

**Reproductive Rights in India:  
The Search for a 'New' Constitutional Home**



DPhil Thesis

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## ABSTRACT

### **Reproductive Rights in India: The Search for a ‘New’ Constitutional Home**

Reproductive rights remain deeply contested. Their scope, the duties they impose on the State, their response to conflicting interests, and in some cases their very protection within constitutions are being fiercely debated globally. In India, reproductive rights are not enumerated constitutionally. The Thesis seeks to construct the appropriate constitutional home for reproductive rights in India, to both anchor these rights within the Constitution and define their contours.

In Part I, the Thesis delineates what makes the constitutional home ‘appropriate’. It argues that reproductive rights aim to guarantee ‘real and effective’ reproductive decision-making. Reproductive decision-making ought to be valued because it is undergirded by two sets of interests, those represented by the individual and the social dimensions. The two dimensions are independent yet interrelated. The appropriate constitutional home for reproductive rights must, then, protect both interests and capture their interrelationship.

In Part II, the Thesis examines the existing constitutional home for reproductive rights in India: Article 21, the right to life and personal liberty. The Thesis then adds a second pillar to the home: Article 15, the right to non-discrimination. The Thesis interprets both provisions constitutionally and doctrinally. In turn, it assesses the provisions, so understood, against the normative framing in Part I, to arrive at a key conclusion. Articles 21 and 15, in their roles within the constitutional home, independently protect (or possess the potential to protect) the interests represented by the individual and the social dimensions respectively.

In Part III, the Thesis moves beyond treating the provisions in isolation to viewing them in synthesis. The Thesis illustrates the contributions of the synthesis, in constitutionally grounding reproductive rights, through the use of two examples: abortion and preventable maternal mortality and morbidity. The Thesis shows how the synthesis captures the interrelationship between the individual and social dimensions, to strengthen the constitutional protection granted to reproductive rights, at each stage of analysis: identifying the rights violation, conducting the limitations analysis, interpreting the law, and scoping positive duties on the State. The Thesis, thus, proposes a ‘new’ constitutional home for reproductive rights in India: the synthesis between Article 21 and Article 15.

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BPL	Below Poverty Line
CAD	Constituent Assembly Debates
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CUP	Cambridge University Press
GC	General Comment
GDP	Gross Domestic Product
HIV	Human Immunodeficiency Virus
HUP	Harvard University Press
ICPD	International Conference on Population and Development
IPC	Indian Penal Code
JSSK	Janani Shishu Suraksha Karyakram
JSY	Janani Suraksha Yojana
MA	Medical Abortion
MTPA	Medical Termination of Pregnancy Act
NRHM	National Rural Health Mission
OUP	Oxford University Press
P&H	Punjab and Haryana
PUP	Princeton University Press
STI	Sexually Transmitted Infections
WHO	World Health Organisation

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## INTRODUCTION

It is a surreal moment in time to be writing on reproductive rights. The two-year long pandemic has shown us, better than words could ever capture, how precariously protected reproductive rights are. The pandemic saw States unhesitatingly slashing funding for reproductive services,<sup>1</sup> diverting resource and personnel<sup>2</sup> from an area that already suffers from poor financing.<sup>3</sup> This directly translated into reduced access to safe abortions, contraception, HIV/STI testing, ante-natal care and skilled assisted childbirth, causing death and morbidity amongst pregnant women.<sup>4</sup> As two authors note,

When a crisis brings about such rapid reversals in services, benchmarks and commitments, and sees services overwhelmingly needed by women classed as ‘non-essential’, it is clear that the underlying norms around choice, bodily autonomy and the rights of women, girls and gender-diverse people have not meaningfully changed.<sup>5</sup>

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<sup>1</sup> Zara Ahmed et al, ‘Nine Things Congress Must Do to Safeguard Sexual and Reproductive Health in the Age of COVID-19’ (Guttmacher Institute 2020) <<https://www.guttmacher.org/article/2020/04/nine-things-congress-must-do-safeguard-sexual-and-reproductive-health-age-covid-19>> accessed 20 May 2022; Karen McVeigh, “‘Out of Trump Playbook’: UK Accused of ‘Abandoning’ Women with Cuts to Aid’ *The Guardian* (12 April 2021) <<https://www.theguardian.com/global-development/2021/apr/12/uk-aid-cuts-trump-playbook-maternal-deaths-abortion-women-girls-creasy-ippf>> accessed 20 May 2022.

<sup>2</sup> ‘The Effects of COVID-19 on Sexual and Reproductive Health: A Case Study of Six Countries’ (reliefweb) <<https://reliefweb.int/report/world/effects-covid-19-sexual-and-reproductive-health-case-study-six-countries>> accessed 20 May 2022 (‘Case Study’); Michelle Lokot and Yeva Avakyan, ‘Intersectionality as a Lens to the COVID-19 Pandemic: Implications for Sexual and Reproductive Health in Development and Humanitarian Contexts’ (2020) 28 *Sexual and Reproductive Health Matters* 1764748.

<sup>3</sup> Fiona Samuels and Megan Daigle, ‘Sexual and Reproductive Health and Rights after Covid-19’ (ODI 2021) 1 <<https://cdn.odi.org/media/documents/ODI-PB-SRHR.pdf>> accessed 20 May 2022.

<sup>4</sup> Trena I Mukherjee et al, ‘Reproductive Justice in the Time of COVID-19: A Systematic Review of the Indirect Impacts of COVID-19 on Sexual and Reproductive Health’ (2021) 18 *Reproductive Health* 252; Case Study (n 2).

<sup>5</sup> Samuels and Daigle (n 3) 1.

Predictably, women from marginalised groups—adolescent refugee girls, disabled women of lower caste, homeless trans\* youth, or migrant workers from minority ethnicities—were the worst affected.<sup>6</sup>

India was no exception to this global trend, with the pandemic sparking a ‘reproductive health crisis’.<sup>7</sup> India recorded a sharp increase in deaths from severe obstetric complications,<sup>8</sup> compromised access to abortion to 1.85 million women during just the first three months of the pandemic,<sup>9</sup> and a drastic fall in the use of contraception.<sup>10</sup> As one report shockingly concludes,

non-supply, human resource issues and lack of access will lead to 26 million couples in India facing unmet need for contraception...This will result in 2.4 million unintended pregnancies; 1.45 million abortions, out of which more than half would end up being unsafe; and more than 1700 excess maternal deaths.<sup>11</sup>

The effects are only exacerbated amongst women from marginalised groups, ‘amplifying existing gender inequalities and the intersecting forms of gender disadvantage faced by those negotiating myriad aspects of the current crisis’.<sup>12</sup> The pandemic thus exposed existing fault lines and

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<sup>6</sup> Nadjé Al-Ali, ‘Covid-19 and Feminism in the Global South: Challenges, Initiatives and Dilemmas’ (2020) 27 *European Journal of Women’s Studies* 333; Lokot and Avakyan (n 2); Case Study (n 2); Samuels and Daigle (n 3); Jashodhara Dasgupta et al, ‘Axes of Alienation: Applying an Intersectional Lens on the Social Contract during the Pandemic Response to Protect Sexual and Reproductive Rights and Health’ (2020) 19 *International Journal for Equity in Health* 130; Jenny Birchall, ‘Covid-19, Gender and Intersectionality’ (Institute of Development Studies) <<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/16745/Covid19%20Gender%20and%20Intersectionality%20Resource%20Guide.pdf?sequence=3>> accessed 20 May 2022.

