple

58 *Haji Ali Dargah*, para 30.

59 *See Shani Shingnapur Temple*.

60 *See Shani Shingnapur Temple*.

61 TNN, 'Maharashtra govt to take control of Shani Shingnapur temple', (2018) *The Times of India, available at* https://timesofindia.indiatimes.com/city/mumbai/maharashtra-govt-to-take-control-of-shani-shingnapur-temple/articleshow/64673350.cms (last visited 24 February 2019).

62 *The Constitution of India*, article 25(1).

63 *See Sabarimala Temple.*

under the sanction of section 3 of the *Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965*, which allows the restriction of entry in accordance with prior usage or custom. Rule 3(b) of the *Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965* allowed the exclusion of women 'at such time during which they are not by custom and usage allowed to enter a place of public worship.' The Travancore Devaswom Board, which manages the affairs of the temple, therefore prohibited women from entering the temple on the basis of over eight centuries of custom which allegedly prohibited menstruating women from polluting the sanctum in which Lord Ayappa, a 'bachelor', is worshipped.[64] Instances from the Garuda Purana (ch. 231), 'A Brahmana having touched a dog, a Sudra, or any other beast, or a woman in her menses, before washing his face after a meal, shall regain his purity by fasting for a day, and by taking Panchgavyam.' and the Markandeya Purana 35.26-28, '…After touching a menstruous woman, a horse, a jackal, and other animals, or a woman recently delivered of a child, or people of low caste, one should bathe for the sake of purification…' indicate the origins of this stigma associated with menstruation.[65] This very characterisation presents two problems. The first is, of course, the unfairness of placing the word of a religious text over the letter and spirit of the *Constitution*. The second is the lack of understanding that religion and religious worship are choices an individual makes, by extension of which women, as individuals, cannot be excluded from the access to those choices. The Supreme Court, in defending the fundamental nature of a right to privacy, has previously declared, 'the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of the majorities, whether legislative or popular.'[66]

64 As cited in Jain *supra* n. 48.

65 As cited in Jain *supra* n. 48.

66 *Puttaswamy* (Dr DY Chandrachud, J), para 126.

In *Sabarimala Temple*, one of the primary issues which arose for the consideration was whether the restriction of menstruating women constituted an essential religious practice under article 25 of the *Constitution* and whether a religious institution could impose any restrictions under its right to manage its own religious affairs under article 26(b).[67] On 3 October 2018, the Supreme Court held, by a 4-1 majority, that the practice of prohibiting the entry of menstruating women into the Sabarimala temple was unconstitutional. Justice Malhotra, in her dissenting opinion, noted that the question of whether women's entry was an essential religious practice or not, was a determination which only the religious denomination under consideration could make.[68] It is to be noted that neither Justice Malhotra in her dissent nor her fellow judges in their exposition of the majority, analysed the privacy aspect associated with the female devotees of the temple.

The decision in *Sabarimala Temple* received backlash and resulted in a state wide protest by devotees who believed the Court was interfering in their religious affairs. The Court heard 65 petitions–56 review petitions and four fresh writ petitions–against its decision. The case is closed for orders.[69]

From a purely privacy related perspective, women are entitled to their worship without being scrutinised for a perceived notion of impurity associated with their menstrual cycles. In this regard, the Supreme Court observed that the menstrual status of a woman was deeply personal and an intrinsic part of her privacy.[70] A woman's menstrual status 'must be treated by the *Constitution* as a feature on

67 The Constitution Bench hearing the *Sabarimala Temple* case framed five issues vide their order dated 13 October 2017 *available at* https://www.supremecourt.gov.in/supremecourt/2006/18956/18956_2006_Judgement_13-Oct-2017.pdf (last visited 24 February 2019).

68 *Sabarimala Temple* (Malhotra, J), para 10.

69 All India, 'Sabarimala Temple Highlights: Supreme Court Reserves Verdict', (2019) *NDTV, available at* https://www.ndtv.com/india-news/supreme-court-to-hear-sabarimala-review-petitions-today-live-updates-1989011 (last visited 24 February 2019).

