

JOURNAL OF INDIAN LAW AND SOCIETY

Volume XII(1)

Monsoon

EDITORIAL NOTE

PRIVACY AND POVERTY OF WOMEN: WITH A FOCUS ON REPRODUCTIVE AND MATERNITY RIGHTS IN INDIA

—ANAMIKA KUNDU*

I. INTRODUCTION

It is said that denial of the right to bear and take care of children is a deprivation of basic humanity i.e. human dignity and equal status.¹ The right of a woman to make individual decisions regarding her body is the crux of the fundamental right to privacy and equality with regards to intimate matters related to “physical and psychological integrity”.² Privacy gives space to women to decide what they need for their bodily autonomy.³ This decisional autonomy is needed for “the development and expression of personhood and personality, including the

* Editor in Chief of the Journal of Indian Law and Society and Fifth Year Student at the National University of Juridical Sciences, Kolkata.

¹ United Nations Human Rights Special Procedures, ‘Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends’ (*Working Group on the issue of discrimination against women in law and in practice*, October 17 2018) <<https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>>accessed February 13, 2021, p. 1.

² *Ibid.*

³ Stephen J. Schnably, ‘Beyond Griswold: Foucauldian and Republican Approaches to Privacy’ (1991)23 Connecticut Law Review 861, 932-34 <<https://core.ac.uk/download/pdf/214393843.pdf>> accessed February 13, 2021.

freedom to exercise moral responsibility”.⁴ Wealthier women require negative privacy rights to restrict the State from interfering with their access to healthcare, and allow them to exercise choices with regards to abortion, surrogacy and maternity freely.⁵ However, poorer women also need positive privacy rights, which do not allow the government to impose conditions to receiving healthcare.⁶

Poor mothers have existed on both sides of the deserving and undeserving poor.⁷ Deserving poor are those who are considered to be in need and not able to join the workforce due to certain externalities, whereas, the under deserving poor are those who are said to not wish to work, and are considered able-bodied.⁸ Throughout history, poor women have had lesser privacy than that of other women.⁹ When the government asks for private information from these pregnant women, or enters a poor woman’s house to scrutinise whether her children are being taken care of, or when the children are put into foster care, are some instances where interventions by the government affect the poor woman’s privacy, and not as a result of government neglect.¹⁰ On a basic level, poor women take up low paying jobs¹¹ and States intrude into their homes, especially if they are single mothers, under the paternalistic notion that these women need to be saved.¹² In jurisdictions such as USA, a condition for poor women to receive welfare benefits means extensive government inspection and restrictions on reproductive choices.¹³ To be eligible for the benefits, poor women are forced to travel to far off offices to gather the required approval and prove their eligibility, which requires the answering of very personal and intimate questions.¹⁴ Thus, while there is a universal feeling of unease among people about their privacy rights in the technological era, the risks of privacy deprivation faced by poor women go beyond unease, questioning their daily existence.¹⁵

⁴ Ibid.

⁵ Khicara Birdges, *The Poverty of Privacy Rights*, 58 (Mickey Spillane Publishing 2017).

⁶ Ibid.

⁷ Ibid.

⁸ State, *The Deserving vs the Undeserving Poor: How do we deem who’s worthy?*, <<https://sites.psu.edu/aspsy/2020/12/01/the-deserving-vs-the-undeserving-poor-how-do-we-deem-whos-worthy/#:~:text=The%20deserving%20are%20those%20who,people%20fit%20into%20this%20category>> accessed February 13, 2021.

⁹ Ibid., at 60.

¹⁰ Ibid.

¹¹ Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy From Colonial Times to the Present*, 29 (Boston: South End Press 1998).

¹² Ann Bartow, ‘A Feeling of Unease About Privacy Law’ (2006)155 *University of Pennsylvania Law Review* 52, <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1119&context=law_facpub> accessed February 13, 2021.

¹³ Michele E. Gilman, ‘Welfare, Privacy and Feminism’ (2008) 39(1) *University of Baltimore Law Forum Article 4*, page 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1238891> accessed February 13, 2021.

¹⁴ Ibid.

¹⁵ *Supra* note 6.

Through this paper, I attempt to show how privacy rights for women on the margins are more formalistic in nature, with the State using their poverty as a way to keep them under constant surveillance, thereby increasing their existing vulnerabilities. In Part I, I look at how the notion of public patriarchy works with regard to the American Medicaid programmes, and the general anxieties surrounding the individualistic conceptualisation of both privacy and poverty. Part II studies the *Puttaswamy* cases, and the subsequent effects of the AADHAAR on the reproductive and maternity rights of women in India. I observe alternate approaches to privacy, as suggested by scholars in Part III which focuses on distributive equality through the Directive Principles of State Policies ('DPSP'). Lastly, I conclude the paper by ascertaining that merely attempting to digitise aspects of maternal healthcare through the usage of AADHAAR not only ignores the existing inequalities in the society, but also furthers the issues relating to poverty through a complex web of surveillance.