<sup>7</sup> ‘COVID-19 Lockdowns Spark a “Reproductive Health Crisis” in India’ *Oxford Population Health* (29 July 2021) <<https://www.ndph.ox.ac.uk/news/covid-19-lockdowns-spark-a-2018reproductive-health-crisis2019-in-india>> accessed 20 May 2022.

<sup>8</sup> Manisha Nair, MaatHRI writing group, and on behalf of the MaatHRI collaborators, ‘Reproductive Health Crisis during Waves One and Two of the COVID-19 Pandemic in India: Incidence and Deaths from Severe Maternal Complications in More than 202,000 Hospital Births’ (2021) 39 *EClinicalMedicine* 101063.

<sup>9</sup> Sruthi Chandrasekaran et al, ‘Preparing for an Increased Need for Abortion Access in India during and after COVID-19: Challenges and Strategies’ (2020) 51 *Studies in Family Planning* 377.

<sup>10</sup> Kranti Suresh Vora, Shahin Saiyed and Senthilkumar Natesan, ‘Impact of COVID-19 on Family Planning Services in India’ (2020) 28 *Sexual and Reproductive Health Matters* 1785378.

<sup>11</sup> *ibid.*

<sup>12</sup> Jashodhara Dasgupta, ‘Has India’s Covid Policy Response Actually Helped Women, or Is It All Just Smoke and Mirrors?’, *Essays on Equality* (King’s College London 2021) 32 <<https://www.kcl.ac.uk/giwl/assets/essays-on-equality-december-2021.pdf>> accessed 20 May 2022.

inequities, ‘sustained and reproduced by the underlying historical, social, political and cultural contexts that shape access to [sexual and reproductive health]’.<sup>13</sup>

At the same time, the legal landscape on reproductive rights, especially the right to abortion, has witnessed exponential global shifts recently. Through courts and (or) the legislature, the law, in some States, has taken resounding leaps towards recognising and protecting reproductive rights,<sup>14</sup> while in other States has rolled back (or is threatening to roll back) existing meagre protection.<sup>15</sup> Domestic constitutions are key players in this contestation, determining, at the outset, whether reproductive rights are even recognised, and, in turn, influencing their scope, the nature of duties they impose on the State and the institutions responsible for their protection. In one sense, constitutions may not be the best instruments to occupy the role of the legal linchpin in guaranteeing reproductive rights:

Women have not, in general, written or agreed to constitutions...More recently, women have had some voice in constitutive processes, but nowhere near half of the

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<sup>13</sup> Rishita Nandagiri, Ernestina Coast, and Joe Strong, ‘COVID-19 and Abortion: Making Structural Violence Visible’ (2020) 46 *International Perspectives on Sexual and Reproductive Health* 83; Manisha Dutta, Drishti Agarwal and M Sivakami, ‘The “Invisible” among the Marginalised: Do Gender and Intersectionality Matter in the Covid-19 Response?’ (2020) 05 *Indian Journal of Medical Ethics* 302; Debadrita Chakraborty, ‘The “Living Dead” within “Death-worlds”: Gender Crisis and Covid-19 in India’ (2021) 28 *Gender, Work & Organization* 330.

<sup>14</sup> Mónica Arango Olaya, ‘The Fundamental Right to Abortion in Colombia’ (*Oxford Human Rights Hub*, 10 March 2022) <<https://ohrh.law.ox.ac.uk/the-fundamental-right-to-abortion-in-colombia/>> accessed 21 May 2022; Isabel Fulda, ‘The Green Tide Floods the Mexican Supreme Court’ (*Oxford Human Rights Hub*, 29 September 2021) <<https://ohrh.law.ox.ac.uk/the-green-tide-floods-the-mexican-supreme-court/>> accessed 21 May 2022; Stephanie Slader and Kelle Howson, ‘New Zealand’s Abortion Law Reform’ (*Oxford Human Rights Hub*, 5 April 2020) <<https://ohrh.law.ox.ac.uk/new-zealands-abortion-law-reform/>> accessed 21 May 2022; Sunhye Kim, ‘“If Abortion Is a Crime, the State Is the Criminal”: The Role of Reproductive Justice Movements in Challenging South Korea’s Abortion Ban’ (*Oxford Human Rights Hub*, 27 July 2021) <<https://ohrh.law.ox.ac.uk/if-abortion-is-a-crime-the-state-is-the-criminal-the-role-of-reproductive-justice-movements-in-challenging-south-koreas-abortion-ban/>> accessed 21 May 2022; Jane Rooney and Sheelagh McGuinness, ‘The Abortion (Northern Ireland) Regulation 2020’ (*Oxford Human Rights Hub*, 1 April 2020) <<https://ohrh.law.ox.ac.uk/the-abortion-northern-ireland-regulation-2020/>> accessed 21 May 2022; Tom Phillips, ‘Argentina Legalises Abortion in Landmark Moment for Women’s Rights’ *The Guardian* (30 December 2020) <<https://www.theguardian.com/world/2020/dec/30/argentina-legalises-abortion-in-landmark-moment-for-womens-rights>> accessed 21 May 2022.

<sup>15</sup> Kelly Davis and Alise Powell, ‘Valuable or Viable: Reproductive Justice and the Texas Abortion Ban’ (*Oxford Human Rights Hub*, 9 September 2021) <<https://ohrh.law.ox.ac.uk/valuable-or-viable-reproductive-justice-and-the-texas-abortion-ban/>> accessed 21 May 2022; *Thomas Dobbs v Jackson Women’s Health Organisation* (1<sup>st</sup> draft, United States Supreme Court) <<https://www.politico.com/f/?id=00000180-874f-dd36-a38c-c74f98520000>> accessed 21 May 2022 (*Dobbs*); Atina Krajewska, ‘Reproductive Rights and Democracy in Poland’ (*Oxford Human Rights Hub*, 2 November 2020) <<https://ohrh.law.ox.ac.uk/reproductive-rights-and-democracy-in-poland/>> accessed 21 May 2022.

clout. With exceptions, dominant men have largely interpreted constitutions, and have overwhelmingly confined debates they deem authoritative on them, to terms they set.<sup>16</sup>

Tellingly, many constitutions make no explicit reference to reproductive rights.<sup>17</sup> This silence has prompted courts to question whether constitutional protection extends *at all* to these rights,<sup>18</sup> shutting the door on women's claims at the very threshold.

The Indian Constitution is one such instrument. Drafted over a two-year period in the late 1940s, the Constitution makes no textual reference to reproductive rights. However, in contrast to courts in comparative constitutional contexts, the absence of an explicit right has rarely deterred courts in India from recognising it, with several unenumerated rights being housed by courts within existing constitutional rights. Or, more accurately, *an* existing constitutional right: the right to life and personal liberty under Article 21.

