Privacy Through the Ages: India's Privacy Jurisprudence in Gender and Sexuality Rights

—Torsha Sarkar*

With the decision of the Supreme Court in Puttaswamy v. Union of India, it would seem that the doctrinal debates around the right to privacy have been put to rest. Yet, questions regarding privacy's place in numerous ongoing issues of civil liberties and struggles remain unanswered. At the heart of every judicial determination of the right to privacy lies the question: what is the protection being granted for or against? In the context of the struggles against heteropatriarchal practices, laws and norms — which includes both LGBTQIA+ rights and challenges to the institution of a patriarchal marital structure — this determination becomes complex, rife with political and moral divides. This paper investigates some common conceptions and formulations of privacy that have been used by Indian courts in the past to either grant or deny the right to privacy in cases concerning gender and sexuality issues. It further utilises this analysis to map out India's current doctrine on the right to privacy and posit the possible outcomes of several issues surrounding women's rights within the institution of heterosexual marriage, as well as the welfare and social justice rights of the LGBTQIA+ community in India.

Keywords: *Feminism, Privacy, Constitutional Law, Queer Rights.*

I. Introduction

Of all the fundamental liberties that are recognised, at least theoretically, by modern liberal democracies, 'privacy' is one that continues to garner renewed attention across fields. The rise in authoritarianism and curbing of civil liberties via the enactments of discriminatory legislations and policies seem to only add

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fuel to these fiery debates. What is the right to privacy? Who gets to exercise it? What are its limitations?

One area that encompasses all these questions is the domain of acts, behaviours, and expressions that have formed an intrinsic part of an individual's 'personal' life. As this paper explores, the relationship between such a domain and the right to privacy has not always been straightforward, especially when these acts have been a challenge to heteronormativity[1] or oppressive gender norms within heterosexual marriages. Over the past few decades, footing privacy as a source for liberation in the struggles to recognise these broad gamuts of sexualities and expressions has yielded mixed results. At several points in judicial history, for instance, attempts at decriminalising homosexuality over privacy-related grounds have been contested on the grounds of family, religion, and morals. Similarly, when patriarchal norms embodied within personal laws have been challenged, the constitutional bulwark of privacy has been termed a "*ruthless destroyer of marriage*"[2] by ostensible defenders of societal norms.

This paper is interested in historicising India's privacy jurisprudence in the context of this interplay between the right to privacy and confrontations to the hetero-patriarchal subordination of women and sexual minorities. This historical narrative is utilised to provide a roadmap for how struggles for these rights could be operationalised in the future. Towards this aim, *first*, the paper undertakes a review of international jurisprudence to understand the historically dominant doctrines of privacy that courts have adopted. *Second*, these approaches are used to taxonomise independent India's privacy jurisprudence, starting from *MP Sharma v. Satish Chandra* (1954) and ending at the modern-day legal position. *Finally*, it argues that despite the progressive notes in the Supreme Court's recent, prominent judgments on privacy, aspects of the Indian state's current laws and policies towards gender and sexuality rights — including in relation to marital rape, marriage equality, and trans autonomy — continue to be unconstitutional, and incompatible with our current constitutional articulation of the right to privacy.

II. The personal, the political and the private

In this section, the paper goes over some key international jurisprudence to understand the different conceptions of privacy that courts and scholars have put forward over the last century. These conceptions are divided into three broad categories: a) heteronormative privacy, b) spatial privacy, and c) liberty-based privacy.

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[1] For a definition of heteronormativity, see: Joan W Howarth, 'Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence' (2004) 5(1) Nevada Law Journal 260 <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1316&context=nlj> accessed 8 July 2021 ("the complex social, political, legal, economic and cultural systems that together construct the primacy, normalcy, and dominance of heterosexuality.").

[2] *Harvender Kaur v Harmender Singh Choudhry* 1983 SCC OnLine Del 322 : AIR 1984 Del 66 [33].

These conceptions are framed with a focus on gender and sexuality discourses. Furthermore, given the persuasive and instructive weight of American and South African jurisprudence in shaping the Indian court's understanding of privacy, as subsequent sections would display, the scope of this discussion is limited to these jurisdictions.

A. Heteronormative Privacy

Some legal scholars have argued that the outcome of early American judgments on the right to privacy was dependent on the moral endorsement of the 'act' for which the protection was sought.[3] For instance, the US Supreme Court decision in *Griswold v Connecticut* (1965) (*hereinafter* Griswold), which was concerned with the constitutional validity of an anti-contraceptive statute[4], put the sanctity of the marital relationship at the heart of the right to privacy afforded to the petitioners.[5] While striking down the statute, the court emphasised the nature of marriage being "[...] *a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred*".[6] The court in *Griswold* also cited the dissent in a previous case, *Poe v. Ullman* (1961), with approval, where it was held that: "*Adultery, homosexuality and the like are sexual intimacies which the State forbids ..., but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage* [...]".[7]

This strain of privacy jurisprudence, therefore, did not protect an individual's sexual autonomy but afforded protection to only those sexual activities that were 'legitimately' pursued within the tenets of an 'acceptable' domestic home (read: the institution of heterosexual marriage).[8] This is evidenced by the same court's subsequent decision in *Bowers v. Hardwick* (1986) (*hereinafter* Bowers), which was concerned with the validity of a 'sodomy' statute in the state of Georgia.[9] The court found no connection between homosexuality and '*family, marriage, or procreation*,' aspects of life that had been previously afforded the

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3 Anna Lvovsky, 'Fourth Amendment Moralism' (2018) 166 University of Pennsylvania Law Review 1189, 1200 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9624&context=penn_law_review> accessed 9 July 2021; Adam Hickey, 'Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions against Sodomy' (2002) 111 The Yale Law Journal 993, 997 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4578&context=ylj> accessed 9 July 2021; Michael J. Sandel, 'Moral Argument and Liberal Toleration: Abortion and Homosexuality' (1989) 77(3) California Law Review 521, 525 <https://www.jstor.org/stable/3480558?seq=1> accessed 9 July 2021.

4 *Griswold v Connecticut* 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965).

5 Sandel (n 3).

6 *Griswold* (n 4) [487].

7 *Poe v Ullman* 1961 SCC OnLine US SC 133 : 6 L Ed 2d 989 : 367 US 497 (1961) [554].

8 Lvovsky (n 3).

9 *Bowers v Hardwick* 1986 SCC OnLine US SC 165 : 92 L Ed 2d 140 : 478 US 186 (1986).

protection of the right to privacy,[10] and therefore, held that homosexuality was not eligible to be granted protection in keeping with the right to privacy in this particular case. The concept of 'fundamental liberties' was interpreted to encompass either those rights that were "*implicit in the concept of ordered liberty*" or "*deeply rooted in this Nation's history and tradition*".[11] In the court's opinion, the right to "*engage in consensual sodomy*" did not fall in either of those categories, owing to longstanding 'proscriptions' against homosexuality, and therefore, the court found it judicially sound to deny such rights going forward.[12] The emphasis of the court in *Bowers* on concepts of 'family, marriage or procreation' as the necessary bedrock of 'ordered liberty' further reinforces the idea that this conception of privacy required the court to find the act in question morally acceptable. Family, marriage, or procreation, as were used in *Bowers*, were simply coded words for 'moral/legitimate' heterosexuality.[13]

B. Spatial Privacy

Spatial privacy, in its most basic sense, seeks to protect particular 'spaces' from external interference. Most understandings of privacy presuppose the existence of a private realm where the right can be exercised.[14] Arguably, this conception can also be amorphous.[15] There has been a multitude of attempts to define what this 'private realm' constitutes, ranging from Brandeis and Warren's proclamation that a right to privacy simply comprised a 'right to be let alone';[16] the Aristotelian dichotomy of the *polis* (the public sphere) and the *oikos* (the household or the private sphere);[17] the old English proclamation of "*the house of everyone is to him as his castle and fortress*";[18] to Bert-JaapKoops et al.'s definition of spatial

[10] ibid; See, generally: *Moore v City of East Cleveland* 1977 SCC OnLine US SC 93 : 52 L Ed 2d 531 : 431 US 494 (1977); *Zablocki v Redhail,* 1978 SCC OnLine US SC 14 : 54 L Ed 2d 618 434 US 374 (1978).

[11] ibid *Bowers*. See also: *Palko v State of Connecticut* 1937 SCC OnLine US SC 173 : 82 L Ed 288 : 302 US 319 (1937); *Moore v. City of East Cleveland,* 1977 SCC OnLine US SC 93 : 52 L Ed 2d 531 : 431 US 494 (1977).

[12] ibid *Bowers.*

[13] John V Harrison, 'Peeping Through the Closet Keyhole: Sodomy, Homosexuality, and the Amorphous Right of Privacy' (2000) 74(4) St John's Law Review 1087, 1095 <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1456&context=lawreview> accessed 9 July 2021.

[14] Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – II: Privacy, the Individual, and the Public/Private Divide' (Indian Constitutional Law and Philosophy, 28 August 2017) <https://indconlawphil.wordpress.com/2017/08/28/the-supreme-courts-right-to-privacy-judgment-ii-privacy-the-individual-and-the-publicprivate-divide/> accessed 9 July 2021.

[15] Pritam Baruah and Zaid Deva, 'Justifying Privacy: The Indian Supreme Court's Comparative Analysis' in Mahendra Pal Singh and Niraj Kumar (eds), *The Indian Yearbook of Comparative Law 2018* (Springer 2018).

[16] The Brandeis Brief <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety> accessed 1 December 2021.

[17] J Roy, 'Polis and Oikos in Classical Athens' (1999) 46(1) Cambridge University Press 1 <https://www.jstor.org/stable/643032?seq=1> accessed 9 July 2021

[18] *Semayane's case* (1604) 5 Co Rep 91 a : 77 ER 194.

privacy as "*the protection of the privacy of people in relation to the places where they enact their private life*".[19] While free from the supposed moral underpinnings of the previous approach, this conception has nevertheless been challenged by feminist and queer scholars.

1. *Feminist discourse*

Feminist scholars have argued that privacy, when accorded to 'spaces', has sanctified violence and oppression within the home, especially within heterosexual spaces.[20] This insulation of private spaces from state intervention is hinged upon the assumptions that a) there is a commonality of interests between family members, notwithstanding inequalities of power and status, and b) the male head of the household would be a safe repose of such interests.[21] In operation, the protection is therefore only extended to the virtue of the married couple in the conjugal home[22] and not to the individuals within it. Unlike the right to equality, which is a positive right that presupposes state intervention, all that the right to privacy requires is non-intervention.[23] This leaves the fate of many victims of oppression within the 'privacy' of the home in the hands of the oppressor themselves.

2. *LGBTQIA+ discourse*

Scholars who have written about LGBTQIA+ rights, have argued that reading privacy into expressions of sexuality should not be solely confined to the protection of activities performed in the privacy of one's bedroom[24] since that would not encompass self-definition and visibility.[25] Privacy, interpreted spatially, actively works against these aims since it does not necessarily require society or law to change but only displays a level of tolerance for queerness when expressed in private.[26]

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[19] Bert-Jaap Koops et al, 'A Typology of Privacy' (2017) 38(2) University of Pennsylvania Journal of International Law 483, 516 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1938&context=jil> accessed 9 July 2021.