70 *Sabarimala Temple* (Dr DY Chandrachud, J), para 57.

the basis of which no exclusion can be practised and no denial can be perpetrated.'[71] The Court also recognised the arguments put forth by the *amicus curiae* that such an exclusionary practice violated women's right to privacy under article 21 as it compelled them to disclose both their age and menstrual status.[72]

Although there was no deeper analysis from the privacy perspective, the Court placed 'those who were denuded of their human rights before the advent of the *Constitution* – whether in the veneer of caste, patriarchy or otherwise – … in control of their own destinies by the assurance of the equal protection of law.'[73] The Court observed that discrimination as a social institution is not merely perpetrated by the State, but can also be individualistic and societal. The Court further noted that article 17 of the *Constitution* must have an overarching reach: '… as an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution.'[74]

In *Sabarimala Temple*, the Supreme Court upheld the individual to be the basic unit of the *Constitution*, as a result of which all customary practices and traditions which reduce human dignity must pass constitutional scrutiny.[75] The missing aspect of privacy becomes stark, because of the Supreme Court's observation of human dignity taking centre stage, as the individual is the basic unit of the *Constitution*. This observation is analogous to the reasoning used in *Puttaswamy* for privacy. There is a further extension of how notions of impurity affect women's right to worship, in that 'these beliefs have been used to shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order.'[76] The Court observed that the stigma of menstruation has been used to relegate women to the

71 *Sabarimala Temple* (Dr DY Chandrachud, J), para 57.
72 *Sabarimala Temple* (Misra, J and Khanwilkar, J), para 72.
73 *Sabarimala Temple* (Dr DY Chandrachud, J), para 2.
74 *Sabarimala Temple* (Dr DY Chandrachud, J), para 75.
75 *Sabarimala Temple* (Dr DY Chandrachud, J), para 100.
76 *Sabarimala Temple* (Dr DY Chandrachud, J), para 57.

confines of a social order that does not respect aspects of individual autonomy. Privacy, though not deeply analysed in the *Sabarimala Temple* judgment, forms one of these aspects.

The exclusivity of temple entry has long been a tool in the hands of the upper echelons of societal hierarchies. It was originally used to restrict Dalits entering places of religious worship on the grounds of their perceived untouchability. There is little to support a legitimate State aim in banning women from entering the inner sanctums of religious places of worship. The idea of impurity associated with menstruation discriminates against women who are therefore restricted from entry by virtue of the biological differences of their sex. Under the guise of the 'impiety of menstruation' argument, male-dominated trusts demonise menstruating women from the rest of the worshippers by creating a precariously poised 'us versus them' phenomenon. Here, 'us' refers to the non-menstruating worshippers who are better off and more deserving than menstruating women of the right to access such institutions.

C. Privacy and Piety

The idea of privacy discernibly influences contemporary jurisprudence in determining women's rights in entering religious places of worship. The Supreme Court referred to a fundamental exposition of nine primary types of privacy which fall broadly under two aspects of freedom: the freedom to be left alone and the freedom for self-development.[77]

The very first type of privacy, which is relevant to the entry of women in religious places of worship, is bodily privacy. Bodily privacy reflects the privacy of the physical body and emphasises the negative freedom of preventing others from violating one's body or from restraining the freedom of bodily movement.[78] From the privacy lens alone, any bar to women's entry in religious places based on

77 *Puttaswamy* (Dr DY Chandrachud, J), para 142.

78 Bert-Jaap Koops *et al*, 'A Typology of Privacy', (2016) 38(2) *University of Pennsylvania Journal of International Law* 483, 567, *available at* https://ssrn.com/abstract=2754043 (last visited 24 February 2019).

their menstrual cycles is a violation of bodily privacy as it constitutes unwarranted restraint on the freedom of bodily movement. The Court declared that the concern for bodily integrity implied freedom from any unwarranted stimuli.[79] The exclusion of women from religious places on the basis of a perception of impurity works like an unwarranted stimulus. This stimulus ensures that they behave in a manner in which they would have ordinarily not behaved in, had it not been for the social and moral compunctions, compelling them to conform. Admittedly, the Court extrapolated its declaration with instances of corporeal punishment and forced feeding, and applied the idea of a violation of bodily privacy in the primary instance to State surveillance,[80] but the principles can also be applied to the present facts.