Article 21 guarantees that '*no person* shall be deprived of *life* and *personal liberty* except according to procedure established by law'.<sup>19</sup> Initially, 'life' and 'personal liberty' were understood as limited to issues of arrest and detention. As KM Munshi recounted in the Constituent Assembly, 'liberty of the person' means that 'nobody can be convicted, sent to jail or be sentenced to death without due process of law. *That is the narrow meaning of this clause*'.<sup>20</sup> The early jurisprudence

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<sup>16</sup> Catharine A MacKinnon, 'Foreword' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism* (CUP 2012) ix ('Foreword').

<sup>17</sup> Some constitutions, in contrast, do make reference to reproductive rights. For instance, The Constitution of the Republic of South Africa 1994, ss 12(2) and 27(1)(a); Constitution of Kenya 2010, art 26(4).

<sup>18</sup> For instance, *Dobbs* (n 15) 5.

<sup>19</sup> Constitution of India 1950, art 21 (emphasis added).

<sup>20</sup> KM Munshi, Constituent Assembly of India Debates ('CAD') (Volume VII, 6 December 1948) [7.67.230] (emphasis added).

on Article 21 was similarly limited, with the meanings of ‘life’ and ‘personal liberty’ confined to issues of bodily restraint and coerced detention.<sup>21</sup>

However, the scope of Article 21 was, with time, ‘radically redefin[ed]’ through repeated references to the idea of ‘dignity’ and life as being ‘more than mere animal existence’ to go beyond arrest and detention.<sup>22</sup> In *Francis Coralie Mullin*,<sup>23</sup> for instance, the Supreme Court observed:

The fundamental right to life [must] *be interpreted in a broad and expansive spirit* so as to invest it with significance and vitality which may endure for years to come and *enhance the dignity of the individual and the worth of the human person.*<sup>24</sup>

Through such interpretative expansion, several rights, otherwise unenumerated within the Constitution,<sup>25</sup> were brought within the ambit of Article 21. These include a right to shelter,<sup>26</sup> education,<sup>27</sup> food,<sup>28</sup> healthy environment including fresh air and water,<sup>29</sup> health,<sup>30</sup> privacy,<sup>31</sup> and self-determination in the context of sexual orientation<sup>32</sup> and gender identity.<sup>33</sup>

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<sup>21</sup> See for example in *AK Gopalan v State of Madras* AIR 1950 SC 27 (*‘AK Gopalan’*); S.P Sathe, ‘India: From Positivism to Structuralism’ in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (OUP 2007) 231.

<sup>22</sup> Anup Surendranath, ‘Life and Personal Liberty’ in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 756.

<sup>23</sup> *Francis Coralie Mullin v Union of India* (1981) 1 SCC 608.

<sup>24</sup> *ibid* [6] (emphasis added).

<sup>25</sup> Part III of the Constitution of India sets out enforceable Fundamental Rights.

<sup>26</sup> *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 (*‘Olga Tellis’*).

<sup>27</sup> *Unnikrishnan v State of Andhra Pradesh* AIR 1993 SC 2187.

<sup>28</sup> *People’s Union for Civil Liberties v Union of India* AIR 1982 SC 1473 (*‘PUCL’*).

<sup>29</sup> *MC Mehta v Union of India* AIR 1987 SC 695.

<sup>30</sup> *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426 (*‘Paschim Banga’*).

<sup>31</sup> *KS Puttaswamy v Union of India* (2017) 10 SCC 1 (*‘Puttaswamy’*).

<sup>32</sup> *Nartej Singh Johar v Union of India* AIR 2018 SC 4231 (*‘Nartej Johar’*).

<sup>33</sup> *National Legal Services Authority v Union of India* (2014) 5 SCC 438 (*‘NALSA’*).

Following this trend, courts have also housed reproductive rights within Article 21. ‘Life’ and ‘personal liberty’ have been interpreted to include a constellation of rights relevant in a reproductive context, including the right to reproductive choice<sup>34</sup> or reproductive autonomy,<sup>35</sup> the right to self-determination and the right to privacy,<sup>36</sup> the right to bodily integrity,<sup>37</sup> and the right to reproductive health.<sup>38</sup> This jurisprudence has been described as ‘extremely progressive’<sup>39</sup> and ‘trailblazing’.<sup>40</sup>

On the one hand, the willingness of Indian courts to move beyond the silences in the constitutional text to locate reproductive rights within Article 21 ought to be appreciated. It speaks to underlying theories of constitutional interpretation guiding courts in India,<sup>41</sup> and the constitutional conception of the role of courts in protecting rights.<sup>42</sup> However, on the other hand, it is important to acknowledge that the struggle does not end with simply grounding the right within the Constitution. In fact, the constitutional recognition of unenumerated rights is only the first step. The next steps—identifying the nature and scope of the right, the duties it imposes on States, and how it responds to conflicting interests—are equally, if not more, crucial. They determine the strength of constitutional protection offered to the right, and more importantly in

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<sup>34</sup> *Suchitra Srivastava v Chandigarh Administration* (2009) 9 SCC 1 (‘*Suchitra Srivastava*’).

<sup>35</sup> *Meera Santosh Pal v Union of India* (2017) 3 SCC 462 (‘*Meera Santosh Pal*’).

<sup>36</sup> *Puttaswamy* (n 31).

<sup>37</sup> *Z v Bihar* (2018) 11 SCC 572.

<sup>38</sup> *Laxmi Mandal v Deen Dayal Harinagar Hospital* (2010) 172 DLT 9 (‘*Laxmi Mandal*’).

<sup>39</sup> Jayna Kothari, Maya Unnithan and Siri Gloppen, ‘A Half-Written Promise’ *The Hindu* (23 April 2019) <<https://www.thehindu.com/opinion/op-ed/a-half-written-promise/article26914712.ece>> accessed 20 May 2022.

<sup>40</sup> ‘Reproductive Rights in Indian Courts’ (Centre for Reproductive Rights) <<https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf>> accessed 20 May 2022.

<sup>41</sup> Chintan Chandrachud, ‘Constitutional Interpretation’ in Khosla, Mehta, and Choudhury (eds) (n 22) (‘Constitutional Interpretation’).

<sup>42</sup> Vikram Aditya Narayan and Jahnvi Sindhu, ‘A Historical Argument for Proportionality under the Indian Constitution’ (2018) 2 *Indian Law Review* 51.

the context of reproductive rights, whether women—and especially, *which* groups of women—are able to claim the right as their own. These next steps are significantly shaped by *where* the right is located, or, as I call it, the ‘constitutional home’ of the right.

Set against the heightened fragility of reproductive rights, and accompanied by the urgent global deliberation on the role of constitutional law in guaranteeing these rights, this Thesis asks: does Article 21, *independently*, offer an appropriate constitutional home for reproductive rights in India? In critically interrogating the role of Article 21, the Thesis identifies its strengths in framing reproductive rights, but also recognises its weaknesses. Using these as its inflection point, the Thesis searches the Constitution for an accompaniment to Article 21, which preserves its contributions while remedying its deficiencies. The Thesis lands at the door of the right to non-discrimination under Article 15,<sup>43</sup> a novel jurisprudential step in India, as discussed below. Reading Articles 21 and 15 in synthesis, the Thesis arrives at the ‘new’ constitutional home for reproductive rights in India. By ‘new’, I do not mean that the Thesis eschews the ‘old’ home, Article 21. Instead, on the one hand, the Thesis harnesses Article 21’s contributions, while supplementing it with

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<sup>43</sup> Constitution of India 1950, art 15:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 15 to remedy its shortcomings. On the other, the Thesis draws on Article 21 to respond to Article 15's limitations. The 'new' home is, thus, built on the synthesis between the provisions.