II. POOR WOMEN AND THE PUBLIC PATRIARCHY

Welfare States violate the privacy of poor women not only as a mandatory requirement for processing applications but also as a reinforcement of paternalism towards the abject.¹⁶ State assistance looks down upon women who do not cater to the stereotypical notion of a 'good woman' and the invasion of privacy is a commonly used tactic for stigmatising maternal and reproductive welfare.¹⁷ Intrusion into their personal lives causes poor women to suffer psychologically and fear degradation.¹⁸ To bypass these intrusions, women tend to take up informal work to ensure that their families are taken care of.¹⁹ This further segregates women already on the fringes of society, due to the fear of exposure.

Khiara Bridges, an anthropologist, discusses the American example of how the Medicaid program would include the evaluation of women's formal education and reading level, history of previous pregnancies, substance abuse etc.²⁰ A woman without adequate insurance is required to disclose such intimate details, thus leading to an avoidance of state assistance due to the risks.²¹ According to her, poor mothers do not have privacy rights in the first place, due to both,

¹⁶ *Supra* note 7, at 3.

¹⁷ Amy Mulzer, Note, 'The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs' (2005)36 Columbia Human Rights Law Review. 663, 675 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr36&div=30>> accessed February 13, 2021.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ The Medicaid Program is a both federal and state program in the United States of America which assists low income groups with medical costs.

²¹ Tanvi Misra, 'Why Some Women Don't Actually Have Privacy Rights' (*Bloomberg CityLab*, July 24, 2017) <<https://www.bloomberg.com/news/articles/2017-07-24/why-poor-women-don-t-have-the-right-to-privacy>> accessed February 13, 2021.

public benefits and the criminal justice system.²² Since the introduction of welfare schemes in America, payments are dependent on the woman's compliance with the standard of "sexual and reproductive behaviour".²³ Welfare frauds have been taken seriously in most states of America by introducing law enforcement agencies into the welfare system.²⁴ In states such as California, a mother receiving welfare ought to sign documents which could reduce her entitlements if she were to have a boyfriend without having informed the State or having past criminal records.²⁵ Even Brazil's Bolsa Familia Program receives complaints regarding the legitimacy of beneficiaries which inevitably play into gender stereotypes.²⁶ For instance, it involves a discussion on who is a 'good mother' and the issue of the female identity being attached to the notion of motherhood.²⁷

Such judgements are similar to Iris Young's conception of public patriarchy, where dependence on childcare results in intrusive control over women.²⁸ The public patriarchy is the State and other institutions which tend to preserve patriarchal practices in society by furthering existing gender inequalities.²⁹ It is ironic that the State only cares for the children of poor mothers, attributing latent criminality to the latter because of their status of poverty.³⁰ Even now, the State does not see abortion or maternity rights as necessary to achieve gender equality as female happiness is not accounted for, being a matter of convenience for only few women.³¹ However, the answer to protect the privacy rights of poor women does not merely lie within the law, according to Bridges.³² Court pronouncements or rights based legislations do not always give these women the dignity and respect they deserve; what is more important is the cultural outlook of State and non-State actors.³³

²² Ibid.

²³ *Supra* note 5; See Linda Gordon, *Pitied but Not Entitled: Single Mothers And The History of Welfare* 5 (Harvard University Press 1994).

²⁴ Ibid.

²⁵ Kaaryn Gustafon, 'The Criminalisation of Poverty' (2009) 99 J. Crim. L. & Criminology 642, page 645.

²⁶ Privacy International, Brazil's Bolsa Familia Program: the impact on privacy rights (*Privacy International*, 13 May 2020) <<https://privacyinternational.org/long-read/3758/brazils-bolsa-familia-program-impact-privacy-rights>> accessed February 13, 2021.

²⁷ Ibid.

²⁸ "The state has a systematic bias towards patriarchal interests in its policies and actions" – Sylvia Walby, *Theorising Patriarchy* (Wiley Blackwell 1990).

²⁹ Ibid; Mary Welek Atwell, *Equal Protection of the Law?: Gender and Justice in the United States* (International Academic Publishers 2002).

³⁰ *Supra*, note 26, at 715.

³¹ Jessica Valenti, Abortion isn't about the right to privacy, It's about women's right to equality (*The Guardian*, October 14 2014) <<https://www.theguardian.com/commentisfree/2014/oct/14/abortion-right-to-privacy-women-right-to-equality>> accessed February 13, 2021.