The second type of privacy relevant to the entry of women in religious places of worship is behavioural privacy which is typified by the privacy interests a person has while conducting publicly visible activities.[81] The Court opined that behavioural privacy postulates that even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion.[82] Although religious worship is primarily a self-regarding act, it is almost always conducted in the public eye with members of a community and often with a certifiably public spirit. Thus, it provides the perfect instance of where privacy interests are necessary while conducting publicly visible acts. The access to places of religious worship should be granted to women in two respects. First, their right to entry inheres in their being devotees of a particular faith or members of a certain denomination. Women merit the right to entry under the universality of article 25(1). Secondly, any restriction to such entry is a violation of behavioural privacy under article 21 of the *Constitution*. The individual woman is

79 *Puttaswamy* (Chelameswar, J), para 36.
80 *Puttaswamy* (Chelameswar, J), para 38.
81 Bert-Jaap Koops *et al supra* n. 77, 568.
82 *Puttaswamy* (Dr DY Chandrachud, J), para 142.

not considered fit to determine the extent of her access to religious places; it is handed down to her on the basis of purely biological distinctions. There is a clear and deliberate intrusion into aspects of her behavioural privacy.

Here too, the three-pronged requirement of legality, necessity and proportionality put forth in *Puttaswamy* comes into play in assessing violations of the right to privacy under article 21.[83] In *Sabarimala Temple*, the Travancore Devaswom Board contended the existence of a law, that is section 3 the *Kerala Hindu Places of Worship (Authorization of Entry Act) of 1965*, which allows the restriction of entry in accordance with prior usage or custom. This law allowed the Travancore Devaswom Board to bar women from entering the temple.[84] The dubiety is with respect to the need for a legitimate State interest and proportionality in restricting women's access to temples. In fact, in *Haji Ali Dargah* and *Sabarimala Temple*, the State had a positive obligation to prevent the infringement of fundamental rights of one private party (the women) by another (the Dargah Trust and the Travancore Devaswom Board, respectively). Assuming instead of action which lead to infringement of such rights, that it was the State that enacted discriminatory legislation to the same effect, it would have undoubtedly been struck down. In cases where the State must prevent infringement at the hands of another, especially when that religious institution has acquired public character, the same standards of unconstitutionality apply.

Considering the proportionality standard specifically, religious institutions, and by extension the State, must prove that there exists a rationale in excluding menstruating women from entering inner sanctums of public places of worship. The arguments of impurity and sexuality that are associated with women, especially menstruating women, are sweeping stereotypical generalisations that should not be treated as valid defences if individual autonomy and the principle

83 *Puttaswamy* (Dr DY Chandrachud, J), para 180.

84 Suhrith Parthasarthy, 'The Sabrimala Singularity', (2018) *The Hindu, available at* https://www.thehindu.com/opinion/lead/the-sabarimala-singularity/article24514458.ece (last visited on 24 February 2019).

of choice are to be treated as tenets of privacy. Moreover, there is a considerable infringement of women's rights in such restrictions: of equality in article 14, of discrimination in article 15, of untouchability in article 17, of religious rights in article 25, and of course of personal life and liberty in article 21 of the *Constitution of India.*

Chronologically, the Supreme Court's exposition of privacy succeeded the tumult following women's movements pressing for entry into religious places. The High Court of Bombay in *Haji Ali Dargah* took the view that women must be permitted entry on a purely libertarian and egalitarian basis. Privacy did not play a role in these judgments. Understandably, privacy is one aspect of the right of women to enter places of religious worship. It does not encompass the whole right, it merely affords a lens with which it is necessary to view a woman's individuality in the context of religion and worship.

IV. Privacy Creates Confusion with Respect to Public Space

A. Privacy is an Irrelevant Defence to Claims for Individual Liberty

'A right to privacy looks like an injury got up as a gift.'[85]

MacKinnon and Nussbaum argue that privacy is often plastered on as an unnecessary defense in order to fill in constitutional gaps.[86] The difference in the approaches followed by MacKinnon and Nussbaum, is seen in the former's reliance on equality and the latter's faith in liberty to restore individualistic rights. However, what both scholars fundamentally oppose is the relevance of a privacy claim with respect to concerns such as access to public spaces.