Before moving to how the Thesis makes and establishes these claims, it is important to define what the Thesis understands by 'reproductive rights'. In constitutionally recognising reproductive rights, courts in India have not defined them. So, I look externally for the definition.

## I. Defining Reproductive Rights

The most internationally accepted definition of reproductive rights was adopted at the International Conference on Population and Development ('ICPD') in 1994,<sup>44</sup> which identified reproductive rights as embracing human rights already recognised internationally and domestically.

More specifically:

These rights rest on the recognition of the basic rights of all couples and individuals to *decide freely and responsibly the number, spacing and timing of their children* and to have the *information and means* to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.<sup>45</sup>

This definition resembled older definitions adopted by the 1968 Final Act of the Tehran Conference on Human Rights<sup>46</sup>—'parents have a basic human right to *decide freely and responsibly on the number and spacing* of children and a right to *adequate education and information* in this respect'—and the 1975 Declaration of Mexico on the Equality of Women and

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<sup>44</sup> The ICPD definition was adopted by the United Nations General Assembly in UNGA Res 49/128 (8 February 1995) UN Doc A/RES/49/128; 'Reproductive Rights Are Human Rights' (United Nations Office of the High Commission for Human Rights, UNFPA, Danish Institute for Human Rights 2014) 27 <<https://www.ohchr.org/sites/default/files/Documents/Publications/NHRIHandbook.pdf>> accessed 20 May 2022 ('Reproductive Rights Are Human Rights') ('The generally acknowledged definition of reproductive rights is taken from the ICPD Program of Action'); Cf Corinne Packer, 'Defining and Delineating the Right to Reproductive Choice' (1998) 67 *Nordic Journal of International Law* 78-81.

<sup>45</sup> Program of Action adopted by the International Conference on Population and Development Cairo (5-13 September 1994) [7.3] <[https://www.unfpa.org/sites/default/files/pub-pdf/programme\\_of\\_action\\_Web%20ENGLISH.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf)> accessed 21 May 2022 (emphasis added).

<sup>46</sup> Final Act of the International Conference on Human Rights Tehran (22 April-13 May 1968) UN Doc A/CONF.32/41, endorsed by the General Assembly in UNGA Resolution 2442 (XXIII) (19 December 1968) (emphasis added).

their Contribution to Development and Peace—'[e]very couple and every individual has the right to *decide freely and responsibly whether or not to have children* as well as to determine their number and spacing and to have the *information, education and means* to do so'.<sup>47</sup> The ICPD definition was, in turn, endorsed within the Convention on Elimination for Discrimination Against Women 1979.<sup>48</sup> The Beijing Declaration and Platform for Action 1995 also defined reproductive rights as the right to 'have *control over and decide freely and responsibly* on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence'.<sup>49</sup> Similar language was, once again, used in the 2012 Amman Declaration and Programme of Action,<sup>50</sup> and by the Committee on Economic, Social and Cultural Rights in 2016.<sup>51</sup> Crucially, this understanding continues to hold purchase even today: 'In [the] 20 years since these

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<sup>47</sup> Report of the World Conference of the International Women's Year Mexico City (19 June-2 July 1975) UN Doc E/CONF. 66/34, principle 12 (emphasis added).

<sup>48</sup> Convention on the Elimination of all forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 ('CEDAW'), art 16(1)(e) guarantees women equal rights in deciding 'freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'.

<sup>49</sup> Beijing Declaration and Platform for Action (1995) [95] <[https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/PFA\\_E\\_Final\\_WEB.pdf](https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/PFA_E_Final_WEB.pdf)> accessed 21 May 2022, adopted by the General Assembly in UNGA Res 50/203 (1995) UN Doc A/RES/50/203 (emphasis added).

<sup>50</sup> Amman Declaration and Programme of Action adopted by the Eleventh International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Amman Jordan (5-7 November 2012) [25] <[https://www.ihrec.ie/app/uploads/download/pdf/icc\\_of\\_nhris\\_ammandeclarationandprogrammeofaction2012.pdf](https://www.ihrec.ie/app/uploads/download/pdf/icc_of_nhris_ammandeclarationandprogrammeofaction2012.pdf)> accessed 21 May 2022.

<sup>51</sup> United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No 22 on the right to sexual and reproductive health' (2 May 2016) E/C.12/GC/22 [5]:

The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to *make free and responsible decisions and choices*, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include *unhindered access to a whole range of health facilities, goods, services and information*, which ensure all people full enjoyment of the right to sexual and reproductive health (emphasis added).

definitions were adopted the language referring to reproductive rights...has not been substantially altered'.<sup>52</sup>

Three features stand out across these definitions. At the outset, the central aim of reproductive rights is clear: to guarantee reproductive decision-making, by allowing individuals to make reproductive decisions 'freely and responsibly'. At the same time, reproductive decision-making is 'very broadly defined'.<sup>53</sup> It spans across a range of reproductive decisions: whether or not to have children at all, the number, spacing and timing of children, and the woman's health during reproduction. The definition thus 'paves the way for an *integrated, comprehensive model of programmes and services* that includes full antenatal and obstetric care, infertility treatment, breastfeeding, prevention and treatment of gynaecological cancers, HIV and other STDs, as well as a wide range of family planning methods and counselling', all part of a 'seamless fabric'.<sup>54</sup> And, it requires the State not just to abstain from intervening in reproductive decision-making but to act positively to guarantee to *all* individuals, including members of marginalised groups, the 'means' (including education and information) to make these decisions 'freely'.<sup>55</sup>

Thus, reproductive decision-making, as understood by this definition of reproductive rights, does not resemble traditional, liberal reproductive 'choice'. It is not restricted only to decisions to not have children, facilitated through access to contraception and abortion. Rather, it also protects decisions *to have* children, facilitated, for instance, through access to timely and quality

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<sup>52</sup> Sonia Corrêa, 'Reproductive and Sexual Rights: Transnational Trends from a Global South Perspective', *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier 2015).

<sup>53</sup> Rosalind P. Petchesky, 'Reproductive and Sexual Rights: Charting the Course of Transnational Women's NGOs' (2000) 15 <<https://www.files.ethz.ch/isn/38676/OP%20008b.pdf>> accessed 20 May 2022.

<sup>54</sup> Rosalind Pollack Petchesky, 'From Population Control to Reproductive Rights: Feminist Fault Lines' (1995) 3 *Reproductive Health Matters* 154 ('Feminist Fault Lines') (emphasis added); *Reproductive Rights are Human Rights* (n 44) 23.

<sup>55</sup> *Reproductive Rights Are Human Rights* (n 44) 23; Tedros Adhanom Ghebreyesus and Natalia Kanem, 'Defining Sexual and Reproductive Health and Rights for All' (2018) 391 *The Lancet* 2584.

obstetric care, and arguably forms of State support in childrearing. And, reproductive decision-making, so understood, rejects the notion of the negative State at the heart of liberal reproductive choice.<sup>56</sup> It is instead built on a ‘positive vision’ of the State,<sup>57</sup> coupling reproductive decision-making with ‘enabling rights’ to ensure that choice is not ‘illusory’ but ‘meaningful and complete’.<sup>58</sup> In essence, this conception of reproductive rights seeks to guarantee ‘real and effective’ reproductive decision-making by protecting a wide basket of reproductive decisions and offering ‘thick’ (as opposed to ‘thin’) protection to these decisions through requiring State facilitation.