³² Book Culture, Q&A with Khiara M. Bridges, author of 'The Poverty of Privacy Rights' (*Book Culture*) <<https://www.bookculture.com/blog/2017/08/13/qa-khiara-m-bridges-author-poverty-privacy-rights>> accessed on February 13, 2021.

³³ Ibid.

Catherine MacKinnon argues that the right to privacy, whilst keeping away state intervention, allows others to oppress the marginalised without the involvement of the State; there may still be individualised oppression, where men oppress women.³⁴ The current jurisprudence of privacy, according to her, focuses only on the absence of state threat, but does not take into account that state action might be fundamental in order to secure freedom and equality.³⁵ For instance, women may not be able to exercise their choice over pregnancies even when the State allows for medical termination as they do not acknowledge the biological differences or their substantive rights. There might be situations of poverty, inadequate access, etc. which do not allow women to get contraceptives.

In India, the AADHAAR violates an impoverished woman's privacy as it interferes with the decisions of women by using government benefits to push women into or out of motherhood.³⁶ The State not only fails to provide the freedom of choice to women but also does not provide the requisite needs i.e. adequate healthcare infrastructure.³⁷ This individualistic view of poverty is that people are poor because of their faults and not externalities such as economic and social policies and inherent biases. Due to this presumption of personal faults, poor mothers are scrutinised more than other women as their poverty, perceived to be their fault, would turn into a vicious cycle and affect their offspring as well.³⁸

III. THE PUTTASWAMY CASES AND THEIR IMPACT ON PRIVACY RIGHTS FOR WOMEN

A. THE RIGHT TO PRIVACY JUDGEMENT

Puttaswamy I, which upheld the right to privacy as a fundamental right emanating from Article 21 of the Indian Constitution, cannot be seen as a comprehensive position on reproductive and maternity rights.³⁹ This is due to the fact that it lacks an expansive discussion on the various access hurdles for women in India, merely focusing on the privacy aspect.⁴⁰ However, the right to privacy changes the way abortion and surrogacy are looked at in India. By ensuring that

³⁴ Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 102.

³⁵ *Ibid.*, at 300.

³⁶ Kanika Sharma, Sweta Dash, 'Aadhaar Adds to Women's Problems in India. Here's Why' (*The Wire*, August 28 2019) <<https://thewire.in/women/aadhaar-women-india>> accessed on February 13 2021.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

⁴⁰ Severyna Magill, 'The Right to Privacy and Access to Abortion in a Post-Puttaswamy World' (2020) 3(2) University of Oxford Human Rights Hub Journal, 169 <<https://ohrh.law.ox.ac.uk/wp-content/uploads/2020/05/U-of-OxHRH-J-The-Right-to-Privacy-and-Access-to-Abortion.pdf>> accessed February 13, 2021, page 161.

the right to privacy is based on one's individual autonomy and the important parts of one's life, it allows women to challenge the socio-legal structures that restrict their abilities to exercise full rights over their bodies.⁴¹

While Justice Chandrachud's insight into the comparative American right to privacy may be useful, it cannot be directly imported to the Indian context. India lacks basic healthcare infrastructure in both urban and rural areas, and widespread poverty translates into limited access for women to such infrastructure.⁴² Even where adequate infrastructure might exist, poor women are unable to access them due to financial and social limitations.⁴³ Such existing barriers disallow women from accessing necessary healthcare services. The poor healthcare infrastructure, systemic impoverishment, low educational qualifications, and other barriers, even with the presence of facilities, limit the knowledge base of women to make informed decisions regarding contraceptives, etc.⁴⁴

Even with the stark socio-economic differences between India and the United States of America, the concept of privacy being a part of one's liberty, i.e. giving importance to individual free choice, has been reiterated throughout the case.⁴⁵ There is no discussion on how a woman's ability to exercise choice might be substantially different in India due to the aforementioned constraints.⁴⁶ Even though the judgment has addressed the usage of the right to liberty in America, it has not considered the effects of the judgement in India.⁴⁷ Despite India's positive obligations under various statutes, such as the Medical Termination of Pregnancy Act, 1971 ('MTPA'), and DPSPs, meaningful access is not always present due to India's huge rural population and poor healthcare infrastructure. Women on the fringes face extreme difficulty in paying private hospitals and paying for daycare, pushing them towards greater marginalisation, resulting in them accessing in formalised methods of abortions.⁴⁸ There have been estimations that for every legal abortion in India, there occur around two to ten illegal abortions.⁴⁹

⁴¹ Aparna Chandra, 'Privacy and Women's Rights' (2017) 52(51) *Economic and Political Weekly* <<https://uniteforreproprights.org/wp-content/uploads/2018/01/privacy-and-womens-rights.pdf>> accessed February 13, 2021, page 47.