MacKinnon argues that equality offers all the protection individuals need, delving into a privacy defense is improbable in helping end

85 MacKinnon *supra* n. 41.

86 Nussbaum *supra* n. 6.

hierarchies and domination.[87] Nussbaum ventures farther by suggesting that liberty interests need express protection and that equality alone does not suffice.[88] In that respect, Nussbaum argues that many liberty interests for women have sparked the privacy defense and need to be extricated from the same. This narrative claims that there is a far more direct, constitutional, and libertarian way of addressing such concerns without bringing privacy into the picture.[89]

Women's rights issues in India, many of which are poised to be resolved by the judiciary, cannot be disassociated from a privacy interest simply on the ground that they are concerns of individual liberty. Given that the Supreme Court's dissemination of privacy includes the principles of decisional autonomy, informational self-determination and spatial control,[90] every individual liberty concern corresponds to the same access to choice and consent that a privacy right grants. One is not equated to another. Neither can one exclude the other. Equality and liberty in the access to public spaces are irrelevant without a sphere in which these principles can be realised with independence and impunity. Ultimately, even issues like access to public spaces, which do not arise from strict legal theory, are products of the individualistic liberty assigned to women, after any equality issues have been ironed out. Privacy is essential for the women to have uninhibited and free access to public spaces.

B. The Relevance of Public Space to Privacy

The liberty and independence that a woman enjoys in moving around in public is not the same as a man's. When a woman's independence is so curtailed, it tends to limit the choice and control she has in terms of her public surroundings. A woman walking down a dark alley at night will always be on her way somewhere: she might be

87 Nussbaum *supra* n. 6.

88 Nussbaum *supra* n. 6.

89 Nussbaum *supra* n. 6.

90 *Puttaswamy* (Dr DY Chandrachud, J), para 141(iii), citing Bhairav Acharya, 'The Four Parts of Privacy in India' (2015), *Economic & Political Weekly* 50 (22), 32.

homeward bound from work or on her way to eat dinner but rarely will women step out in entirely public spaces for a leisurely night-time stroll. In fact, in most cases where women are out with companions, especially during the later hours of the evening, they will be dropped to their very doorstep. The same courtesy doesn't extend to a man. When a lone female guest is leaving, it is only polite to hail a cab for her or at the very least, accompany her to her car. Male guests are bid goodbye at the door. In several ways, social conditioning makes it polite, or often even necessary to oversee that women are not alone in public spaces. Shilpa Phadke, a sociologist and gender studies scholar, argues that women do not claim public space the way men do.[91] She suggests that women go out of their way to use markers to prove their purpose of being out in public.[92] Women's access to public space involves a series of strategies (appropriate clothing, symbolic markings often indicating being married, and reserved body language) in order to maintain the idea that despite their presence in public space, they remain respectable women out for the legitimate purposes of work or education or the like.[93] More significantly, however, Phadke clarifies that the right to public space, rather than just conditional access, can be achieved only when women are free to be out in public spaces without having to demonstrate either purpose or respectability and without being categorised into public or private women.[94] This corresponds with the individualistic notion of privacy that women as individuals are entitled to.

The counternarratives to a privacy right for women stem from the very trenchant belief that privacy rights are inherently incompatible with women's equality in terms of civil, sexual, political and other liberties. According to MacKinnon, the right to privacy assumes that State action is the primary threat to the freedom and equality of

91 *See* Shilpa Phadke *et al*, 'Why loiter? Radical possibilities for gendered dissent' in Melissa Butcher and Selvaraj Velayutham (eds) *Dissent and Cultural Resistance in Asia's Cities* (1st edn Routledge Oxon 2009).

92 *Ibid*.

93 Phadke *supra* n. 91, 189.

94 Phadke *supra* n. 91, 192.

individuals, when oftentimes it is State action that makes these rights available to its citizens.[95] MacKinnon finds privacy untenable because it justifies inequality on the incorrect presumption that all individuals are equal, when they, in fact are not.[96] In this context, a man has unquestioned access to public space. However, giving a woman the same access will not erase the concerns of safety and harassment that prevail. Here, the man and the woman are inherently unequal, because despite giving them both unrestricted access to public space, one is still more disadvantaged than the other. Tracing this principle of inherent inequality, especially with respect to public space, is easy, based on the introductory illustrations. Insofar as MacKinnon states that the perception of State action being the primary threat to individual liberties is incorrect, the Indian example suggests that even when states may not proactively stall individual liberties, their inaction leads to the creation of an environment where it is easy for these liberties to be denied or ignored. Women in India have the constitutional freedom of movement and independence. In reality, this is not a viable possibility for most women.