[20] Martha C Nussbaum, 'Is Privacy Bad for Women?' (*Boston Review*, 1 April 2000) <https://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women> accessed 3 December 2020.

[21] Bertha Wilson, 'Women, the Family and the Constitutional Protection of Privacy' (1992) 17(5) Queen's Law Journal 431, 439 <https://commentary.canlii.org/w/canlii/1991CanLIIDocs19.pdf> accessed 9 July 2021.

[22] ibid.

[23] Catharine A. MacKinnon, *Feminism Unmodified* (Harvard University Press 1988) 96, 97.

[24] See: Emma M Henderson, 'Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalisation Debates' (1996) 20(4) Melbourne University Law Review 1023, 1030 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2790632> accessed 9 July 2021.

[25] Saptarshi Mandal, ' "Right to Privacy" in *Naz Foundation*: A Counter-Heteronormative Critique' (2009) 2 NUJS Law Review 525, 534 <http://nujslawreview.org/wp-content/uploads/2016/12/saptarshi-mandal.pdf> accessed 9 July 2021.

[26] Sandel (n 3).

This is counter-productive as it continues the erasure of queer presence in the 'moral' public.[27]

For instance, in the South African case of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice* (1998) (*hereinafter* National Coalition for Gay and Lesbian Equality), the applicants submitted that: "[*the spatial conception of privacy*] *reinforces the idea that homosexuality is shameful or improper: that it is tolerable so long as it is confined to the bedroom — but that its implications cannot be countenanced outside.*"[28]

Even though the protection of sexual activities within the bedroom is a legitimate outcome, such a reading still does not extend this protection to expressions of queerness in public spaces, nor does it take into account that access to private space is a privilege unattainable to many within the community itself.[29] An example from India is members of the *Hijra* community, who routinely face harassment and discrimination in public spaces.[30] Ultimately, this reading of spatial privacy ends up privileging heteronormative conduct in the public spaces and confining other forms of self-expression to a bedroom.

C. Liberty-Based Privacy

The final conception in this section relates to a variety of rights, claims, and justifications for privacy that can be broadly grouped as 'liberty-based'. Privacy, situated within the broad liberal political theory, is essentially a protection of the liberated self and aid for self-determination.[31] The common thread that runs through this understanding of privacy is the framing of privacy as an 'intuitively' fundamental claim related to deeper notions of individual personhood.[32]

One approach for incorporating such liberty-based claims into legal doctrine is by linking privacy to the right to dignity[33]

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[27] See: Zaid Al Baset, 'Section 377 and the Myth of Heterosexuality' (2012) 4(1) Jindal Global Law Review 89, 100 <https://completejusticepodcast.s3.ap-south-1.amazonaws.com/Zaid+Al+Baset+-+Section+377+and+the+Myth+of+Heterosexuality+.pdf> accessed 9 July 2021.

[28] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 SCC OnLine ZACC 15 [29].

[29] Oishik Sarkar, 'Issue in Focus: Questions of Visibility' (TARSHI) <https://www.tarshi.net/index.asp?pid=100> accessed 10 December 2020.

[30] Danish Sheikh, 'Queer Rights and the Puttaswamy Judgment' (2017) 52(51) Economic and Political Weekly <https://www.epw.in/journal/2017/51/privacy-after-puttaswamy-judgment/queer-rights-and-puttaswamy-judgment.html> accessed 9 July 2021.

[31] Julie E. Cohen, 'What Privacy is For' (2013) 126 Harvard Law Review 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175406> accessed 9 July 2021.

[32] Hilary Delany and Eoin Carolan, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Round Hall 2008).

[33] Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: an Answer to Dean Prosser' (1964) 39 New York University Law Review 156, 165 <https://www.cambridge.org/core/books/philosophical-dimensions-of-privacy/privacy-as-an-aspect-of-human-dignity-

and personhood.[34] The latter is also termed as the right to an 'inviolate personality'.[35] For instance, Justice Ackerman, in *National Coalition for Gay and Lesbian Equality* (1998), emphasised that at the core of one's sexual privacy was the ability of an individual to build their own sexuality and relationships sans interference from external sources.[36] Dignity was a recurring theme throughout the decision, where it was considered to be related to the exercise of an intimate sphere of life, self-worth, and equality.[37] This idea of dignity was further linked to a conception of privacy that was transformative, in as much as it governed the entire gamut of relationships individuals had with "*their bodies, their communities, their cultures, their places and their times*".[38] This judgment was a repudiation of the older, act-based, or space-based models of privacy as it instead placed individuals and their relationships at the core of the right to privacy. Justice Ackerman noted in clear terms:

> "*There is no good reason why the concept of privacy should, as was suggested, be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private.*"[39]

Another approach is to view privacy through the lens of individual autonomy, which encompasses the freedom to 'choose' and to bodily integrity.[40] As noted in *Lawrence v. Texas* (2000), the case that ultimately overruled *Bowers* seventeen years later: "*autonomy of self [...] includes freedom of thought, belief, expression, and certain intimate conduct*".[41] Such privacy allows the individual the autonomy to self-develop, understand, and construct their gender identity and sexuality.[42]

Bodily integrity as a concept is also closely related to these constructions of autonomy, inasmuch as it is impossible to secure one without the other.[43] In

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an-answer-to-dean-prosser/92970E3DFDF1E292EB6E30210E58DED0> accessed 9 July 2021; But see: Conor O' Mahony, 'There is no Such Thing as a Right to Dignity' (2012) 10(2) International Journal of Constitutional Law <https://academic.oup.com/icon/article/10/2/551/666082#11616513> accessed 9 July 2021.

34 Jeffrey H Reiman, 'Privacy, Intimacy and Personhood' (1976) 6(1) Philosophy and Public Affairs 26, 39 <http://people.brandeis.edu/~teuber/Reiman_on_Privacy.pdf> accessed 9 July 2021.

35 ibid.

36 *National Coalition for Gay and Lesbian Equality* (n 28) [32].

37 ibid [120].

38 ibid [117].

39 ibid [116].

40 Danielle Keats Citron, 'Sexual Privacy' (2019) 128 The Yale Law Journal 1870, 1886 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233805> accessed 9 July 2021.

41 *Lawrence v Texas* 2003 SCC OnLine US SC 73 : 539 US 558 (2003) [564].

42 Citron (n 40).

43 ibid.

Planned Parenthood of Southeastern Pennsylvania v Casey (1992) (*hereinafter* Planned Parenthood), for instance, the US Supreme Court observed that any state restrictions on abortion would violate a woman's right to privacy in two ways: a) forced continuation of pregnancy would compromise a woman's right to bodily integrity by introducing potential physical and health-related harms; and b) would deprive the woman of her right to make her own decisions about reproduction and other critical life-choices.[44]

The individual, therefore, sits at the core of these liberty-based claims and justifications for privacy, which include values such as dignity, personhood, personality, autonomy, equality, and bodily integrity within its ambit. Compared to the previous two conceptions of privacy discussed, there are obvious advantages with courts adopting an individual-centric, liberty-based conception of privacy. However, this too must be taken with two caveats. First, reading liberty into the right to privacy might run the risk of formulating a sort of '*privatised liberty*'. Akin to the criticism of the formulation of spatial privacy, via this doctrine, in privatised liberty, non-conformity is not legitimised, only domesticated.[45] Second, even within the framework of a liberty-based reading of privacy, the state is under no obligation to create conditions where such privacy can be realistically exercised. For instance, despite the proclamations of the American Supreme Court in *Roe v. Wade* (1973) and *Planned Parenthood*, affirming that a woman had a constitutionally recognised right to privacy in respect of decisions relating to abortion, different US states had not stopped from passing laws that made access to such an option difficult, including the banning of the use of public facilities for abortion, prohibiting the promotion and advertisement of abortion services, and so on.[46] The inherent nature of the right to privacy, in its most basic sense, is a negative right to be free from state (and public) interference. In such light, perhaps privacy sceptics are correct in arguing that adopting an anti-discrimination or equality approach would be more suited in these causes.[47]

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[44] *Planned Parenthood of Southeastern Pennsylvania v Casey* 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833 (1992) [928].

[45] See: Katherine M Franke, 'The Domesticated Liberty of *Lawrence v. Texas*' (2004) 104 Columbia Law Review 1399, 1411 <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1050&context=faculty_scholarship> accessed 23 October 2021.

[46] See: Heather Dawn Lakey, 'Informed Consent, Abortion and Reproductive Autonomy' (2015) Electronic Theses and Dissertations 61-62 <https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=3356&context=etd> accessed 9 July 2021.

[47] Harrison (n 13); See generally: Elizabeth M Schneider, 'The Synergy of Equality and Privacy in Women's Rights' (2002) 1(8) University of Chicago Legal Forum <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1320&context=uclf> accessed 9 July 2021. Also see: Erin Daly, 'Reconsidering Abortion Law: Liberty, Equality and the New Rhetoric of Planned Parenthood v. Casey' (2010) 45 American University Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562001> accessed 9 July 2021.

III. Conceptions of Privacy within the Indian Jurisprudence

Based on the previous discussion on the different conceptions of privacy and the learnings derived from the literature review, this next investigation into the Indian privacy jurisprudence is aimed at answering the following questions: a) To what extent have these aforementioned conceptions of privacy been used in judicial reasoning?; b) To what extent have these conceptions been used in cases of gender and sexuality struggles, and; c) What have been the outcomes? Answers to these questions allow for these judgments to be framed as part of a continual narrative for the purposes of this paper, streamlining their contributions to Indian privacy jurisprudence via their impact on gender and sexuality rights. This discussion is divided into three time periods: a) The time between 1954-1963, where the Supreme Court was first confronted with the question of a constitutional right to privacy, b) The time between 1975 - 2017, where numerous articulations of the privacy right had begun to form, and c) 2017 - present day, where these articulations have been put to test.