⁴² Severyna Magill, 'The Right to Privacy and Access to Abortion in a Post-Puttaswamy World' (2020) 3(2) *University of Oxford Human Rights Hub Journal*, 169 <<https://ohrh.law.ox.ac.uk/wp-content/uploads/2020/05/U-of-OxHRH-J-The-Right-to-Privacy-and-Access-to-Abortion.pdf>> accessed February 13, 2021.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Ravi Duggal, Vimala Ramachandran, 'The Abortion Assessment Project—India: Key Findings and Recommendations' (2004) 12(24) *Reproductive Health Matters* 122-129, 125 <<https://www.jstor.org/stable/3776123?seq=1>> accessed February 13, 2021.

⁴⁹ Siddhivinayak Hirve, 'Abortion Law, Policy and Services in India: A Critical Review' (2004) 12(24) *Reproductive Health Matters Supplement: Abortion Law, Policy and Practice in Transition* 114, 115 <<https://pubmed.ncbi.nlm.nih.gov/15938164/>> accessed February 13, 2021.

Puttaswamy I acknowledges the movement of reproductive rights away from the governmental perspective of population control and focuses instead on women's bodily autonomy and the freedom to choose in terms of healthcare.⁵⁰ Though Indian jurisprudence till Puttaswamy I has reiterated the fundamental right to procreate and the importance of the use of contraception, there have not been any case laws recognising abortion rights. Moreover, the MPTA regulating abortions still does not allow the woman to independently abort the fetus at any stage.⁵¹ The woman cannot choose to abort according to her wishes, and can only do so for medical reasons.⁵² The MPT Bill, 2020 which is considered to be progressive, still requires abortions to be done by specialised doctors, which excludes a huge percentage of women who do not have access to such doctors.⁵³

B. AADHAAR AND LINKED WELFARE SCHEMES

Even though Puttaswamy I is hailed to be extremely progressive, Puttaswamy II has legitimised the linking of the AADHAAR card for any welfare benefits.⁵⁴ Moreover, Puttaswamy I itself did not address concerns regarding the data collection of individuals in matters of public interest.⁵⁵ Public hospitals mandate women to produce AADHAAR cards to receive maternal healthcare.⁵⁶ Even without specific notices from the Centre regarding the same, many hospitals have made AADHAAR compulsory for the availing of any reproductive health procedures.⁵⁷ In 2017, a hospital in Chandigarh denied ultrasonography services to a pregnant woman as she failed to produce her AADHAAR card.⁵⁸ Due to this refusal, she was forced to go to a local doctor who did not carry out the

⁵⁰ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1, para 113. The Court, in the judgment, acknowledges that legislative efforts on reproduction had been mainly focused on sex selection and population control, without paying much heed to female autonomy. It highlights the importance of reproductive choice.

⁵¹ The Medicinal Termination of Pregnancy Bill 2020, cl 3.

⁵² The Medicinal Termination of Pregnancy Bill 2020, cl 3.

⁵³ The Medicinal Termination of Pregnancy Bill 2020, cl 3.

⁵⁴ Privacy International, Initial Analysis of Indian Supreme Court Decision on Aadhaar (*Privacy International*, September 26, 2018) <<https://privacyinternational.org/long-read/2299/initial-analysis-indian-supreme-court-decision-aadhaar>> accessed February 13, 2021.

⁵⁵ Nishith Desai, Supreme Court Holds that the Right to Privacy is a Fundamental Right Guaranteed Under the Constitution of India (Mondaq, September 15, 2017) <<https://www.mondaq.com/india/privacy-protection/629084/supreme-court-holds-that-the-right-to-privacy-is-a-fundamental-right-guaranteed-under-the-constitution-of-india>>.

⁵⁶ Anumeha Yadav, Menaka Rao, 'The Government Wants Pregnant Women to Enroll in Aadhaar to Get their Social Scheme Benefits' (*The Scroll*, March 8, 2017) <<https://scroll.in/pulse/831175/the-government-wants-pregnant-women-to-enroll-in-aadhaar-to-get-their-social-scheme-benefits>> accessed February 13, 2021.

⁵⁷ The Wire, 'Activists Slam Mandatory Linking of Aadhaar to Health Services After Woman Denied Abortion' (The Wire, November 1 2017) <<https://thewire.in/government/activists-slam-mandatory-linking-aadhaar-health-services-woman-denied-abortion>> accessed February 13, 2021.