Importing MacKinnon's argument to this context would suggest that by creating laws which allow female independence in public space, the State has done everything it possibly could to make the right to space available to women. There is no room for a privacy claim in MacKinnon's argument. However, this is not entirely true. Although loitering in itself is considered a frivolous activity, regarded as a suspicious performance of non-productivity,[97] men who choose to loiter are not reproached. Most women cannot even think of being present in public spaces without cause. Unlike Indian men, women rarely, if ever, laze in public parks unless they were to meet a friend there. In this context, a privacy claim is relevant because a man lounging in a public park will retain his right to privacy. He will not be questioned as to his presence. A woman, on the other hand, is

95 MacKinnon *supra* n. 41.
96 MacKinnon *supra* n. 41.
97 Phadke *supra* n. 91, 192.

always required to justify her presence in a public domain in addition to remaining a private person even in a public setting.[98]

Nussbaum presents an interesting viewpoint when considering the confusion privacy claims create.[99] She suggests that where privacy can be clearly demarcated through legal tradition to indicate expressly what citizens have a right to and freedom from, it is useful and appropriate.[100] However, to assert a nebulous right to privacy, according to her, does little to indicate how privacy rights shape the diverse fields of pre-existing law. The confusion of a privacy claim lies in its unelaborated form. The loose assertion of a mere 'right to privacy' does not indicate where and how privacy impacts law as it already exists and that complicates the source, strength and legitimacy of a privacy defence for individuals.

Creating an all-encompassing law for privacy is virtually impossible given the wide range of applicability privacy claims hold. The evolution of privacy rights can come through the fashioning of legal principles and the determination of how these legal principles can be tested in real world situations by following judicial precedent, as the *Puttaswamy* judgment itself reiterates. However, the idea of privacy rights goes a little beyond just applicability. Privacy exists as the concepts of equality and liberty do, in the spirit of the laws and not in their precise wordings. Just as actual legislation for equality and rights of freedoms would be improbable, in the same way, privacy as a concept must be suffused in the spirit of our laws and in their understanding and interpretation. Access to public space does point to an inherent inequality between men and women. Women's right to claim public space is certainly a liberty concern, given that the surrounding environment is not conducive for the realisation of the constitutional guarantee of access and movement. However, privacy plays an incremental role in reassuring women of their independence, safety and autonomy in public spheres.

98 *Ibid*.

99 Nussbaum *supra* n. 6.

100 Nussbaum *supra* n. 6.

C. Public Privacy

For a woman to retain her privacy in a space that is freely and uninhibitedly public is the ultimate test of the autonomy, independence and inclusion of consent and choice. The right to public space is controversial even in sophisticated democracies–yet it shouldn't be.

The right to a collective and common space for individuals of a particular community dates back to the start of the earliest forms of civilisation. The conception of a common town hall, or town square, often in Indian villages, a particular area where the village panchayat gathered for local governance, finds ground in almost all communities, across cultures and countries. The concern when it comes to women is that they are rarely a part of public space in mere exercise of a right. Women access public space with a purpose. Using public spaces purposefully–taking a train or bus to get to work, going grocery shopping at street markets, taking their children to the park, or their parents for a walk–lends some legitimacy to their being out in the open. Such legitimacy insulates their safety in case anything untoward happens outside the confines of the home.[101] The right to access public space is not a fundamental right–it hasn't even been acknowledged as such. At best, it can be interpreted as an implied right, manifested in the freedoms articulated in article 19 of the *Constitution of India*. Surely, a right to access public space seems far removed from the convoluted knots of women's reproductive, marital and political rights.

The right to public space rests on access. In India, this access is clouded. This access is contingent on legitimacy–the stronger the purpose women have for being out in the public eye, the safer they feel. This can never be the true interpretation of access. It cannot be conditional. It is absurd to expect a reason for explaining the simple exercise of a right, implied or otherwise. Access which is contingent upon an apparent legitimacy of use of space is not true access.