A. Kharak Singh and MP Sharma (1954 - 1963)

In 1954, the Supreme Court was faced with the question of whether there was a fundamental right that prohibited unreasonable search and seizures, analogous to the Fourth Amendment in the United States.[48] This right was sought to be located in Article 19(1)(f) [now repealed], which had provided a right to property, and Article 20(3), which provided a right against self-incrimination. In *MP Sharma v Satish Chandra* (*1954*), the court refused to recognise such a right, citing the fact that the Constituent Assembly had not explicitly included it in the Constitution.[49]

Subsequently, in 1963, in *Kharak Singh v State of UP* (*hereinafter* Kharak Singh), the Supreme Court was called upon to decide on the constitutionality of several provisions in the Uttar Pradesh Police Regulations that allowed the police to conduct surveillance on suspected criminals, including house visits at night, inquiries into the person's activities and income, and tracking their movements.[50] Challenges to the different measures were considered separately. While deciding on the validity of domiciliary visits, the court cited the old English adage in *Semayne's case* — "*every man's house is his castle*" — with approval and held that unauthorised intrusions into an individual's house were a violation of '*ordered liberty*'.[51] The domiciliary visits were declared unconstitutional since they were not

[48] *MP Sharma v Satish Chandra* AIR 1954 SC 300.
[49] ibid [24].
[50] *Kharak Singh v State of UP* (1963) AIR SC 1295.
[51] ibid [19].

based on law and thus violated Article 21. While the judgment did not fully incorporate *Semayne's* doctrine into the final decision, this reference was still interesting since it seemed to suggest that the sanctity of the house would be protected within the right to life guaranteed under Article 21.[52]

However, this did not lead to the majority formulating any particular conception of privacy *per se*. In fact, the court refrained from striking down the provisions in the Regulations that had allowed inquiries, and it refused to recognise outright a right of privacy guaranteed under the Indian Constitution.[53]

B. Gobind and onwards (1975 - 2017)

This section deals with a period of development when courts progressively moved away from the findings of *Kharak Singh* and *MP Sharma* by watering down the original finding of the court about the non-existence of a constitutional right to privacy. As a time period, this section covers over thirty years of case laws and pronouncements, and as such, consists of a long, varied stretch of jurisprudence, dotted by important contributions made by both High Courts and the Supreme Court. Certain contributions by the different High Courts during this period, today stand overruled. This, however, does not diminish their importance in the development of India's privacy doctrine, and the findings from these decisions are iterated throughout the paper, with the assumption that the stances taken by these judgments were the correct proposition of law.

This section is divided into four issue-based subsections: 1) Privacy as part of the personal intimacies of the home, 2) Privacy in cases concerning the restitution of conjugal rights, 3) Privacy as part of decriminalisation of section 377, and 4) Privacy as part of liberty-based rights.

1. *"The personal intimacies of the home"*

While Kharak Singh and MP Sharma denied the existence of a constitutional right to privacy, subsequent judgments slowly watered this pronouncement down. One of the first cases to do so was *Gobind v State of MP (1975)* (*hereinafter* Gobind), which was also concerned with state police regulations similar to the ones challenged previously in Kharak Singh.[54] The petitioner claimed that the

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[52] *KS Puttaswamy v Union of India* (2017) 10 SCC 1 [16] (Chandrachud J) ("*Kharak Singh regards the sanctity of the home and the protection against unauthorized intrusion an integral element of "ordered liberty". This is comprised in 'personal liberty' guaranteed by Article 21.*").

[53] *Kharak Singh* (n 50) (Interestingly, the dissent in *Kharak Singh* was more radical in that it struck down all these provisions as violative of the petitioner's fundamental rights. Notably, it also saw differently from the majority on the position of privacy as a right: "*It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.*").

[54] *Gobind v State of MP* (1975) 2 SCC 148: AIR 1975 SC 1378.

forms of police surveillance under challenge infringed upon his fundamental right to privacy. The Supreme Court found the regulations to be valid. However, it also went on to recognise that if the court finds a constitutional right to privacy, the same might be only overridden by a compelling state interest.[55] Such a right to privacy would further include: "*[...] the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing*".[56]

This particular formulation of the right to privacy would go on to become the bedrock for several subsequent judgments during this period[57] and therefore warrants a closer look.

Firstly, the judgment deploys the general language of spatial privacy as the protection is extended to '*the personal intimacies of the home*', which is the imagined private realm as per this conception of privacy. *Secondly*, this particular conception of the right to privacy is not completely free from its heteronormative brackets. What does it mean when the right is linked to '*personal intimacies of the home*', where motherhood and procreation are, presumably, illustrative values? Akin to the criticism of the majority in *Bowers,*[58] this conception of privacy in *Gobind:* a) lays the foundation for spatial protection, and b) becomes a coded indication for the right being extended to protect these social institutions like marriage and motherhood only in their heteronormative sense. Had any hypothetical future court, faced with facts similar to *Bowers*, chosen to rely solely on the '*personal intimacies*' aspect of the right to privacy, they too would have found it difficult to cull out liberties for anything other than a heteronormative way of life, out of the groundwork laid down in *Gobind*.

Elsewhere however, the judgment also concerns itself with liberty-based aspects of privacy. Justice Matthew notes that "*privacy primarily concern[ed] the individual*"[59] and that the concept of dignity is closely related to this conception of privacy.[60]

Is it possible to reconcile these three separate formulations into a coherent doctrine? A liberal reading would be to emulate Justice Ackerman's model of privacy, where the individual is placed at the core of privacy, and the entire gamut of their relations, with their bodies, families, and communities, are all encompassed within this right.[61] In such a reading, the protection of the right to

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55 ibid [22].

56 ibid [24].

57 See: *R Rajagopal v State of TN* (1994) 6 SCC 632 : AIR 1995 SC 264; *X v Hospital Z* (1998) 8 SCC 296.

58 Harrison (n 13).

59 *Gobind* (n 54) [23].

60 ibid [22] ("*There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior.*").

61 *National Coalition for Gay and Lesbian Equality* (n 28).

privacy extends to the protection to personal intimacies, inasmuch as it relates to the individual: marriage, procreation and motherhood become of significance only because they are a function of individual decision-making,[62] and therefore, not restricted to their coded heteronormative meanings. On the other hand, a conservative reading would be to consider the spatial and institutional aspects of the right as limiting features of any individual liberties. In other words, the extent of an individual-centred right to privacy would be limited within '*the personal intimacies of the home*' and would extend solely to decisions relating to those pertaining to '*the home, the family, marriage, motherhood, procreation and child-rearing*'.[63] The judgment, however, does not clarify these nuances itself, nor does it make a specific finding regarding the right to privacy within the Constitution.[64]

The chief contribution of the *Gobind*, therefore, consists in imagining the existence of a right to privacy when there previously existed none and indicating that further doctrinal development of the right would have to be done on a case-to-case basis.[65] The court did not go into the issue of whether enforcement of morality would be a justification for infringement of the right to privacy,[66] and the adoption of this approach left this question wide-open for interpretations.

2. *Restitution of conjugal rights*

A series of cases around the issue of restitution of conjugal rights ('RCR') allows us to understand another facet of the judiciary's approach towards the right to privacy in relation to the rights of women. Section 9 of the Hindu Marriages Act ('HMA'), 1955, empowered either the husband or the wife to apply to the court and compel their spouses to cohabit with them. The constitutional validity of this provision was first challenged successfully, in the Andhra Pradesh High Court, in *T. Sareetha v. T. Venkata Subbaiah* (1983) (*hereinafter* Sareetha).[67] The court held that the ultimate effect of the operation of section 9 was to force a '*positive act of sex*' over an '*unwilling person*'.[68] It also noted that where such restitution can result in unwanted pregnancies, it would constitute an affront to the

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[62] Gautam Bhatia, 'The Constitution and the Public/Private Divide: T. Sareetha vs Venkatasubbaiah' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010972> accessed 12 July 2021.

[63] *Gobind* (n 54)[24].

[64] *Puttaswamy* (n 52) [49] (Chandrachud J) ("*Yet a close reading of the decision in Gobind would indicate that the Court eventually did not enter a specific finding on the existence of a right to privacy under the Constitution.*").

[65] *Gobind* (n 54) [28] ("*The right to privacy in any event will necessarily have to go through a process of case-by-case development.*").

[66] ibid [22] ("*The question whether enforcement of morality is a state interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of state.*").

[67] *T Sareetha v T Venkata Subbaiah* 1983 SCC OnLine AP 90 : AIR 1983 AP 356.

[68] ibid [18], [29].

wife's human dignity and effectively result in a loss of "*autonomy or control over intimacies of personal identity*".[69] Finally, the court proclaimed that "[...] *any plausible definition of right to privacy is bound to take the human body as its first and most basic reference for control over personal identity*".[70]

By placing the 'human body' at the crux of the right to privacy and reading dignity and autonomy into the rubric of the right, the court brought forth the strain of privacy-dignity, individual-centred formulation from *Gobind*.[71] The emphasis on individual liberties, as a necessary component of privacy within Article 21, is also important in reinforcing this fact, since, as the article notes in the *National Coalition for Gay and Lesbian Equality* case, such a reading essentially frees up the right from its moral or spatial brackets. By upholding a woman's decisional autonomy regarding whether or not to cohabit with her husband, even within the institution of a marriage, this decision reads the feminist critiques of privacy within its subtext.[72]

Following this came the Delhi High Court's judgment in *Harvender Kaur v Harmander Singh Choudhry* (1983) (*hereinafter* Harvender Kaur), which also involved a constitutional challenge to section 9 of the HMA.[73] The Delhi High Court upheld the provision and went on to disagree with the view taken in *Sareetha*. Similar to *Griswold*, the judgment was almost infallibly hinged on its endorsement of the institution of heterosexual marriage[74] and the court's appointment of itself as the guardian of this institution,[75] responsible for its preservation. Privacy does not feature within the operative tenets of the judgment at all. In(famously), the court observed that the introduction of constitutional law would prove to be "*a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14 have any place*".[76]

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69 ibid [29].

70 ibid [24].

71 ibid [23] ("*Govind's case (Supra) thus firmly laid it down that Article 21 protects the right to privacy and promotes the individual dignity mentioned in the preamble to our Constitution.*").

72 See generally: Gautam Bhatia, 'T. Sareetha vs T. Venkata Subbaiah: Remembering a Revolutionary Decision' (Indian Constitutional Law and Philosophy, 13 January 2016) <https://indconlawphil.wordpress.com/2016/01/13/t-sareetha-vs-t-venkata-subbaiah-remembering-a-revolutionary-decision/> accessed 21 December 2020.

73 *Harvender Kaur v Harmander Singh Choudhry* 1983 SCC OnLine Del 322 : AIR 1984 Del 66.

74 ibid [1] ("*This appeal raises an issue of great importance to the well-being of the nation, as it goes to the very root of the marriage relationship.*").

75 ibid [13] ("*The outstanding fact is that the husband and wife are living apart and leading their own separate lives. The court seeks to enquire into this separation. [...] It can be that the erring spouse comes on the right path and a broken home is rebuilt.*").

76 ibid [33].