As will be seen across Chapters 2, 4 and 5, the constitutional conception of reproductive rights in India closely mirrors the definition discussed above. It extends protection to a wide range of reproductive decisions—‘reproductive choices can be exercised to procreate as well as to abstain from procreating’<sup>59</sup>—and envisages the State as bearing positive duties to facilitate these decisions.<sup>60</sup> Recognising this congruence, the Thesis, in referring to reproductive rights, understands them as set out above.

## II. Central Argument

The Thesis advocates a shift from Article 21 alone to the synthesis between Articles 21 and 15 as the ‘new’ constitutional home for reproductive rights in India. In making this claim, the Thesis is divided into three parts.

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<sup>56</sup> Robin West, ‘From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights’ (2009) 118 *The Yale Law Journal*.

<sup>57</sup> Sandra Fredman, *Comparative Human Rights Law* (OUP 2019) 60.

<sup>58</sup> Packer (n 44) 85; Cf Petchesky, *Feminist Fault Lines* (n 54) critiquing the conferences for conferring positive duties on the State in theory but failing to give them teeth through offering directions on resource allocation.

<sup>59</sup> *Suchitra Srivastava* (n 34) [11].

<sup>60</sup> See Chapter 2, Part III; Chapter 5, Part III.

Part I, 'The Foundation', sets in place the normative backbone of the Thesis. Chapter 1 interrogates why reproductive decision-making ought to be valued. It identifies that reproductive decision-making is undergirded by two independent yet interrelated sets of interests, represented by the individual and the social dimensions. The individual dimension has an identity and a bodily component. Together, they represent an individual's interest in reproductive decision-making *because* such decision-making is central to an individual's sense of self, a function of the interaction between one's body and mind. The social dimension has a historical and an intersectional component. They represent a woman's interest in reproductive decision-making *because* women, as a group, have been denied such decision-making within the patriarchal institution of motherhood, perpetuating their historical disadvantage. They also note that such denial takes different forms depending on women's membership of other social groups. The two dimensions are independent: they identify two distinct interests as underlying reproductive decision-making, justifying the value that ought to be attributed to it. The two dimensions are however also interrelated: they reinforce the value that ought to be attributed to reproductive decision-making by women, and guarantee it to them in a 'real and effective' fashion by acknowledging and redressing group-based disadvantage. As reproductive decision-making is undergirded by the two interests, and constitutional reproductive rights aim to guarantee 'real and effective' reproductive decision-making, the appropriate constitutional home for reproductive rights must be capable of protecting both these interests and capturing their interrelationship. This sets the stage for Parts II and III.

Part II, 'The Pillars', conducts a constitutional and doctrinal analysis of Articles 21 and 15, the doctrinal pillars which build on the normative foundation to hold up the constitutional home. Chapter 2 parses through India's reproductive rights jurisprudence under Article 21 to show how, in constitutionally grounding reproductive rights, Article 21's 'right to life' and 'personal liberty' clauses protect the interests represented by the individual dimension. Chapter 2 also argues that Article 21 cannot and should not be interpreted to protect the interests represented by the social

dimension: it cannot because such interpretation is at odds with Article 21's constitutional role; and it should not because such interpretation would dilute the core of Article 21's protection, which is not only undesirable but also unnecessary if there is another constitutional provision that can perform this role. Thus, Article 21's constitutional protection for reproductive rights, while important, remains incomplete. Chapter 3 then introduces Article 15 to remedy Article 21's deficiencies. Through an exercise in constitutional interpretation, Chapter 3 identifies the conception of equality underlying Article 15 as substantive equality. It develops a conceptual response to pregnancy and reproduction reflecting substantive equality. It then builds a doctrinal reading of Article 15 mirroring this conceptual account. It demonstrates how this conceptual and doctrinal approach to pregnancy and reproduction under Article 15, when introduced within the constitutional home for reproductive rights, possesses the potential to protect the interests represented by the social dimension. Finally, in line with the argument in Chapter 2, Chapter 3 argues that Article 15 cannot and need not be interpreted to protect the interests represented by the individual dimension. Such interpretation would be inconsistent with Article 15's constitutional role, and is unnecessary when Article 21 exists within the constitutional scheme. Overall, Part II shows that Articles 21 and 15, in their independent roles within the constitutional home, protect the interests represented by the individual and the social dimension respectively.

Part III, 'The Synthesis', shifts from looking at the provisions in isolation to examining their interaction within the constitutional home. To illustrate this, Part III uses two examples: India's law on abortion in Chapter 4 and the prevailing high rates of maternal mortality and morbidity in India in Chapter 5. Together, the two chapters highlight how the synthesis strengthens the constitutional protection offered to reproductive rights. The synthesis performs this role by *first*, identifying the whole range and full extent of rights violation occurring when reproductive decision-making is denied. *Second*, by radically transforming the scope of positive duties on the State to guarantee reproductive rights. *Third*, in expansively interpreting India's law

on abortion. And *fourth*, through giving teeth to the limitations analysis; the synthesis smokes out stereotypical assumptions about women underlying the State's proportionality defense, and seeks from the State particularly stringent justifications for failing to perform its positive duties. Crucially, at each of the above four stages, reading Articles 21 and 15 in synthesis takes the constitutional protection granted to reproductive rights further than Article 21 acting alone does, a clear illustration of the power of the synthesis. Finally, in their conclusions, both Chapters revisit the normative framing in Chapter 1, to show how the synthesis captures the interrelationship between the individual and social dimensions. Through the example of abortion, Chapter 4 demonstrates how the synthesis reaffirms the constitutional weight granted to reproductive decision-making by women. Using the example of preventable maternal mortality and morbidity, Chapter 5 points to the centrality of acknowledging and redressing group-based disadvantage in guaranteeing women 'real and effective' reproductive decision-making, and the role of the synthesis, as the constitutional tool, in enabling such redressal. The synthesis, then, independently protects the interests represented by the individual and the social dimension *and* captures their interrelationship. In conclusion, the synthesis offers the appropriate constitutional home for reproductive rights in India.