⁵⁸ Maitri Porecha, 'Aadhaar, a Problem for Women Seeking Abortions' (*DNA India*, October 21, 2017) <<https://www.dnaindia.com/india/report-aadhaar-a-problem-for-women-seeking-abortions-2554206>> accessed February 13, 2021.

procedure properly, resulting in the need for intensive medical care and blood transfusion.⁵⁹ In another instance in Gurgaon, a woman was allegedly denied admission into a public hospital as she did not carry her AADHAAR card, and eventually had to deliver the baby outside the emergency ward.⁶⁰ Some have even had to deliver babies in the parking lots of hospitals, as they could not be admitted due to the lack of an AADHAAR card.⁶¹ The outcome of this is the denial of basic services and fundamental rights to those who have not been able to get AADHAAR cards, and difficulty in accessing those benefits that come with opening a bank account and linking it with AADHAAR.

Although the AADHAAR and allied regimes have brought about easier mass surveillance, surveillance has not always depended on technology. Surveillance is a way of social control over women's choices and bodies. Women from all walks of life are constantly monitored concerning their "bodies, actions and choices".⁶² Continuous surveillance leads to a "social panoptic" where the fear and threat of scrutiny and the resulting gender non-conformity results in the reclusion of women by themselves.⁶³ Apart from the chilling effect of surveillance, giving the government access to personal information of persons can make the latter susceptible to various vulnerabilities. There are concerns regarding equality and individual autonomy with schemes collecting personal data.⁶⁴ In a country where women's choices are constantly criticised, such collection will restrict not only choices but also accessibility to the required services.⁶⁵ Increased visibility of women from vulnerable backgrounds leads to increased tensions. For example, women who are under the Swadhar Grah scheme, which rehabilitates impoverished women and those trafficked,⁶⁶ or those covered by the rehabilitation scheme for the feminised work of manual scavenging,⁶⁷ have to now mandatorily use their AADHAAR to receive any kind of benefits.⁶⁸ Under such schemes, women might not want their work history or personal information to be out for the public patriarchy. Usha Ramanathan has noted that technology is meant to pull out people

⁵⁹ Ibid.

⁶⁰ NDTV, Denied Entry Over Aadhaar, Woman Delivers Baby Outside Gurgaon Hospital (*NDTV*, February 10 2018) <<https://www.ndtv.com/gurgaon-news/with-no-aadhaar-gurgaon-hospital-turns-woman-away-she-delivers-outside-1810911>> accessed February 13, 2021.

⁶¹ Reetika Khera, Aadhaar Failures: A Tragedy of Errors (*Economic & Political Weekly*, April 6 2019) <<https://www.epw.in/engage/article/aadhaar-failures-food-services-welfare>> accessed February 13, 2021.

⁶² *Supra* note 24.

⁶³ Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics' (2001) 89(3) *California Law Review*, 643-740 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=269983> accessed February 13 2021, page 725.

⁶⁴ Anita Gurumurthy, Nandini Chami, *Digital India through a Gender Lens*, January 2018, p. 36.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Pam Dixon, 'A Failure to "Do No Harm" – India's Aadhaar Biometric ID Program and its Inability to Protect Privacy in Relation to Measures in Europe and the US' (2017) 7(6) *Health and Technology* <<https://techscience.org/a/2017082901/>> accessed February 13, 2021.

from oppressive structures and not place an eternal label on them. She also mentioned how the “anonymity of these women was the first casualty”.⁶⁹ The creation of welfare databases implies that female beneficiaries will have their information with the government for any transaction.

The Janani Suraksha Yojana, which is meant to give cash incentives for institutional delivery to women from poorer households, has mandated the requirement of AADHAAR verification.⁷⁰ Furthermore, the Pradhan Mantri Matru Vandana Yojana, a conditional cash transfer which gives lesser assistance than mandated by the Food Security Act, has mandated AADHAAR too.⁷¹ A survey suggests that only 39% of the beneficiaries had even received the first instalment for their first child.⁷² Most of the applicants are newly married young women who are either pregnant, or nursing an infant and need to take rest.⁷³ What they are forced to do instead is to fix these AADHAAR related errors.⁷⁴ The scheme also requires the AADHAAR card of the father of the child, which makes it difficult for single or unmarried mothers to avail of the benefit.⁷⁵ The procedure for making corrections related to birth date, names, addresses etc. have not been properly set out or explained.⁷⁶ Moreover, a government circular has limited the number of genders, dates of birth, and names that can be changed.⁷⁷ Such measures affect women more than men, as due to patriarchal practices, it is the women who have to take up their husbands’ surname.

Anecdotal accounts of women across the country have gone through a wide number of issues due to the absence of the card or seeding. Banks have explained that they are merely following the KYC guidelines issued by the RBI which necessitate seeding. Additionally, a copy of the marriage certificate is not enough to link if there are errors in the name.⁷⁸ The beneficiary has to bring a

⁶⁹ Usha Ramanathan, ‘A Shaky Aadhaar’ (*The Indian Express*, March 30, 2017) <<https://indianexpress.com/article/opinion/columns/aadhaar-card-uid-supreme-court-a-shaky-aadhaar-4591671/>> accessed February 13, 2021.