Not only is this an astonishing prioritisation of institutional or spatial privacy over any individual claims of privacy, integrity, and autonomy,[77] but it is also the prioritisation of the sanctity of the institution of marriage over constitutional norms and protections. Whatever privacy that the court *did* grant, in this case was to the unit of heterosexual marriage and not to the individuals within it.[78]

The Supreme Court was finally called to resolve this difference in opinion in *Saroj Rani v Sudarshan Kumar Chadha* (1984) (*hereinafter* Saroj Rani).[79] The court upheld the opinion of the Delhi High Court, noting that conjugal rights were "[...] *inherent in the very institution of marriage itself.*"[80]

This precedent is troubling because it is difficult to see how the reasoning in *Sareetha* — that the operation of RCR would result in non-consensual sexual intercourse within a marriage — can be avoided. The only way such a position can even be made 'acceptable' within the existing legal system is by sub-textualising the rationale behind the marital rape exemption ('MRE') embodied within section 375 of the Indian Penal Code ('IPC'), which categorises even forceful sexual intercourse between adult husband and wife as not rape. While the MRE has its own problems, its presence as an exception to the statutory definition of rape is of significance. Rape, an act that would otherwise be criminal, is solely saved by the status of the perpetrator and the victim, i.e., by virtue of them being within a marital institution.[81]

The sanctification of the marital institution is the unifying thread that runs through both the RCR and the MRE provisions and 'saves' them from constitutional review. Ultimately, however, this position is untenable. Fundamental rights inhere in individuals, and while their application has judicially recognised limits, neither *Harvinder Kaur* nor *Saroj Rani* show any reasons to prove that the preservation of the institution of marriage is encompassed within these limits or that such interests should take primacy over individual liberties.

3. *Naz Foundation and Suresh Koushal*

In 2009, the constitutional validity of section 377 of the IPC was called into question in *Naz Foundation v Union of India* (*hereinafter* Naz Foundation).[82] Section 377 penalised 'unnatural' sexual activity. This included, *inter alia*, consensual sexual activities in private between two adults of the same sex. The

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[77] Gautam Bhatia, 'The Constitution and the Public/Private Divide: T. Sareetha vs Venkatasubbaiah' (n 62).

[78] ibid.

[79] *Saroj Rani v Sudarshan Kumar Chadha* (1984) 4 SCC 90 : AIR 1984 SC 1562.

[80] ibid.

[81] See: Law Commission of India, One Hundred and Seventy Second Report, *Review of Rape Laws* <https://lawcommissionofindia.nic.in/rapelaws.htm> accessed 12 July 2021.

[82] *Naz Foundation v Govt of NCT of Delhi* 2009 SCC OnLine Del 1762.

petitioners claimed that the provision violated the right to privacy, as implicit within the right to life under Article 21 of the Constitution, and prayed that the ambit of Section 377 be read down to exclude consensual intercourse between adults of the same sex who had attained the age of consent.

A division bench of Delhi High Court, while allowing the prayer, paid a considerable amount of attention to the privacy-based challenge made against section 377 and how its operation had affected the exercise of queer rights. One particular thread that ran through the judgment was the emphasis on 'dignity' and 'autonomy' of the individual[83] as sources of privacy, though it has also been argued that the court deployed dignity, autonomy, and privacy as nearly interchangeable concepts.[84] The court relied significantly on South African and American jurisprudence to arrive at a three-pronged idea of the right to privacy:[85]

- The right to develop human relations without interference from the outside community or the state (*non-interference*)
- The right to exercise individual autonomy to attain self-esteem, fulfilment, build relations of their choice, etc. (*decisional autonomy*)
- The right to full personhood and dignity (*dignity and inviolate personality*)

The emphasis on the individual being at the core of the right is a continuation of the line of thought from *Sareetha*. Additionally, it is worth considering how the three prongs of the conception of privacy, as developed by the Delhi High Court, are related: the right to non-interference in its essence is a negative right, which does not indicate the nature of the act that deserves this non-interference. The court attempts to dispel some of this amorphicity by reading the right to exercise autonomy and dignity with regards to the self within the description of the imagined private realm.[86] As per this, queer rights are neither simply restricted to a narrowly tailored right to have a bedroom shielded from the public eye, nor does 'popular morality' form a tenable ground to restrict this right.[87] Instead, this particular right consists of a series of connected liberties, working together to form a comprehensive framework for affirmative, constitutional protection.

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[83] ibid [26] ("*At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action.*").

[84] Pritam Baruah, 'Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity' (2009) 3 NUJS Law Review 505, 515 <http://nujslawreview.org/wp-content/uploads/2016/12/pritam-baruah.pdf> accessed 12 July 2021.

[85] ibid.

[86] ibid.

[87] *Naz Foundation* (n 82) [79] ("*Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21.*").

While the doctrinal implications of this decision are paramount, its operative part had been only limited to the original prayer of the petitioners, which had sought to decriminalise consensual, same-sex activities, carried out 'in private'. One interpretation of this outcome of the case, as argued by scholars, has been that the protection offered by the right to privacy is only extended to those who could afford access to a private space, excluding those communities of the sexually marginalised who are unable to access the same.[88] Others, however, have contended that the privacy argument embodied in the decision had been more outward-looking; the right to privacy had not simply privileged actions performed in private but had extended to the right to participate in society and the right to assert one's identity in public.[89]

This decision was challenged in *Suresh Kumar Koushal v Naz Foundation* (2013) (*hereinafter* Suresh Koushal), where a two-judge bench of the Supreme Court was called upon to examine the High Court decision.[90] The court overruled the *Naz Foundation* and upheld the constitutionality of the impugned provision. Privacy formed a substantial portion of the arguments submitted by the respondents. However, there was little to discern in the operative part of the judgment regarding the court's conception of the right. While the court acknowledged the existence of a right to privacy, bodily integrity, and sexual choice,[91] any semblance of 'analysis' of the contention that section 377 violated these rights was surprisingly aborted.

The court approached the claims of the respondents with suspicion: the rights of the LGBTQIA+ persons were termed 'so-called',[92] and a clear distinction was drawn between "*[t]hose who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature*".[93] Presumably, this distinction was ultimately between heterosexuality and homosexuality,[94] but there was no policy rationale on the court's part for affirming this distinction or for upholding the impugned provision as a result. Finally,

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88 Sarkar (n 29); Radhika Radhakrishnan, 'How does the Centre appear from the Margins? Queer Politics after Section 377' (2019) 12(3-4) NUJS Law Review 1, 12-13 <http://nujslawreview.org/wp-content/uploads/2020/01/12-3-4-Radhakrishnan-1.pdf> accessed 12 July 2021; Saptarshi Mandal, 'Section 377: Whose Concerns Does The Judgment Address?' (2018) 53(37) EPW Engage <https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment> accessed 12 July 2021.

89 Mayur Suresh, 'The Right to be Public: India's LGBT Movement Builds an Argument about Privacy' (2019) 20(1) Australian Journal of Asian Law 87, 97 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3490425> accessed 23 October 2021.

90 *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.

91 ibid [46]-[50].

92 ibid[52].

93 ibid [42].

94 Gautam Bhatia, 'The Unbearable Wrongness of Koushal v Naz' (*Outlook Magazine*, 11 December 2013) <https://www.outlookindia.com/website/story/the-unbearable-wrongness-of-koushal-vs-naz/288823> accessed 12 July 2021.

while 'morality' did not feature in the language of the judgment itself, this framing occurs throughout the appellant's arguments, where they argue the legislative rationale of section 377 is the protection of 'morals'.[95] In the absence of any analysis or counter to these arguments by the court, one way of interpreting this judgment is to understand the role of 'public morality' as a subtext for the court's decision.[96] Either way, the lack of any coherent constitutional analysis of the issue makes *Suresh Koushal* an aberration in the otherwise (mostly) carefully deliberated string of cases discussed above.

4. *Liberty-based readings*

While *Gobind* continued to be the broad governing principle, its amorphous boundaries allowed a variety of interpretations to blossom subsequently. For instance, *District Registrar and Collector, Hyderabad v. Canara Bank* (2004) (*hereinafter* Canara Bank), interpreted the doctrine in *Gobind* to essentially mean that the right (in reference to search and seizure cases) dealt with "*persons and not places*",[97] thereby diluting some of the earlier connotations of spatial or moral-institutional brackets of the judgment. This section, accordingly, deals with judgments where the court has conceptualised the right to privacy to encompass a variety of liberty-based values, including autonomy and dignity.

a. Decisional autonomy

In multiple judgments, the Supreme Court has affirmed the autonomy of the individual as an essential part of their right to privacy, including in their choice of profession,[98] dietary choices,[99] gender identity,[100] women's reproductive choices,[101] and so on. It is worth considering two judgments in this sequence, which are placed seven years apart.

The first is *Anuj Garg v Hotel Assn of India* (2007) (*hereinafter* Anuj Garg), which was concerned with a provision of the Punjab Excise Act that forbade any men below the age of 25 years, and any women from being employed on the premises of any establishment where liquor was sold.[102]

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[95] *Suresh Kumar Koushal* (n 91) [16.12], [16.14].

[96] A similar argument is made here: Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – V: Privacy and Decisional Autonomy' (Indian Constitutional Law and Philosophy, 31 August 2017) <https://indconlawphil.wordpress.com/2017/08/31/the-supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/> accessed 12 July 2021.

[97] *District Registrar and Collector v Canara Bank* (2005) 1 SCC 496.

[98] *Anuj Garg v Hotel Assn of India* (2008) 3 SCC 1.

[99] *Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat* (2008) 5 SCC 33.

[100] *National Legal Services Authority (NALSA) v Union of India* (2014) 5 SCC 438.

[101] *Suchita Srivastava v Chandigarh Admn* (2009) 9 SCC 1.

[102] *Anuj Garg* (n 98).

At the outset, the court identified one of the core issues to be the tension between 'security', that is, the state interest in 'protecting' women,[103] and individual autonomy.[104] The court introduced a standard of proportionality in the balancing of these interests by noting that the state's interference in the name of protection should not be so severe as to erode individual autonomy.[105] Interestingly enough, even though the state's submission was restricted to the 'security' argument, the court recognised this to be ultimately an argument based on cultural, social, and biological stereotypes of the sexes.[106] Reading autonomy into the right to privacy, the court went on to hold: "*majoritarian impulses rooted in moralistic tradition [should] not impinge upon individual autonomy*".[107] This is of paramount importance for the purpose of this discussion. Not only did the court recognise the primacy of a constitutional guarantee — in this case, individual autonomy — over considerations of popular morals, but it also recognised that government norms may well embody these undertones. The vehicle of 'morality' did not have a place in the constitutional framework of rights, and any government policies furthering such a cause ought to be untenable.