### **III. Central Contribution**

Gender equality-based arguments for reproductive rights are not unprecedented. Existing arguments represent a range of standpoints, and can be located on a spectrum. Some argue that the denial of forms of healthcare that only women need—abortion or obstetric care—amounts to sex discrimination.<sup>61</sup> Others point out that laws restricting women's reproductive decision-making

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<sup>61</sup> Emilia Ordolis, 'Lessons from Colombia: Abortion, Equality, and Constitutional Choices' (2008) 20(2) Canadian Journal of Women and the Law 269; Patricia Palacios Zuloaga, 'Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?' (2021) 21 Human Rights Law Review 899.

impair women's abilities to be 'equally autonomous...in relation to a man',<sup>62</sup> and deny them the 'dignity of equal community membership'.<sup>63</sup> Some observe that these laws 'reflect constitutionally suspect assumptions about women...traditional sex-role stereotypes about care-giving or decision-making around motherhood'.<sup>64</sup> Yet others argue that such laws establish and perpetuate women's structural subordination,<sup>65</sup> so that when 'women are forced into maternity, they are reproductively exploited'.<sup>66</sup> Others identify that these laws have a disproportionate adverse impact on adolescent, poor, rural, and indigenous women, and displaced victims of internal conflict.<sup>67</sup> Finally, some also present equality arguments which do not see the denial of reproductive decision-making as gendered, but still identify the constitutionally suspect forms of differential treatment underlying such denial.<sup>68</sup>

Some authors regard an equality-based approach to reproductive rights as displacing liberty (or privacy) as a constitutional frame. These authors identify the 'privacy-related liberty argument [as] seriously flawed, and perhaps even antagonistic to ideals of gender equality and full citizenship for women', especially for women from marginalised groups,<sup>69</sup> and present equality as a 'superior

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<sup>62</sup> Ruth B. Ginsburg, 'Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*' (1985) 63 *North Carolina Law Review* 375; Kenneth Karst, 'Foreword- Equal Citizenship Under the Fourteenth Amendment' (1977) 91 *Harvard Law Review* 58; Laurence H Tribe, *Abortion: The Clash of Absolutes* (Norton 1992) 105.

<sup>63</sup> Joanna Erdman, 'In the Back Alleys of Health Care: Abortion, Equality and Community in Canada' (2007) 56 *Emory Law Journal* 1099.

<sup>64</sup> Reva Siegel and Neil Siegel, 'Equality Arguments for Abortion Rights' (2013) 160 *UCLA Law Review Discourse* 161; Reva Siegel, 'Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression' (2007) 56(4) *Emory Law Journal* 815 ('Sex Equality').

<sup>65</sup> S Law, 'Rethinking Sex Equality and the Constitution' (1984) 132 *University of Pennsylvania Law Review* 962; Frances Olsen, 'Unraveling Compromise' (1989) 103 *Harvard Law Review* 105; Joanna N Erdman, 'The Gender Injustice of Abortion Laws' (2019) 27 *Sexual and Reproductive Health Matters* 4.

<sup>66</sup> Catherine MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100 *The Yale Law Journal* 1317 ('Reflections'); Zuloaga (n 61).

<sup>67</sup> Ordolis (n 61) 270.

<sup>68</sup> Donald Regan, 'Rewriting *Roe v. Wade*' (1979) 77 *Michigan Law Review* 1569; Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (OUP 1996).

<sup>69</sup> Ruth Colker, 'Equality Theory and Reproductive Freedom' (1994) 3 *Texas Journal of Woman and the Law*.

alternative'.<sup>70</sup> In contrast, others argue that equality is deficient in framing reproductive rights: as women can become pregnant and men cannot, pregnancy-related regulation does not even raise, they claim, concerns of equality.<sup>71</sup> Some also point out that seeing abortion as necessary for women's equality devalues pregnancy by requiring women to give up parenthood (through abortion) to be treated as equals.<sup>72</sup> These authors advocate developing a 'liberty framework' to constitutionally ground reproductive rights.<sup>73</sup> Yet others see equality rights, on their own, as running the risk of 'reinforcing discourses of victimhood, motherhood and disadvantage'.<sup>74</sup>

At this point, one conclusion becomes immediately clear. The role played by equality and liberty (or privacy) as the constitutional home for reproductive rights depends on the constitutional conception of equality and liberty (or privacy). If equality is understood as formal equality and liberty as traditional liberal reproductive choice, then neither offers a helpful constitutional basis to ground reproductive rights. This, then, brings me to the first central contribution of this Thesis.

Through rigorous constitutional interpretation, which relies on a combination of interpretative techniques, the Thesis arrives at the constitutional conception of 'life' and 'personal

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<sup>70</sup> Ruth Colker, 'An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class' (1991) 1991 *Duke Law Journal* 356-57 ('Equal Protection Analysis'); Cass Sunstein, 'Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)' (1992) 92 *Columbia Law Review* ('Neutrality'); Catharine MacKinnon, 'Privacy v. Equality: Beyond Roe v. Wade', *Feminism Unmodified* (HUP 1987) 93, 97 ('Beyond Roe v Wade'); Sanda Rodgers, 'Misconceptions: Equality and Reproductive Equality in the Supreme Court of Canada' in Sheila McIntyre and Sanda Rodgers (eds), *Diminishing returns: inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis Butterworths 2006) 271-78.

<sup>71</sup> David Smolin, 'Why Abortion Arguments Are Not Justified by Reference to Gender Equality' (1990) 23 *John Marshall Law Review* 638-641; Robert John Araujo, 'Abortion from Privacy to Equality: The Failure of the Justifications for Taking Human Life' (2009) 45 *Houston Law Review* 1739; Mary Wilcox, 'Why the Equal Protection Clause Cannot "fix" Abortion Law' (2008) 7 *Ave Maria Law Review* 307.

<sup>72</sup> Kristina Mentone, 'When Equal Protection Fails' (2002) 70 *Fordham Law Review* 2657; Jennifer Hendricks, 'Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion' (2009) 45 *Harvard Civil Rights-Civil Liberties Law Review* ('Body and Soul'); Erika Bachiochi, 'Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights' (2011) 34(3) *Harvard Journal of Law & Public Policy* 889.

<sup>73</sup> Hendricks, *Body and Soul* (n 72) 329.

<sup>74</sup> Catherine Albertyn, 'Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts' (2019) 1 *Oxford Human Rights Hub Journal* 103.

liberty' underlying Article 21, and equality underlying Article 15. It then applies these conceptions to reproductive rights. This approach is unique for several reasons. *First*, it conducts a thorough constitutional interpretation of the two rights, drawing on a range of interpretative techniques. *Second*, it identifies a constitutional account of the two rights indigenous to India, which then provides a platform to engage with existing arguments on the use of equality or privacy to ground reproductive rights. *Third*, it establishes an anchor for current and future jurisprudence, on reproductive rights and beyond. Some interpretations of Articles 21 and 15 tend to reflect liberal choice and formal equality respectively. By clarifying how the Constitution understands these provisions, the Thesis throws weight behind one line of jurisprudence over the other, restraining the provisions from being interpreted otherwise. *Fourth*, in applying the carefully developed constitutional conceptions to reproductive rights, the Thesis marks new ground. So far, both courts<sup>75</sup> and authors<sup>76</sup> have endorsed housing reproductive rights within Article 21, highlighting its strengths as the constitutional home. The Thesis agrees; it shows, through constitutional interpretation and doctrinal investigation, how reproductive decision-making under Article 21 does not resemble traditional liberal reproductive choice. At the same time, the Thesis goes one step forward. It unveils where Article 21 falls short in grounding reproductive rights, even though it surpasses the limitations of liberal reproductive choice. It thus carves out a role for equality, even when liberty (or privacy) is understood affirmatively. Coming to equality, the Thesis' contributions are especially crucial: '[Indian] courts have primarily addressed [reproductive] rights as a matter of life and personal liberty but have yet to robustly address [it] as an issue of equality and non-discrimination'.<sup>77</sup> The Thesis is the first work to develop a doctrinal reading of Article 15 which

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<sup>75</sup> See Chapter 2, Part II.