⁷⁰ Reetika Khera, ‘How Aadhaar is Making it Harder for Indian Women to Access their Maternity Benefits’ (*The Scroll*, December 7, 2019) <<https://scroll.in/pulse/945587/how-aadhaar-is-making-it-harder-for-indian-women-to-access-their-maternity-benefits>> accessed February 13, 2021.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Government of India, Ministry of Electronics and Information Technology, Unique Identification Authority of India (Enrolment and Update Division), Updating of Name, Gender and Date of Birth in Aadhaar – modification of process – reg., F. No. 4(4)/57/159/2016-E&U, <https://uidai.gov.in/images/resource/Circular_DoB_14_Oct_19.pdf>.

⁷⁸ Shraddha Ghatge, No Mechanism for Welfare: Aadhaar Turns into a Burden Instead of Benefit for 3,000 Tribal Women in Maharashtra (*Firstpost*, August 30, 2018) <<https://www.firstpost.com/india/no-mechanism-for-welfare-aadhaar-turns-into-a-burden-instead-of-benefit-for-3000-tribal-women-in-maharashtra-5080071.html>> accessed February 13, 2021.

new card with the updated name, as the KYC system does not get updated if even slight changes are made in the name.⁷⁹

Apart from restrictions to access, the database also collects personal information on women seeking reproductive healthcare, which is then transferred to a centralised server and distributed amongst *associated parties*.⁸⁰ An associated party is one that has access to people's AADHAAR numbers, and can request information from the UIDAI.⁸¹ As per the Ministry of Law and Information Technology, such a party could include most government bodies, banks, telecoms etc.⁸² Leaks being common in the digital system, undermines the right to privacy.⁸³ Recently, a data breach made the records of 12.5 million women available online.⁸⁴ These records included various intimate details, such as abortions, etc. Despite the sensitive nature of the information, it took the government a month to fix the breach.⁸⁵

Increasing data surveillance whilst having minimal protection puts the privacy of women at risk. It is especially threatening for women who face access restrictions and makes them vulnerable to data hacks, which is common to the AADHAAR database.⁸⁶ In a country where there is widespread stigmatisation and ostracisation due to misinformation, a database on health choices furthers the vulnerabilities that women go through to access basic healthcare.⁸⁷ On an individual basis, the details of each woman are digitised into a data set.⁸⁸ This results in shifting focus from the complexities of women's health to the amplification of their identities. The argument of putting socio-economic rights at the forefront despite the intrusion into the right to privacy is a flawed concept, as the mandatory linking of AADHAAR for social security schemes ends up compromising both informational privacy and women's basic healthcare rights in specific ways. Moreover, a dearth of public consultations and redressal systems makes these services even more difficult for marginalised women to access.⁸⁹

⁷⁹ Ibid.

⁸⁰ Nupur Anand, 'Who can Tap the Aadhaar Database? India's Private Firms are Still Guessing' (*Quartz India*, March 12, 2019) <<https://qz.com/india/1570568/is-indias-aadhaar-data-only-for-telcos-banks-or-also-fintechs/>> accessed February 13, 2021.

⁸¹ Ibid.

⁸² Aria Thaker, 'Data Leaks Could Wreak Havoc in India, So Why Aren't they An Issue this Election?' (*Quartz India*, April 4, 2019) <<https://qz.com/india/1586748/data-leaks-and-cybersecurity-should-be-an-election-issue-in-india/>> accessed February 13, 2021.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Aayush Rathi, Ambika Tandon, 'Data Infrastructures and Inequities: Why Does Reproductive Health Surveillance in India Need Our Urgent Attention?' (*The Centre for Internet & Society*, February 14, 2019) <<https://cis-india.org/internet-governance/blog/data-infrastructures-in-equities-reproductive-health-surveillance-india>> accessed February 13, 2021.

⁸⁸ Ibid.

⁸⁹ Ibid.