This reading of autonomy was subsequently affirmed in the *National Legal Services Authority (NALSA) v. Union of India* (2014) (*hereinafter* NALSA).[108] *NALSA* was concerned with the right to self-determination and identity of the transgender community. At the outset, the court recognised that "*each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom*".[109]

Further, the court expanded on the nature of individual autonomy to include "*both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in*".[110] Framing autonomy as a right to be free from "*interference by others*", as opposed to free from merely governmental interference, is of significance here. This is because the rights demanded by the petitioners in *NALSA* were not simply impeded due to discriminatory acts on account of State action, but as the court recognised early in the judgment, the infringement of their rights reflected a larger "*moral failure*" of the society, located in the ridicule and abuse faced by the community in public spaces.[111] Placing a

[103] ibid[51] ("*[the government] cites examples of Jessica Lal and BMW to highlight dangerous consequences of allowing sale and consumption of liquor by young men below the age of 25 years and vulnerability of women while working in bars.*").
[104] ibid[32]-[37].
[105] ibid[34].
[106] ibid[39].
[107] ibid [39].
[108] *National Legal Services Authority v Union of India* (2014) 5 SCC 438 : AIR 2014 SC 1863.
[109] ibid [20].
[110] ibid [69].
[111] ibid [1].

constitutional right to exercise autonomy in direct opposition to "*interference by others*" therefore, expands on the line of reasoning embodied in *Anuj Garg*, inasmuch as it conveys that majoritarian norms, codified either in legislation or within the amorphous concept of 'public morality', ought to be rejected.

b. Bodily integrity

In cases of sexual violence, the Supreme Court has incorporated issues of preservation of bodily integrity[112] as an incident of the privacy[113] of the victim. Similar readings of privacy are also found in the case of *Suchita Srivastava v. Chandigarh Administration,*[114] where a woman's reproductive choices were interpreted to be subsumed within her right to privacy, dignity, and bodily integrity.[115] These precedents provide fuel to argue against the standards set by the RCR cases, where the bodily integrity and autonomy of women was deprioritised to preserve the marital institution.

C. Puttaswamy and Onwards (2017 - 2020)

One thread of commonality that runs through the previous section has been the sheer variety of privacy articulations proposed by the courts at different instances. As doctrinally important these pronouncements were, in fleshing out degrees of progressive jurisprudence, however, their existence alongside the original *MP Sharma - Kharak Singh* duo was always going to be uneasy. This section, therefore, concerns the period of judicial history, where the Supreme Court was called to re-examine the doctrinal question of whether the Indian Constitution allowed for a right to privacy. It is divided into two subsections: a) The privacy articulation of the judgment in *Puttaswamy v. Union of India,* and b) Post-*Puttaswamy* judgments that have continued to develop the contours of the right to privacy in India.

1. *Puttaswamy v. Union of India*

In 2017, the Supreme Court of India, by way of a constitutional bench of nine judges, delivered their judgment in *Puttaswamy v. Union of India* (2017) (*hereinafter* Puttaswamy). This decision originally stemmed from the assertion of the Attorney-General of India, in the challenge to the Aadhaar program, that the operative portions of *Kharak Singh* and *MP Sharma* essentially denied the

[112] *State of Maharashtra v Madhukar Narayan Mardikar* (1991) 1 SCC 57 : AIR 1991 SC 207; *State of Karnataka v Krishnappa* (2000) 4 SCC 75 : 2000 Cri LJ 1793; *Sudhansu Sekhar Sahoo v State of Orissa* (2002) 10 SCC 743.

[113] *Puttaswamy* (n 52) [52] (Chandrachud J).

[114] *Suchita Srivastava* (n 101).

[115] ibid [11].

existence of any right to privacy within the Indian Constitution.[116] *Puttaswamy,* however, unanimously affirmed such a right, thereby overruling *Kharak Singh* and *MP Sharma*. The nine judges together wrote six separate but concurring opinions (Justice Chandrachud wrote for himself, Justices Agarwal, Khehar, and Nazeer), and *in toto*, the judgment presents several doctrinal propositions regarding privacy in the Indian context and explores the questions, justifications, and criticisms of privacy discussed in the previous sections, in substantial detail. It must be noted at the outset that there is no 'correct' formulation of privacy in the judgment. In fact, the only operative portion of the judgment is the one-page long order at the end of the judgment, which affirms the right to privacy within the Indian constitutional framework. Instead, the judgment, over the course of 547 pages, seems to look at privacy simply as an amalgamation of different but connected rights.[117]

a. Liberty-based claims

A common thread that runs through the six opinions in the case is the emphasis on privacy being an important facet of the gamut of liberty-based rights and claims[118] as well as being the foundation for several other rights and freedoms guaranteed by Part III of the Indian Constitution, including the freedom of speech, association, and religion. All the opinions also reflect the three broad prongs of this liberty-based reading of privacy — dignity, decisional autonomy, and integrity (both physical and mental) — and their grounding within the broad constitutional framework and incorporation into the enforceable fundamental rights within Part III of the Constitution.[119]

Table I: Distribution of liberty-based values within the six opinions in Puttaswamy.

Values	Opinions
Dignity	Individual privacy is an essential aspect of dignity, where such dignity is both intrinsic to human existence as well as instrumental in securing 'freedom'.[120] (*Justice Chandrachud*) This dignity, in

[116] Prachi Shrivastava, 'Privacy not a Fundamental Right, Argues Mukul Rohatgi for Govt as Govt Affidavit Says Otherwise' (Legally India, 23 July 2015) <https://www.legallyindia.com/home/privacy-not-a-fundamental-right-argues-mukul-rohatgi-for-govt-as-govt-affidavit-says-otherwise-20150723-6332> accessed 12 July 2021.

[117] Amber Sinha, 'The Fundamental Right to Privacy - Part II: Structure' (Centre for Internet and Society, 27 September 2017) <https://cis-india.org/internet-governance/blog/the-fundamental-right-to-privacy-an-analysis> accessed on 24 December 2020.

[118] *Puttaswamy* (n 52) [168] (Chandrachud J).

[119] Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment - I: Foundations' (Indian Constitutional Law and Philosophy, 27 August 2017) <https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations/> accessed 3 December 2020.

[120] *Puttaswamy* (n 52) [169] (Chandrachud J).

Values	Opinions
	turn, forms part of the larger concept of liberty[121] (*Justice Kaul*) and is a value derived from the Preamble. It casts a positive obligation on the state to respect the 'personality' of every citizen and create conditions where citizens can achieve self-fulfilment.[122] (*Justice Sapre*) Further, this dignity a) comprises the guarantee to secure the inner recess of one's personality from intrusion;[123] and b) inheres in the rights to life, liberty, and freedom guaranteed within the broader tenets of the Constitution.[124] (*Justice Chandrachud*) This dignity allows the individual the freedom to behave in a manner (consistent with the freedom of another) to achieve self-fulfilment.[125] Additionally, once it is established that this right to privacy is derived within the broad tenets of Part III of the Constitution, the source of this dignity becomes the jurisprudence around Article 21, where it has been held, over and over again, that the right to 'life' extends beyond mere animal existence.[126] (*Justice Bobde*)
Decisional and deliberative autonomy	The fundamental right to privacy includes the privacy of choice, which protects an individual's autonomy over their most personal choices. (*Justice Nariman*) The source of this autonomy could be traced from Gary Botswick's work,[127] where privacy was divided into three aspects - repose, sanctuary, and intimate decision, where the latter reflected individual autonomy with respect to the most personal life choices.[128] (*Justice Chelameswar*) Similar to the concept of dignity, autonomy also comprised the right of an individual to preserve their personality by way of a) their ability to make intimate decisions; and b) their decisions on what matters are to be kept private.[129] Additionally, this autonomy, as a facet of the broader gamut of liberties under Part III of the Constitution, also meant that the right to privacy extended to dietary choices and religious freedom, among others.[130] (*Justice Chandrachud*)
Integrity	The other aspect of the individual that requires protection under the right to privacy is bodily and mental integrity. Such protection functions on the premise that individuals possess an innate ability

[121] ibid [40] (Kaul J)
[122] ibid [8] (Sapre J).
[123] ibid [113] (Chandrachud J).
[124] ibid [169] (Chandrachud J).
[125] ibid [26] (Bobde J).
[126] ibid [29] - [30] (Bobde J).
[127] Gary L. Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision' (1976) 64(6) California Law Review 1447, 1448 <https://lawcat.berkeley.edu/record/1110973> accessed 12 July 2021.
[128] *Puttaswamy* (n 52) [36] (Chandrachud J).
[129] ibid [168] (Chandrachud J).
[130] ibid [169] (Chandrachud J).

Values	Opinions
	and right to preserve a private space where the human personality can develop.[131] Such an ability is intrinsically related to the value of autonomy since it is impossible to exercise autonomy without bodily and mental integrity. (*Justice Chandrachud*) Privacy of the body allows the individual to preserve the physical aspects of their personhood[132] (*Justice Chandrachud* and *Justice Nariman*), while mental integrity allows individuals to exercise a variety of other liberties, including freedom of thought and self-determination. With specific reference to the construction of gender identity, these guarantees become even more crucial.[133] (*Justice Chandrachud*)

b. Expansion/modification of spatial privacy

As the history of India's privacy jurisprudence in the *Gobind* phase indicates, spatial and institutional concerns have taken primacy over individual interests in several critical decisions. However, this language of spatial or institutional privacy is notably absent from most of the judgment, save in two places within Justice Chandrachud's opinion itself, though the contours of it are notably different from its older articulations. First, he states that: "*Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation*".[134] While it emulates the older pronouncement, there are two key differences: a) unlike *Gobind*, this formulation is not purely heteronormative, since the freedom to preserve one's sexual orientation is inherently an individual act; and b) this formulation is immediately followed by emphasis on individual liberties, something that was missing in the original pronouncement.

Second, he defines spatial control as the creation of private spaces.[135] This framing is important since the protection is not accorded to a 'space' per se, but to the process of 'creation', which is inherently an individual act.[136] Taken in the context of a right to privacy that subsumes individual values like self-determination, personhood, and autonomy, this conception of spatial privacy holds the potential to provide more comprehensive protection to marginalised communities. Akin to the framing in *NALSA* (which the court cited with approval), this right to privacy, therefore, could be interpreted as being: a) a bulwark against interference and harassment from the public at large, and b) extended beyond

[131] ibid [168] (Chandrachud J).
[132] ibid [168] (Chandrachud J), [81] (Nariman J).
[133] ibid [169] (Chandrachud J).
[134] ibid [T.3 (F)] (Chandrachud J).
[135] ibid [142] (Chandrachud J).
[136] Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – II: Privacy, the Individual, and the Public/Private Divide' (n 14).

the domains of an individual's home. This is further evidenced by Justice Chandrachud's opinion that "*privacy attaches to persons and not places*".[137]

Finally, the judgment also seems alive to the feminist criticisms that have followed formulations of spatial privacy. Catharine MacKinnon has argued that privacy, in its basic characteristics, only presupposes the lack of intervention and is insufficient to improve gender justice within the domestic sphere.[138] Justice Chandrachud's opinion considers the challenge in this regard to be two-fold: to *enable* the state to tackle violations in the domestic sphere (a positive duty) while-protecting privacy entitlements of women, which have been a rampart *against* state violations on dignity and bodily sanctity (a negative right).[139] Clubbing a positive state obligation with the classic understanding of privacy as a negative right would be interesting going forward in ongoing cases of gender justice. We consider its implications in the subsequent sections in more detail.

c. Enforcement of popular morality, sexual orientation, and Suresh Koushal

Justice Chandrachud and Justice Kaul also considered the precedent set by *Koushal* in their opinions. Apart from the previous assertion that the interest to preserve and exercise one's sexual orientation is an inherent part of one's right to privacy, both of them also criticised the judicial reasoning in *Koushal* categorically.[140] However, what is more interesting is both Justices Chandrachud and Kaul's assertion that the popular, majoritarian view would not be a valid ground in curbing the rights of the minorities.[141] Justice Chandrachud also framed the right to privacy as "*an intrinsic recognition of heterogeneity*".[142] While the court did not explicitly strike down *Koushal*, its criticism had important precedential value and affirmed the groundwork laid down in judgments like *Anuj Garg* and *NALSA*. The entire matrix of the right to privacy was grounded within the framework of Part III of the Constitution, which meant that any restrictions on an individual's privacy would have to be tested against constitutionally established benchmarks, and 'popular morality' would not find any place within the same.