<sup>76</sup> For instance, Severyna Magill, 'The Right to Privacy and Access to Abortion in a Post Puttaswamy World' (2020) 3 University of Oxford Human Rights Hub Journal 160; Aparna Chandra, 'Privacy and Women's Rights' [2017] Economic and Political Weekly 5.

<sup>77</sup> 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] Columbia Journal of Gender and Law 12.

reflects a substantive equality approach to pregnancy and reproduction, offering an argumentative blueprint for future courts.<sup>78</sup> While there is a nascent line of literature discussing the implications of an equality-based approach to reproductive rights in India,<sup>79</sup> it does not conduct a comprehensive conceptual, constitutional, and doctrinal analysis, which, in contrast, lies at the heart of the Thesis. This literature also focuses solely on abortion while the Thesis also analyses preventable maternal mortality and morbidity. Through the two distinct examples, the Thesis doubly affirms the independent contributions of an equality lens. *Fifth*, the Thesis offers methodological insights on reading unenumerated rights into the Constitution in India and beyond, requiring decision-makers to thoughtfully choose the existing rights within which the unenumerated right is housed.

As the next step, the Thesis assesses Articles 21 and 15, so understood, against the normative framing on reproductive rights developed in Chapter 1. The Thesis shows that in constitutionally grounding reproductive rights, the former protects the interests represented by the individual dimension and the latter those represented by the social dimension. If so, *both* Articles 21 and 15 are necessary, in constitutionally framing reproductive rights. This aligns with the conclusion of some authors who argue that we cannot ‘choose between privacy and equality justifications’ for reproductive rights.<sup>80</sup> In turn, they advocate including equality as an ‘additive’ to liberty (or privacy):<sup>81</sup> ‘the mechanics of integrating [equality] claims into the existing [liberty]

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<sup>78</sup> Some authors have conducted a *general* substantive equality reading of Article 15. See Ratna Kapur, ‘Gender Equality’, in Khosla, Mehta and Choudhury (eds) (n 22) 743; Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins Publishers India 2019) 3-74 (*‘Transformative Constitution’*). However, none of these authors have focused specifically on pregnancy and reproduction.

<sup>79</sup> Jain and Shah (n 77); Dipika Jain, ‘Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach’ (2019) 12 NUJS Law Review 21.

<sup>80</sup> Annabelle Lever, *A Democratic Conception of Privacy* (Author House 2015), ch 4.

<sup>81</sup> Anita Allen, ‘The Proposed Equal Protection Fix For Abortion Law: Reflections on Citizenship, Gender, and the Constitution’ (1995) 18 Harvard Journal of Law & Public Policy 420.

framework...shows how *both* lines of analysis are necessary and appropriate to a complete understanding of abortion'.<sup>82</sup>

The Thesis, itself, however goes one step further, which is its second central contribution. In highlighting the role of both equality and liberty, the Thesis does not simply add Article 15 to Article 21, including it within the constitutional home as an extra set of arguments for reproductive rights. Rather, the Thesis builds the constitutional home on the *synthesis* between Articles 21 and 15, drawing out how the two provisions interact with one another to strengthen the constitutional protection offered to reproductive rights. Some authors hint at this approach. Schneider, writing in the context of the United States, proposes a 'synergy of equality and privacy', responding to 'deep flaws' in how both rights have been interpreted within the United States Constitution.<sup>83</sup> Considering that India's constitutional conceptions of both rights differ drastically, Schneider's arguments are not helpful, except as a starting point. More instructive are Robert's<sup>84</sup> conceptual account of the 'connection' between privacy and equality, and Brodsky and Day's suggested use of equality as an 'interpretative filter'.<sup>85</sup> However, as Karlan points out, the challenge still remains: 'to apply [the] principle that both privacy and equality are necessary to *concrete cases*'.<sup>86</sup> Building on these theoretical accounts, and using two concrete examples, the Thesis carefully develops the

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<sup>82</sup> E Daly, 'Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood' (1995) 45 *The American University Law Review* 83 (emphasis added); Agustina Ramón Michel, 'Abortion: More Than Criminalization, Not Yet Women's Constitutional Right' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (OUP 2022) 815-16; Laurel Grelewicz, 'Equality and Abortion in Post-Apartheid South Africa: Inspiration for Choice Advocates in the United States' (2011) 13 *Oregon Review of International Law* 189; Paola Bergallo and Agustina Ramón Michel, 'Constitutional Developments in Latin American Abortion Law' (2016) 135 *International Journal of Gynecology & Obstetrics* 228.

<sup>83</sup> Elizabeth M. Schneider, 'The Synergy of Equality and Privacy in Women's Rights' [2002] *University of Chicago Legal Forum* 142.

<sup>84</sup> Dorothy Roberts, 'Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy' [1991] *Faculty Scholarship at Penn Law* 1370.

<sup>85</sup> Gwen Brodsky and Shelagh Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law* 213.

<sup>86</sup> Pamela Karlan, 'Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment' (2002) 33 *McGeorge Law Review* 476 (emphasis added).

role of the synthesis as the ‘new’ constitutional home for reproductive rights. It identifies both the independent contributions of Articles 21 and 15, and the effect of their interaction on the extent of rights violation identified, the interpretation accorded to the law, the limitations analysis conducted, and the duties imposed on the State to guarantee constitutional reproductive rights.

#### **IV. Scope of Argument**

At the outset, the Thesis raises questions about whether it interrogates reproductive rights only with respect to women, or is more general in its scope. On the one hand, the individual dimension and its constitutional manifestation—Article 21—focus on individuals generally, and pregnant persons specifically, identifying the close relationship between reproductive decision-making and an individual’s sense of self, which is a function of the interaction between an individual’s body and mind. To this extent, the Thesis speaks to the value of reproductive decision-making to an individual as an individual, and is general in its scope. On the other hand, the social dimension and its constitutional manifestation—Article 15—narrow in on the individual as a member of a group; here, women, who have been historically disadvantaged by being denied reproductive decision-making within the patriarchal institution of motherhood, with this disadvantage varying in its nature and extent depending on their membership within other groups. At this point, the Thesis intentionally restricts its scope to women as a group, in recognition of the heightened value of reproductive decision-making to women, a product of their historical disadvantage within patriarchal motherhood.

The use of the category ‘woman’ has been subject to critique, for defining women on ‘the basis of shared experiences, political goals, and similar behaviors and bodily features’<sup>87</sup>—thus, essentialising them<sup>88</sup>—and for failing to recognise the diversity in women’s experiences—thus,

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<sup>87</sup> Natalie Stoljar, ‘Essence, Identity, and the Concept of Woman’ (1995) 23(2) *Philosophical Topics* 282.