To link reproductive services to such a database runs the risk of data leaks in a country which already stigmatises abortions.⁹⁰ It disproportionately affects the marginalised through using ‘data extremes’, i.e. they are living on the edge of data collection, resulting in the system either ignoring them or forcing them to forgo ‘deviant behaviour’.⁹¹ Across different initiatives, such as the Mother and Child Tracking System, maternal and reproductive health is merely seen as a medical process without enough data.⁹² If the initiative is to decrease infant mortality rates, then services should be provided to every woman, regardless of the possession of AADHAAR.⁹³ The opportunities of women to access healthcare is ignored and the behaviour of women through surveillance is heightened. Keeping track of every abortion through AADHAAR leaves a digital trail of decisions taken by a woman regarding her reproductive health, interfering with her freedom of choice over her body. Constant surveillance will force women to use alternative methods of unsafe abortions, increasing risks to life and health.⁹⁴

IV. REALISING THE CAPABILITIES OF WOMEN

Indian women, as elucidated above, have minimal ability to make maternity and reproductive choices. The Office of the United Nations High Commissioner for Human Rights has stated that “that the defining feature of a poor person is that she has very restricted opportunities to pursue her well-being.”⁹⁵ Liberty without adequate access to healthcare is not of much use to Indian women. Even feminist debates that came about soon after *Roe v Wade* highlighted the issues of a decisional based framework, seeing privacy as an “individualistic negative right” as opposed to an equality oriented framework.⁹⁶ The understanding was not related to making abortion services available to women, but to minimise state intervention.⁹⁷ The hiccup in giving women comprehensive healthcare is merely the inconvenience of disrupting the status quo. This might be due to the fact that women are seen just as mothers and not as individuals with complete agency over their decisions. Furthermore, it is worthwhile to note that in the past, women have had the “wrong kinds of privacy” and “too much privacy in the sense of imposed modesty, chastity, and domestic isolation”, and not the required privacy

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Tini Sara Anien, Linking pregnancies to Aadhaar Poses Privacy Threats (*Deccan Herald*, May 1, 2019) <<https://www.deccanherald.com/metrolife/metrolife-on-the-move/linking-pregnancies-to-aadhaar-poses-privacy-threats-731660.html>> accessed February 13, 2021.

⁹⁴ Ibid.

⁹⁵ United Nations Office of the High Commissioner for Human Right, Human Rights and Poverty Reduction: A Conceptual Framework (2004) HR/PUB/04/1, 7, <<https://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf>>.

⁹⁶ Elizabeth M. Schneider, ‘The Synergy of Equality and Privacy in Women’s Right’ (2015) 2002(1) University of Chicago Legal Forum, art 8 <<https://chicagounbound.uchicago.edu/uclf/vol2002/iss1/8/>> accessed February 13, 2021.

⁹⁷ Ibid.

which gives “adequate opportunities for individual modes of privacy and private choice”.⁹⁸

A different perspective following from Martha Nussbaum’s approach to capabilities, which acknowledges the importance of ‘bodily autonomy’ and ‘bodily health’, could be seen as an alternative to individualistic notions of privacy.⁹⁹ If in the future, there are cases regarding the expansion of maternity and reproductive rights in India, the capabilities approach can be a model to understand how the right to privacy affects the discussed rights due to the conditions existing in the country. This approach will not use the usual methods of understanding the development in dealing with the gendered access to resources. A set of questions suggested by her are worth asking¹⁰⁰, such as –

1. What are the resources that exist?
2. To what extent does A have access and control over Y?
3. What is the extent to which A is satisfied with the choices available?

She notes that universally, women are less privileged than men, and that impoverishment is gendered, which does not allow the woman to be “fully human”.¹⁰¹ Development is to be looked at through the opportunities available to each person, which assists one in understanding the intersectionality of gender. This acknowledges that women usually have lesser financial resources, and that physical restrictions affect their access to healthcare. There needs to be a structural solution to make the realisation of rights possible by determining what is to be provided for such a realisation. Reproductive justice is not merely limited to having the freedom to abort or surrogate, but also to meaningful institutions that allow for women to make their own choices. As much as medical decisions are private matters, abortion and the like are also “public goods”.¹⁰²

Sandra Fredman, focusing on the principle of equality, has noted that it is imperative to break the vicious cycle of disadvantage by locating the “distributive inequalities” and fixing the ‘detrimental consequences attached to that status’ which affect some groups more than others.¹⁰³ Partnering equality principles and socio-economic rights, wholesome progress can be made in solving gender inequalities if socio-economic rights are engendered. Focusing on disadvantage instead of trying to reach equality is a better method of ensuring

⁹⁸ Anita L. Allen, ‘Gender and Privacy in Cyberspace’ (2000) 52 Stanford Law Review 1175, 1177 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1788&context=faculty_scholarship> accessed February 13, 2021, page 140.

⁹⁹ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2012), 78.

¹⁰⁰ *Supra* note 27, at 172.

¹⁰¹ *Ibid.*

¹⁰² *Supra* note 19.