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137 *Puttaswamy* (n 52) [168] (Chandrachud J).

138 MacKinnon (n 23).

139 *Puttaswamy* (n 52) [140(*c*)] (Chandrachud J).

140 ibid [126] (Chandrachud J), [80] (Kaul J).

141 ibid [126] (Chandrachud J) ("*Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21.*"), [80] (Kaul J) ("*The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India.*").

142 ibid [168] (Chandrachud J).

2. *Post-Puttaswamy Instances*

a. Independent Thought v. Union of India

The effect of the MRE within section 375 of the IPC is that non-consensual intercourse within a marriage continues to be exempt from being categorised as a crime. In 2017, Independent Thought, a human rights organisation, challenged this, praying for the provision to be read down to exclude minor victims between the age of fifteen and eighteen, that is, it asked the court to hold that even within a marriage, non-consensual intercourse with a minor would constitute rape.[143] While the Supreme Court obliged this prayer, it also noted that its observations should not be applied to situations concerning women above eighteen years of age.[144]

There are two aspects of the judgment that deserve our attention. *First*, the court drew upon its older pronouncements, which linked a woman's dignity and bodily integrity to her right to privacy under Article 21. *Second*, in response to oral submissions from the government that granting this prayer would effectively '*destroy the institution of marriage*', the court noted that: "*Marriage is not institutional but personal*".[145] Both these observations are linked. As I have argued earlier, the sanctification of the marital institution is the only reason for non-consensual sexual intercourse within its tenets to be not considered rape. Once this characteristic is judicially stripped away from a marriage, the only correct outcome would be to consider the personal rights of the parties involved in a constitutional light. In *Independent Thought*, the court proceeded to do just that. It derived the importance of the marital institution not from social, cultural, or religious constructions but in the commitment of the persons involved and then transposed liberty-based readings within the said institution of marriage. This is an operationalisation of *Puttaswamy*'s reading of spatial privacy as a function of individual rights, and therefore, perhaps a step towards incorporating issues of gender justice within India's privacy jurisprudence.

b. Joseph Shine v. Union of India

Section 497 of the IPC criminalised acts of 'adultery' and allowed married men to raise charges against men who had had sexual relationships with their (the married man's) spouses. A woman could neither prosecute nor be prosecuted under the provision. In September 2018, a Constitution Bench of the Supreme Court struck down the provision for being unconstitutional.[146] Primarily, all concurring opinions stated that the provision was based on a gendered conception

[143] *Independent Thought v Union of India* (2017) 10 SCC 800.
[144] ibid [2].
[145] ibid [90].
[146] *Joseph Shine v Union of India* (2018) 2 SCC 189.

of marriage, effectively treating women as their husband's property and was thus, violative of Article 14 of the Constitution. The judgement has been rightly lauded for the fact that all opinions invoke decisional autonomy and privacy of the woman as a central argument when striking down the provision and further locate sexual autonomy as a critical component of dignity.[147]

Pertinently, the judgment goes on to argue that adultery should not be treated as a criminal act at all. However, Justice Mishra (writing for himself and Khanwilkar) concluded that treating adultery as an offence was an "*immense intrusion into the extreme privacy of the matrimonial sphere*".[148] This line of thinking is suspiciously similar to the spatial and institutional conceptions of privacy, primarily intended to protect the institution of marriage from state interference. As noted earlier, this doctrine has been criticised by feminists like Nussbaum and Wilson (see section 2) for being barriers to the realisation of equality for women. While the opinion differentiates between adultery and other crimes like dowry and domestic violence, it fails to provide any principled rationale for such a distinction. The opinion reinforces the view that it is the marital sphere that is deserving of this protection.

Justice Chandrachud's opinion, however, is much clearer. He stresses that the state has a positive duty to "*protect the fundamental rights of women [like dignity and autonomy] from being trampled upon in unequal societal structures*",[149] including marriage. His opinion critiques the spatial view of privacy when he says that the court's duty is to ensure substantive gender equality in all spheres, "*irrespective of whether these spheres may be regarded as 'public' or 'private.'*"[150] Justice Chandrachud's opinion centres the individual instead of the institution at the core of the right to privacy, by clearly adding that the "*identity of the woman must be as an 'individual in her own right' [...] her identity does not get submerged as a result of her marriage*".[151]

Note that the state argued that criminalising adultery was required to preserve the sanctity of marriage.[152] A substantial portion of Justice Nariman's

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[147] Dipika Jain and Payal K Shah, 'Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India' (2020) 39(2) Columbia Journal of Gender and Law 1, 38-40 <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/reimagining-reproductive-rights.pdf>accessed 12 July 2021.

[148] *Joseph Shine* (n 146) [49] (Mishra J).

[149] ibid (Chandrachud J) [61].

[150] ibid (Chandrachud J) [56].

[151] ibid.

[152] This has been the historical position as well, see: Abhinav Sekhri, 'The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India' (2016) Socio-Legal Review <https://docs.manupatra.in/newsline/articles/Upload/544A8DA6-AD05-4DDF-8567-ECFA7B089F1E.pdf> accessed 12 July 2021. (Also note how the provision appears in a chapter dedicated to offences against the institution of marriage.).

opinion was dedicated to examining whether the criminalisation of adultery provision can meet this objective.[153] This implied that the court did, in a limited sense, consider the protection of a marriage a legitimate state goal. Justice Nariman argued that the provision was not meant to preserve the sanctity of marriage but to protect a "*proprietary right of a husband*".[154] Thus, while *Joseph Shine* is rightly heralded for striking down a provision that was obvious in its patriarchal treatment of women, we still see some opinions clinging to arguments that speak to preserving the sanctity of institutions such as marriage.

c. Navtej Singh Johar v. Union of India

In *Navtej Singh Johar v Union of India* (2018) (*hereinafter* Navtej Johar), the constitutional validity of section 377 of the IPC was challenged again before the Supreme Court.[155] With the pronouncement of the Court in *Puttaswamy* already hinting at the incorrectness of *Suresh Koushal*, even the Additional Solicitor, representing the Government of India, did not argue to establish the provision's constitutionality and instead left the question "*to the wisdom*" of the Supreme Court.[156]

The Supreme Court found the provision to be unconstitutional insofar as it criminalised consensual sexual relationships between adults.[157] The four separate opinions relied on varying, and sometimes notably different, reasons for the decision. What separates the concurring opinions is the focus on different aspects of constitutional analysis. Justice Mishra (writing for himself and Justice Khanwilkar), for instance, relied primarily on decisional autonomy as a ground for reading down the provision.[158] They argued that this decisional autonomy, including the right to freely choose one's intimate partner, was an essential part of dignity. Further, the provision was found to be violative of Articles 14 because it legitimised discrimination against the LGBTQIA+ community; and of Article 19 because the restriction had no nexus with a legitimate state goal (the court said that consensual sex in private spaces does not harm decency or morality), and impedes the expression of citizens' identities.[159]

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[153] *Joseph Shine* (n 146) [17]-[24] (Nariman J).

[154] ibid [24].

[155] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

[156] ibid [36] (Misra CJ).

[157] For a discussion on what has not been struck down, see: Vanshaj Jain, 'Guest Post: Navtej Johar v Union of India – What Remains of Section 377?' (Indian Constitutional Law and Philosophy, 10 September 2018) <https://indconlawphil.wordpress.com/2018/09/10/guest-post-navtej-johar-v-union-of-india-what-remains-of-section-377/> accessed 12 July 2021.

[158] *Navtej Johar* (n 155) (Mishra CJ). See also: Gautam Bhatia, ' "Civilization has been brutal": Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement' (Indian Constitutional Law and Philosophy, 6 September 2018) <https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/> accessed on 12 July 2021.

[159] *Navtej Johar* (n 155) [253] (Misra CJ).

Notably, there was no marked emphasis in their opinion on whether the sexual acts belonged in the so-called private sphere. While their opinion did say that the provision "*amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence*", it went on to say that even public displays of affection among members of the LGBTQIA+ community towards their partners (as long as the acts do not amount to public indecency) were permitted.[160]

Justice Nariman largely echoed Justice Misra's analysis of the harms of the provision to the exercise of autonomy and dignity but also attacked the presumed constitutionality of the provision, particularly because it found a place in a colonial-era law.[161] Nariman also concluded that the provision was violative of Article 14 because it could be interpreted as discriminating between homosexual and heterosexual couples without an associated legitimate state aim.[162]

Justice Malhotra held that a person's sexual orientation was intrinsic to their identity and self-expression.[163] Her opinion went on to say that the effect of the provision was to criminalise an entire identity.[164] Relying on *NALSA*, Justice Malhotra argued that Article 15 of the Constitution prohibited state discrimination based on 'sex', which also included sexual identity and orientation.[165] Similar to Justice Misra's reasoning, this opinion also found the provision violative of Articles 14, 15, 19, and 21.[166]

Justice Chandrachud took an egalitarian approach, focusing on establishing that the provisions created discrimination between sets of individuals. Although the provision was 'facially neutral',[167] its effect was that it criminalised a set of identities. Justice Chandrachud's analysis of privacy and liberty was similar to Misra's in that it is centred around individual autonomy and discussed how acting on the basis of one's sexual orientation or expressing the same was an exercise in autonomy.[168] While recognising the right to intimacy and to engage in consensual acts in private, Justice Chandrachud also stated that privacy "*capture[s] the right of persons of the community to navigate public places on their own terms, free from state interference*".[169] This was significant since this substantively attempted to address the public/private dichotomy in queer discourse and asserted that the

[160] ibid [246] (Misra CJ).
[161] ibid [78] (Nariman J).
[162] ibid [94] (Nariman J).
[163] ibid [14.5] (Malhotra J).
[164] ibid [14.3] (Malhotra J).
[165] ibid [15] (Malhotra J).
[166] ibid [14]-[17] (Malhotra J).
[167] *Naz Foundation* (n 82) [94].
[168] *Navtej Johar* (n 156) [149] (Chandrachud J).
[169] ibid.

right to privacy conceptualised within the judgment included the "*public assertion of identity founded in sexual orientation*".[170]

In this varied approach, *Navtej Johar* affirmed the vision of privacy, dignity, and equality as an amalgamation of several interconnected rights identified in the Constitution. In the line of argument that homosexuality is not unnatural, however, the opinions went one step further and fell into the trap of stating that homosexuality was an 'innate' or immutable feature of certain individuals.[171] The immutability argument, as has been argued previously, is at odds with the current application of international human rights law, including the Yogyakarta Principles, since it entraps people in siloed identities, with the underlying narrative that the 'self' is a static, stable subject.[172]

IV. What is the future?

What does the emphasis of *Puttaswamy* on individual liberties mean for all future decisions? How does *Joseph Shine* resolve the tension between marital and individual privacy? Is the *NALSA* pronouncement compatible with the current law? The unifying thread that runs through each of these issues is the struggle for recognition of individual rights against majoritarian moralities that have been codified in legislation, policies, and governance of the state. These struggles and their judicial outcomes also allow us to draw a clear distinction between 'popular morality' — and its several manifestations in struggles for gender justice and queer rights — and 'constitutional morality'.[173] Constitutional morality, as quoted in the *Naz Foundation* case[174] and described by Gautam Bhatia, "*refers to the set of basic political principles that underlie and justify Part III of the Constitution*".[175] This means that if a constitutionally recognised right is to be restricted, the source for those restrictions must come from the Constitution itself.[176]

The Supreme Court has, via several progressive judgments, including in *Anuj Garg* and *NALSA* had the opportunity to do away with the persuasive weight of popular morality on shaping the discourse on fundamental rights. *Puttaswamy* went a step further and footed the fundamental right of privacy

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[170] ibid [60] (Chandrachud J).