101 Phadke *supra* n. 91.

True access implies security. Women do not have the benefit of this security, therefore the access is merely theoretical. This distinction is complicated in terms of equality, when men are not held to the same requirements of reasoning. As Phadke points out, lower middle class men access public space freely (and in due course earning the labels of 'vagrants' or 'loiterers') and it is their access that is seen as a threat to the safety of women in public spaces. Phadke argues that inhibiting women's right to public space, even circumstantially if not through active legislation, is no way of securing some respite from cat-calling and hooting and the general air of sexualising the female form that carries on, unchecked, in the public space.[102] Eve-teasing is a common deterrent that prevents women from claiming public space. At its best, it is a permanent predilection that women out in public are compelled to endure. At its worst, it threatens the very safety of women out alone. In this vein, the Supreme Court opined that eve-teasing is a 'pernicious, horrid and disgusting practice.'[103] It found that eve-teasing is a gross violation of fundamental rights.[104] The Supreme Court relied upon the categorisation of eve-teasing put forth by *The Indian Journal of Criminology and Criminalistics*, which recognised five different types of eve-teasing: verbal eve-teasing, physical eve-teasing, psychological harassment, sexual harassment, and harassment through objects.[105] Every single one of these aspects of eve-teasing curtails a woman's access to public space by invading her individual right to privacy.

The right to access public space then is not dissociated from the inherent right to privacy, as it might seem. True, the essence of a right to access public space is essentially implicit (and not defined).[106] However, consider the implications of this right in the context of

102 Phadke *supra* n. 91.

103 *Inspector General of Police* v. *S Samuthiram* (2013) 1 SCC 598, 32.

104 *Inspector General of Police* v. *S Samuthiram* (2013) 1 SCC 598, 29.

105 *Inspector General of Police* v. *S Samuthiram* (2013) 1 SCC 598, 32.

106 In countries like the United States of America, which limits its Bill of Rights to negative rights that mainly restrict government actions, the right to public space is an implied right just like the right to privacy. Such implied rights, although unarticulated, are essential in the exercise of other more well-defined rights.

the fundamental right to privacy, as held in India. The Court gave a three-pronged definition of the tenets of privacy which included, 'repose, sanctuary and intimate choices'.[107] It is apparent that the individual is entitled to make her choices in relative peace–if that choice is to access public space without a specific aim, it is important to create an environment where it is safe and feasible for women to do so.

Public space is not restricted to roads, gardens and other open and obvious spaces, where safety and feasibility are instinctive concerns for women. Even in religious places of worship, which are public spaces, women's right to access is in partial dubiety. In parks and gardens, on the streets and in other public places, women's safety is a wide concern that advises minimal female participation, outdoors. In temples and mosques, however, it is absurd to apply the safety concern.[108] The High Court of Bombay, in the *Haji Ali Dargah* case found that it was the responsibility of the Dargah Trust to ensure that the *dargah* was a safe space for its female devotees, rather than to enact a blanket restriction on them altogether.

V. Conclusion

The idea of privacy is all encompassing. It finds application in virtually any claim simply because of its fundamental basic nature. Privacy is the enabler through which women can effectively assert their claims to equality and liberty.

For women to be able to speak up in their marriages, their relationships, religious rights and their public presence, there must be the creation of a space where they can exercise their ability to do so.

---

107 *Puttaswamy* (Chelameswar, J), para 36 citing Gary Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision', (1976) 64 *California Law Review* 1447.

108 Interestingly, in the *Haji Ali Dargah* case which granted women access to the inner sanctum of the *dargah*, the Dargah Trust did pursue the women's safety argument.

Privacy enables the creation of such a space. Women must be able to wilfully and deliberately exercise the active principles of choice and consent. This interpretation of privacy is essential in terms of creating a jurisprudence that is acutely fair to all categories of Indian women.

It is to be noted that every single one of the contexts used can be defended, and moreover, has been defended on the basis of other fundamental rights before various courts of justice ie, the marital rape exception violates equality under article 14, temple entry broaches the idea of untouchability under article 17, and eve-teasing in public spaces is an infringement of articles 14 and 19. It is incorrect to assume that privacy replaces these claims of fundamental rights, when in fact it inheres in these very claims. It is impossible to dissociate these claims from privacy rights.

In this light, the inferences drawn from the *Puttaswamy* judgment are important in characterising the concept of privacy as an enabler as opposed to an opaque, unformulated principle. Ultimately, it is the affording of this particular power of unencumbered decision-making to every single woman in the country that creates the true translation of privacy and in turn, marks an equality of choice.