¹⁰³ Sandra Fredman, *Discrimination Law* (OUP Oxford 2012), 25-33.

substantive equality. The principle of equality helps in appreciating the aspect of women's privacy that need positive protections.¹⁰⁴ The concepts surrounding privacy need to include the hierarchical structures present in society that allow for only some women to exercise bodily autonomy, whereas many cannot. She states that the need to increase healthcare standards is already covered by Article 47 of the Indian Constitution.¹⁰⁵ Even though it is a DPSP, case laws have relied on it whilst laying down the State's obligations.¹⁰⁶

V. CONCLUSION

When the State attempts to interfere into poor mothers' private lives, it does so under the assumption that it is alright to invade their rights, and that their actions are just under law, and are fulfilling 'public interest'.¹⁰⁷ A rights-based approach, along with substantial safeguards and a due process being followed, could solve the trade-offs made with privacy to access social welfare. Basing welfare schemes on designs of surveillance goes beyond inclusion and exclusion, as it neglects basic human rights principles such as equity, justice, dignity, and fairness.¹⁰⁸

Each time a new welfare program is initiated, the right to privacy should be taken into account from the very beginning. If it is not considered, the risks will outweigh the benefits. Undeniably, welfare systems are complicated, and thus it is all the more important in the information age to meet certain requirements of protection. Social protection should be in tandem with data protection laws with built-in safeguards.¹⁰⁹ Databases need to be secured through design and by default, with regular human rights impact assessments being conducted. Welfare system designs must protect rights from the very outset, and in case they do not, human rights and other legal principles need to be used to keep an eye on them and challenge them when necessary.

The current healthcare data needs to take into consideration both, physical and mental issues women might face. Health policies need to recognise the different needs of women and give them the best options to treat themselves. The choice to go forward with a pregnancy or not, and the subsequent steps should not be done at the expense of losing out on benefits under welfare schemes or on privacy. It cannot be assumed that poor women reproducing furthers poverty, and instead, policies should address structural changes, instead of cutting

¹⁰⁴ *Supra* note 43, at 154.

¹⁰⁵ *Ibid.*, at 172.

¹⁰⁶ *Paschim Banga Khet Mazdoor Samity v State of W.B.* (1996) 4 SCC 37 : AIR 1996 SC 2426.

¹⁰⁷ Privacy International, 'Privacy, a Precondition for Social Protection' (*Privacy International*, July 8, 2019) <<https://privacyinternational.org/news-analysis/3029/privacy-precondition-social-protection>> accessed February 13, 2021.

¹⁰⁸ *Ibid.*

¹⁰⁹ Principles of transparency, lawfulness, fairness, data minimisation, accuracy, storage limitation, integrity and confidentiality of data and significantly accountability.

administrative costs and time. A Bombay High Court judgement had emphatically stated that a “woman alone should have the right to control her body, fertility, and motherhood choices”.¹¹⁰ It went a step ahead, stating that pregnancy occurs within a woman’s body and affects only her and not the State.¹¹¹

AADHAAR brings about multiple issues for women. In a country facing severe gender inequity, AADHAAR is now one more barrier for women in accessing generic welfare. This database system, and the larger scheme of ‘Digital India’ has failed to solve the gendered issues. Indigitising India, it has further oppressed and excluded women. Introducing new forms of surveillance furthers structured gender discrimination, which is now seen as a problem solver. Such a normative solution for reproductive and maternity behaviour does not address feminist issues. Emphasising on the notion of liberty and free choice on women as being able to make decisions on their health is not an Indian reality. Excluded women will be seen as those who are at fault for their conditions, while ignoring the social environment that they live in. A time consuming and disorganised setup for registration potentially excludes all those who cannot afford to lose a day’s earning, i.e. self-employed women, domestic workers, women with infants or older people to take care of, sole earners, and those on daily wage jobs. Sadly, these are those who are excluded from most welfare programs, which was supposed to be addressed by AADHAAR.¹¹²

As the nature of welfare’s privacy stripping practices further marginalises women on the fringes, there ought to be a multi-dimensional approach in enhancing these women’s privacy. There ought to be equality based approaches taken into consideration in order to look at the problem of the group as a whole, and not merely centering it on issues of individual dignity. While it is a given that all of us have privacy risks considering the ever changing technology, those receiving state assistance suffer much more, and this needs to be acknowledged and worked upon.

¹¹⁰ Gautam Bhatia, ‘The Bombay High Court’s Abortion Judgment: Some Unanswered Questions’ (*SPICTR*, September 22, 2016) <<https://indconlawphil.wordpress.com/2016/09/22/the-bombay-high-courts-abortion-judgment-some-unanswered-questions/>> accessed February 13, 2021.

¹¹¹ *Ibid.*

¹¹² Kalyani Menon Sen, ‘Aadhaar: Wrong Number, or Big Brother Calling?’ (2015) 11(2) *Socio-Legal Review* <<http://docs.manupatra.in/newslines/articles/Upload/FFB88DCF-1290-41C9-B6C2-4AB65B274FEE.pdf>> accessed February 13, 2021, page 95.