[171] Ramya Chandrasekhar, 'Identity as Data: A Critique of the Navtej Singh Johar Case and the Judicial Impetus towards Databasing of Identities' (2019) 12(3-4) NUJS Law Review 1, 14-16 <http://nujslawreview.org/wp-content/uploads/2020/04/12.3-4-Ramya-Chandrasekhar-1.pdf> accessed 12 July 2021; Saptarshi Mandal, 'Section 377: Whose Concerns does the Judgment Address?' (n 88); Gautam Bhatia, ' "Civilization has been Brutal": Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement' (n 158).

[172] ibid.

[173] *Constituent Assembly Debates,* vol 7 (4 November 2018).

[174] *Naz Foundation* (n 82) [79]-[81].

[175] Gautam Bhatia, *Offend, Shock or Disturb: Free Speech Under the Indian Constitution* (OUP 2016) 127.

[176] ibid 127.

within Part III of the Constitution, thereby affirming that a) restrictions on this right would have to flow from the constitutionally recognised limits on its exercise, and b) such limits would have been enacted with the purpose of advancing constitutional morality, which among others, would include avowing to the basic structure of the Constitution, and upholding the anti-subordination principle for historically marginalised groups.[177] Beyond this, amorphous, undefined, majoritarian rationales, therefore, cannot possibly be grounds for infringement of individual rights since they do not derive their sources from any recognised constitutional principles.

A. 'Sanctity' of the Marital Institution

One of the primary oppositions to the application of constitutional law in the 'private' sphere has come from the ostensible defenders of the heterosexual institution of marriage. The continued existence of the MRE embodied within the IPC has seen similar justifications, that is, its deletion would constitute undue interference into the '*marital relationship*'.[178] At the time of authoring this paper, both the RCR and the MRE provision are under constitutional challenges.[179] Previous cases in this area have boiled down to a clash between individual privacy and 'privacy of the home'. *Sareetha* leaned towards the former, while *Harvinder Kaur* and *Saroj Rani* prioritised the latter. Do the new developments resolve this tension?

At the outset, we must consider how marriage is characterised under the current privacy jurisprudence. As discussed earlier, Justice Mishra's opinion in *Joseph Shine,* despite being part of an otherwise progressive judgment, essentially sanctified the marital institution; he considered the introduction of criminal law (with respect to adultery) as an intrusion into the matrimonial sphere. With reference to the MRE, the undertones of this outlook become slightly more pernicious. Any future judgment declaring the MRE unconstitutional would effectively reintroduce criminal law into the marital sphere by holding the husband liable under section 375. This would be a clear contradiction of Justice Mishra's logic.

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[177] ibid 128.

[178] Law Commission (n 81). See also: Standing Committee on Home Affairs, *Report on The Criminal Law (Amendment) Bill, 2012* (2015) Report No 167, 15th Lok Sabha <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/167.pdf> accessed 12 July 2021.

[179] 'Supreme Court to Examine Constitutional Validity of Restitution of Conjugal Rights under the Hindu Marriage Act and Special Marriage Act' (The Leaflet, 5 March 2019) <https://www.theleaflet.in/supreme-court-conjugal-rights-hindu-marriage-act-and-special-marriage-act/#> accessed 12 July 2021; Prarthana Mitra, 'Married Partners can Say "No" to Physical Relations, Observes Delhi High Court' (QRIUS, 18 July 2019) <https://qrius.com/married-partners-can-say-no-to-physical-relations-observes-delhi-high-court/> accessed 12 July 2021.

On the other hand, *Independent Thought*'s refusal to see a marriage at an institutional level was hinged on, among others, the fact that both child sexual abuse and child marriages were made criminal offences by other statutes, and it was the operation of the MRE that "*collaterally legitmize[d]*" these practices.[180]. This partially vindicates my earlier characterisation of the MRE (see section 3): what is otherwise regulated under civil legislation or is made a crime is being legitimised by the MRE, whose operation is underpinned by a moral endorsement of the marital institution.

The factual matrix laid out before the court in *Independent Thought* was slightly different, inasmuch as women below the age of eighteen are concerned, there were separate legislations criminalising conduct that was being otherwise legitimised by the MRE. However, the court's refusal to see a marriage at an institutional level is still instructive for cases when the woman is above the age of eighteen. If the foundation of a marriage is not found in its institutional characteristics, then it must be located, as the court identifies, in the personal attributes of the parties involved. If this is the case, then the fundamental rights of the woman, which would involve her right to bodily integrity, autonomy, and dignity, have to be upheld, irrespective of her marital state. This is strengthened by Justice Chandrachud's opinion in *Joseph Shine*, where he stresses that the identity of a woman is preserved within the marriage[181] and that her autonomy over her own sexuality is constitutionally protected.[182] Finally, consent is a key component of the right to privacy — 'marital' privacy cannot be derived without both parties to the marriage consenting to such an articulation.[183]

If the right to privacy now derives its source from Part III of the Constitution, and if any restrictions on an individual's privacy are be tested against constitutionally established benchmarks *solely*, then this is the clearest rebuttal of the logic deployed in *Harvinder Kaur* and *Saroj Rani*, which had justified (or conceded, by lack of any clear analysis) the curb on individual liberties on furthering the preservation of the 'institution' of marriage. In the face of this evolved jurisprudence of privacy, the burden must now be on the state to justify how such an aim, dismissed in the instance when the woman is less than eighteen years of age, can still be sustained for adult women,[184] and how such an aim would be in furtherance of constitutional morality. Finally, with the emphasis on individual liberties in *Puttaswamy* and the characterisation of spatial privacy as

[180] *Independent Thought* (n 143) [91].

[181] *Joseph Shine* (n 146) [56].

[182] ibid [61].

[183] Agnidipto Tarafder and Adrija Ghosh, 'The Unconstitutionality of the Marital Rape Exemption in India' (2020) 3(2) University of Oxford Human Rights Hub Journal 203, 216 <https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-The-Unconstitutionality-of-the-Marital-Rape-Exemption-in-India-1.pdf> accessed 1 December 2021.

[184] There is a clear equality challenge implicit in this argument as well, but that is beyond the current scope of the paper.

being inhered from these rights, it becomes clear that the domestic sphere cannot be completely warded off from constitutional scrutiny.

Once the operationalising of the MRE becomes unsustainable vis-a-vis this conception of privacy, its impact on the RCR provision also becomes clear. *Sareetha's* recognition that the compelled cohabitation of an unwilling woman with her spouse could lead to unconsenting sexual intercourse was summarily dismissed by the Delhi High Court in *Harvinder Kaur*[185] and never really addressed by the Supreme Court in *Saroj Rani*. Accordingly, this contention still stands implicit in the construction of a spousal demand for RCR, and future courts must confront *Sareetha's* finding on its merits. On the presumption that the MRE *is* unconstitutional, as contended in the previous paragraphs, it is difficult to see how courts could rationalise this finding in *Sareetha* via any other legal provisions, meaning that the only logical outcome should be the courts finding the RCR provision unconstitutional as well.

Ultimately, a woman's private sphere is created as a function of her individual autonomy and not on the virtue of any particular moral or spatial norm. Akin to *Puttaswamy*'s attempted reconciliation between privacy and its feminist criticisms, an argument can be made against the continued existence of the MRE and the RCR, in that they comprise: a) violation of a woman's constitutional rights to bodily sanctity, dignity, and autonomy, and b) a failure of the state's positive obligation to protect and preserve these rights. Accordingly, they are incompatible with the current reading of the right to privacy and should be struck down.

B. Rights of LGBTQIA+ Persons

1. *Transgender Persons (Protection of Rights) Act*

In 2019, the Indian government passed the Transgender Persons (Protection of Rights) Act[186] (*hereinafter* the Trans Act) with the purported aim of protecting the interests of the Indian Transgender community. One of the critical implications of the Trans Act has included the individual being required to obtain a certificate of identity from the District Magistrate for the purposes of the Act.[187] This has rightly faced criticisms for diluting the trans-person's right to self-determination, previously affirmed by *NALSA*.[188] In 2020, the government published

[185] Albeit with some interesting words at its wake, see: *Harvinder Kaur* (n 73) [12] ("*To say that restitution decree 'subject a person by the long arm of the to a positive sex act' is to take the grossest view of the marriage institution.*").

[186] Author's note: As cis-persons, any error in analysis is attributable to the privileged positions they occupy.

[187] The Transgender Persons (Protection of Rights) Act, 2019, s 5.

[188] Kanmani Ray, 'Not just Unconstitutional!' (Medium, 11 July 2020) <https://medium.com/@kanmaniwrites/not-just-unconstitutional-a726401106ba> accessed 24 December 2020; Poorvi Gupta, " 'We are Equal Citizens of this Country" Transgender Community Rejects Bill' Shethepeople (27

the Transgender (Protection of Rights) Rules,[189] which reaffirmed the discretion of the District Magistrate to have the final say in the identification of an individual under the Trans Act. This is proved by the addition of Rule 8, which allows the District Magistrate to reject an application for a certificate of identity.[190]

Together, this legislative approach paves the way for the divesting of the right to identification from the person to the discretion of the District Magistrate. In the context of the pronouncements in *Puttaswamy* and *NALSA,* this is manifestly against the trans person's right to autonomy, dignity, self-determination, and self-identification — all rooted in their constitutional right to privacy. The non-recognition of the trans person's right to self-determination, ironically, also leads to their compelled visibility in the public gaze,[191] further stripping them of their right to a private sphere of their choice, and deepening the existing dichotomies within the queer community: between those who the law privileges with access to a private space, and those who the law does not. As a result, the creation of a private sphere, which should have been otherwise a function of the individual's autonomy, is eroded away in favour of a law clearly against the constitutional morality so espoused by the court.

Additionally, the Trans Act prescribes punishment for sexual abuse as imprisonment for a period between six months and two years.[192] Contrast this with the punishments for sexual abuse committed against a 'woman' within the IPC, extending to life imprisonment in certain cases.[193] What does this hierarchy of offences imply? One, the application of the IPC is somehow restricted when a

November 2019)<https://www.shethepeople.tv/news/rajya-sabha-passes-transgender-bill-amidst-outrage/> accessed 24 December 2020; Vikramaditya Sahai 'The Sexual is Political: Consent and the Transgender Persons (Protection of Rights) Act, 2019' (CLPR, 3 February 2020) <https://clpr.org.in/blog/the-sexual-is-political-consent-and-the-transgender-persons-protection-of-rights-act-2019/> accessed 24 December 2020; Johanna Deeksha, ' "We will not Stop Fighting": TN Transgender Activist, Grace Banu on Recently Passed Transgender Bill, 2019' (EDEXLive, 28 November 2019) <https://www.edexlive.com/news/2019/nov/28/we-will-not-stop-fighting-tn-transgender-activist-grace-banu-on-recently-passed-transgender-bill-9314.html> accessed 24 December 2020.

189 While not immediately within the scope of this paper, any discussions of social justice would be meaningless if we do not pay attention to the material realities within which legislations function. The draft version of the rules was floated for public consultation on April 18, 2020 and comments were due on April 30, 2020. Aside from the abnormally short period of time given to formulate opinions on such an important piece of legislation, the government's choice in publishing this during a raging pandemic and lockdown, is ultimately a travesty of the deliberative process.

190 The Transgender Persons (Protection of Rights) Rules, 2020, r 8.

191 See: Vikramaditya Sahai, 'The Trans Act is a Reflection of Our Broken Democracy' (Huffpost, 9 June 2020) <https://www.huffpost.com/archive/in/entry/transgender-act-2019-reflection-of-broken-indian-democracy_in_5f5468abc5b6946f3eb2ed16?ncid=other_twitter_c0009wqtham&utm_campaign=share_twitter> accessed 12 July 2021.

192 The Transgender Persons (Protection of Rights) Act, 2019, s 18(d).

193 Indian Penal Code, 1860, s 376.

victim is a trans person,[194] and two, abuses committed against a trans person are somehow less grave.[195] Both implications are untenable, not only because they are an affront to the constitutionally recognised dignity and sanctity of the individual but also because they are manifestly arbitrary and would not stand constitutional scrutiny.

2. *Marriages, adoption and social welfare*

If the existence of specific legislations and policies has cast aspersions towards India's realisation of a progressive queer rights jurisprudence, so has their absence. Our personal laws do not recognise same-sex couples' right to marriage, nor of their right to adoption,[196] and previous attempts to remedy this have not been entertained by the apex court in light of the decision in *Navtej Singh Johar*.[197] The Trans Act and the rules are similarly silent on issues of marriage and adoption, despite having chapters dedicated to welfare. Currently, petitions in the Delhi and the Kerala High Courts are pending, arguing that the state's refusal to recognise same-sex marriages violates constitutional rights.[198]

Justice Chandrachud's framing of privacy in *Puttaswamy* as: "*preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation*".[199] is worth considering here. Against the backdrop of an individualist framework of the right, the institutions of 'marriage', 'procreation' and 'the home' are only important because they flow from the exercise of individual autonomy[200] and not due to any inherent value ascribed to them. In such light, a marriage between an LGBTQIA+ couple, or the decision to start a family, or adopt a child, should all be seen as essentially a function of their individual

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[194] See generally: 'A Manifesto for Rights of Trans, Intersex & Gender Non-Binary Indians' (*Sampoorna*, 25 February 2019) <https://sampoornaindiablog.wordpress.com/2019/02/25/a-manifesto-for-rights-of-trans-intersex-gender-non-binary-indians/> accessed 24 December 2020.

[195] See: 'Explained: Transgender Act and How it Affects the Community' (Newslaundry, 25 December 2019) <https://www.youtube.com/watch?v=hSWIzoCBzIY> accessed 12 July 2021.

[196] Prashasti Awasthi Awasthi, 'India's Adoption Policy Discriminative against LQBTQIA+, 20 Million Kids Remain without Family' (The Logical Indian, 10 November 2019) <https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lqbtqia/> accessed 12 July 2021.

[197] *Tushar Nayyar v Union of India* Writ Petition(s)(Criminal) No(s) 176/2018, order dated 29 October 2018.

[198] HT Correspondent, 'Two Same-Sex Couples Move Delhi HC for Recognition of Marriages' *Hindustan Times* (New Delhi, 9 October 2020) <https://www.hindustantimes.com/india-news/two-same-sex-couples-move-delhi-hc-for-recognition-of-marriages/story-gzVejfNsnhCDFRyU7F8huK.html>; Ruth Vanita, 'Marriage Equality is a Constitutional Right, do not Deny it to Same-Sex Couples' *The Indian Express* (4 November 2020) <https://indianexpress.com/article/opinion/columns/marriage-rights-india-same-sex-couples-6929246/> (It must be noted that the scope of the petitions are limited: the Delhi petition only wants such recognition within the framework of the Hindu Marriage Act.).

[199] *Puttaswamy* (n 52) [T.3 (F)] (Chandrachud J).

[200] Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – II: Privacy, the Individual, and the Public/Private Divide' (n 14).

decision-making, which would deserve protection within the rubric of the right to privacy.[201]

Further, a variety of economic and social security legislations, including the Workmen's Compensation Act, 1923 or the Employee Provident Fund Scheme, 1952, bestow special benefits to those who are related by blood or marriage.[202] Married couples also have the benefit of opening joint bank accounts, managing their finances together,[203] or include their partners under life and medical insurance.[204] A heteronormative interpretation of 'marriage' therefore means that LGBTQIA+ couples are consistently excluded from availing these benefits since the law (or its absence, in this case) marks the identity of these couples with disapproval[205] and discriminates against them based on a system of amorphous '*values*'.[206]

Such exclusion is a manifest denial of the dignity and autonomy of an individual in an LGBTQIA+ relationship, and therefore a violation of their constitutional right to privacy. As *Navtej Singh Johar* has established, the ambit of the right to privacy for LGBTQIA+ persons is not simply restricted to the privacy of an individual's bedroom but is extended to the navigation of public spaces and includes the public assertion of such identity. The operationalisation of such a doctrine, accordingly, should foist a positive obligation on the state to ensure that legislations and policies regulating aspects of an individual's life are inclusive and non-discriminatory.[207] In light of this, the continued denial of the recognition of LGBTQIA+ marriages is violative of the privacy doctrine formulated by landmark

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[201] See: Saurabh Kirpal, 'India's Constitution is Ready for Gay Marriage. Are India's Society and Courts?' (*The Print*, 12 September 2020) <https://theprint.in/pageturner/excerpt/indias-constitution-is-ready-for-gay-marriage-are-indias-society-and-courts/501145/> accessed 12 July 2021.

[202] Nayantara Ravichandran, 'Legal Recognition of Same-sex Relationships in India' (2014) 5 Journal of Indian Law and Society 96, 99 <https://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf> accessed 12 July 2021.

[203] Neil Borate, 'Same Sex Couples in India Lack Basic Financial Rights', (*Mint,* 24 June 2019) <https://www.livemint.com/money/personal-finance/same-sex-couples-in-india-lack-basic-financial-rights-1561396839301.html>; Nikhita Venugopal, 'Can Unmarried Heterosexual and Same-Sex Couples Open a Joint Bank Account in India?' (*The News Minute*, 25 January 2019) <https://www.thenewsminute.com/article/can-unmarried-heterosexual-and-same-sex-couples-open-joint-bank-account-india-95633> accessed 12 July 2021.

[204] ibid Borate.

[205] See: *Navtej Singh Johar* (n 155) [118] (Chandrachud, J) ([in quoting *Vriend v Alberta* 1998 SCC OnLine Can SC 29] *"This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society."*).

[206] See: Tanika Godbole, 'India Grapples with Legality of Same-Sex Marriage' (*DW*, 19 October 2020) <https://www.dw.com/en/india-same-sex-marriage-homosexuality/a-55324279> accessed 12 July 2021 (With reference to the petition in Delhi, the solicitor-general has stated that such recognition would be against '*our values*', which can be safely assumed to be a stand-in for endorsement of heterosexual marriages.).

[207] See: *Navtej Singh Johar* (n 155) [125] (Chandrachud, J) ("*The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection.*").

judgments like *Puttaswamy* and *Navtej Singh Johar* and is therefore irreconcilable with the current state policy.

V. Conclusion

This paper has attempted to capture the complexities — theoretical and political — of privacy's place in the struggles for social justice that have characterised the last few decades. The study of the different doctrines and their criticisms have further affirmed this conceptual complication in the court's and the state's rationalisations for granting or taking away the right to privacy. And as has been observed, these rationalisations have often neither been objective nor rooted in constitutional norms.

At the heart of each determination of the right to privacy has also been the question: What is the protection being sought *against?* Or, what is the protection being sought *for*? Even as courts in India have (seemingly) moved away from older, heteronormative, or spatial conceptions of the right, the complexities of this determination have not ceased. The right to privacy has continued to manifest in different ways in each individual struggle. In a contest between individual rights and patriarchal norms within a heterosexual marriage, privacy is to be both a rampart against violations of bodily integrity and a demand from the state to perform its duties. Within queer activism, privacy is to be a shield against the public eye and against compelled visibility, but also a tool for the assertion of one's identity in public. On the one hand, the constitutional right to privacy allows the court to examine individual rights within a marriage; on the other hand, the same right is footed as a source from which social welfare benefits — including marriages — flow for those belonging to marginalised communities.

These contradicting aspects of the right to privacy, however, should not be treated as a basis for doubting its efficacy as an empowering liberty but rather as evidence of the right's multifarious nature. In fact, the few successes that the right to privacy has enjoyed in cases challenging the hetero-patriarchal complex have hinged on the court's willingness to transform the nature of the right in progressive and constitutionally sound ways. It is in its ability to be an expansive shield, encompassing a variety of liberties and protections, does privacy succeed as an important facet of liberal democracy.

I, however, choose to end on a cautionary note. The potential weakness of this paper — and potentially in the doctrinal or theoretical study of privacy as well — lies in its substantial reliance on the textual aspects of the law. The individual is not denied their right to privacy via a singular piece of legislation or document. Rather, vindicating *NALSA's* observation about the moral failure of the society, these violations manifest through a landscape of discriminatory, heteronormative, and majoritarian policies, all encoding the violence faced

by the marginalised and the disenfranchised. Completely footing hopes of liberation on the repeal of particular provisions or legislations would not be sufficient. Unflinching and open criticism of state policy, combined with a progressive state, willing to uphold its democratic values, would be the only way forward.