<sup>88</sup> Elizabeth V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press 1988).

homogenising them.<sup>89</sup> The Thesis explicitly resists both these trends. In response to the essentialist critique, the Thesis treats women as a ‘cluster concept’, avoiding the appeal to a ‘nominal essence which requires that we delimit a set of necessary and sufficient features which members of the type must have’.<sup>90</sup> The cluster concept of ‘woman’, instead, includes different features:

[Firstly], female sex [which] includes having the characteristics of a human female (XX chromosome, sex characteristics, and general morphology) and having other bodily characteristics such as gait or voice quality. Secondly, a range of phenomenological features, or aspects of what it feels like to be a woman, are typically associated with women: for example, physical feelings, like having menstrual cramps and female sexual experience, and the “lived experience” of child- birth, breast-feeding, or at least the potential to have such lived experience. The phenomenology also includes feelings which are the product of social factors, like fear of walking on the streets at night or fear of rape. Thirdly, there are roles such as wearing typical female dress, or being oppressed on the basis of one’s sex, or typically undertaking “private” responsibilities like child-rearing rather than “public” responsibilities in the wider community. Finally, there are self-attributions and the attributions of others which occur as a result of the physical and other features that I have identified: calling oneself a woman and being called a woman.<sup>91</sup>

Across women as a group, various features of the concept cluster together, such that ‘[we] see a complicated network of similarities, overlapping and crisscrossing: sometimes over- all similarities, sometimes similarities of detail’.<sup>92</sup> Crucially, this understanding captures the ‘actual felt similarities’ amongst women,<sup>93</sup> the everyday realities that ‘position them as women’:<sup>94</sup>

Composed of all its variations, the group women has a collective social history of disempowerment, exploitation, and subordination extending to the present. To be treated like a women is to be disadvantaged in these ways as an incident of being assigned to the female sex. To speak of social treatment “as a woman” is thus not to

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<sup>89</sup> Chandra Talpade Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003) 22.

<sup>90</sup> Stoljar (n 87) 283.

<sup>91</sup> *ibid* 284.

<sup>92</sup> *ibid* 283.

<sup>93</sup>*ibid* 286.

<sup>94</sup> Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (PUP 1997) 29 (*Intersecting Voices*).

invoke any universal essence or homogeneous generic or ideal type, but to refer to this diverse material reality of social meanings and practices.<sup>95</sup>

Understanding ‘woman’ this way means that the Thesis takes an expressly anti-essentialist position: ‘We can talk about “women” without thereby assuming that “women” is the only thing that these persons are, or that “woman” is a fixed category’.<sup>96</sup> It also implies that the boundaries of ‘womanhood’ remain porous and open, such that specific features—like the biological ability to become pregnant, or historical disadvantage—remain essential to the concept of ‘woman’ without being essential to *being* an individual woman.<sup>97</sup> The Thesis thus does not exclude trans\* persons from the group ‘woman’, including within the group ‘alternative ways in which [the term woman is] used in trans subcultures’.<sup>98</sup> At the same time, the Thesis does not focus specifically on their reproductive experiences, which may differ from those of cis-gender women.<sup>99</sup> Instead it provides a normative and doctrinal framework on reproductive rights which can, in later work, be adapted and applied to reproductive decision-making by trans\* persons. The Thesis also responds to the homogenisation critique by intentionally adopting, in its normative and doctrinal framing, an intersectional lens, refusing to treat women, their reproductive decisions, and the role of the State in facilitating them, as a monolithic unit. The Thesis thus sidesteps the common pitfalls associated with the analytical category ‘woman’, while retaining both its intrinsic value—in recognising the ‘reality of women’s ‘woman-ness’<sup>100</sup>—and its instrumental value, as a political basis for collective

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<sup>95</sup> MacKinnon, Reflections (n 66) 1299; For an overview of different understandings of the category ‘woman’, see Mari Mikkola, ‘Feminist Perspectives on Sex and Gender’ (Stanford Encyclopaedia of Philosophy 2022) <<https://plato.stanford.edu/entries/feminism-gender/#WomGro>> accessed 20 May 2022.

<sup>96</sup> Lena Gunnarsson, ‘A Defence of the Category “Women”’ (2011) 12 Feminist Theory 32.

<sup>97</sup> Stoljar (n 87) 282.

<sup>98</sup> TM Bettcher, ‘Trans Women and the Meaning of ‘Woman’ in Nicholas Power, Raja Halwani and Alan Soble (eds), *The philosophy of sex: contemporary readings* (6th ed, Rowman & Littlefield Publishers 2013) 235.

<sup>99</sup> Claire E Lunde et al, ‘Beyond the Binary: Sexual and Reproductive Health Considerations for Transgender and Gender Expansive Adolescents’ (2021) 3 Frontiers in Reproductive Health 670919; Kenny Rodriguez-Wallberg et al, ‘Reproductive Health in Transgender and Gender Diverse Individuals’ [2022] International Journal of Transgender Health 1.

<sup>100</sup> Gunnarsson (n 96) 34.

feminist struggle.<sup>101</sup> This explains why the Thesis uses the term ‘woman’ rather than ‘pregnant person’, wherever appropriate.

The second scope-related question is about the choice of concrete cases used in Chapters 4 and 5. The Thesis relies on the examples of abortion and preventable maternal mortality and morbidity because the majority of India’s reproductive rights jurisprudence has been based on these two themes. At the same time, there are compelling substantive reasons for why they are powerful examples to illustrate the Thesis’ central claim. They highlight the interplay between ‘life’, ‘personal liberty’ and discrimination in two distinct factual contexts, yet arriving at similar conclusions. They invoke a range of State responses, from protecting women and preserving foetal potentiality, to considerations of resource shortage and institutional competency. And, they place both negative and positive duties on the State, showcasing the role of the synthesis in each context. The normative and doctrinal analysis in the Thesis could certainly extend to other reproductive themes: contraception and sterilisation, fertility treatment, surrogacy, or State support for parenting. However the specific contours of the arguments in these contexts is beyond the scope of this Thesis; they present possible areas for future work.

## **V. Methodology**

The Thesis employs normative and doctrinal methods in advancing its arguments. In developing its normative standpoint on why reproductive decision-making *ought to be* valued, the Thesis relies on three theoretical bodies on literature: feminist theory on pregnancy and reproduction; reproductive justice theory on the reproductive experiences of women from marginalised groups; and liberal political theory, which the Thesis utilises critically, making an effort to retain what it contributes while explicitly deviating from several of its central assumptions.

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<sup>101</sup> *ibid*; Young, *Intersecting Voices* (n 94) 20.

Drawing from these accounts, I arrived at an initial theoretical framework, or the first principles. These were then tested against two distinct sources. *First*, existing empirical (qualitative and quantitative) literature recording the reproductive experiences of women in India, to develop a ‘normative reflection that is historically and socially contextualized’.<sup>102</sup> And *second*, the relevant judicial doctrine on Articles 21 and 15. The initial account was revised in light of the conclusions that emerged from this assessment. The revised account was then tested once again against these sources, and subsequently revised. This discursive back and forth amongst the theory, the experiences and the doctrine—inspired by the Rawlsian reflective equilibrium<sup>103</sup>—was continued until ‘as wide [a] coherent whole as possible [was] reached’,<sup>104</sup> which forms the normative foundation of the Thesis.

In relying on existing empirical literature, I am aware of the limitations of this method, such as lack of control over the quality of the data or the environment in which the research took place.<sup>105</sup> To mitigate the effects of these limitations, I refer to several sources, across different geographical areas and demographics. Further, the data is not reduced to a simple numerical form, but is used only to set the context.

The Thesis uses the doctrinal method to conduct ‘rigorous analysis and creative synthesis, [through] the making of connections between seemingly disparate doctrinal strands, and...extracting general principles from an inchoate mass of primary materials’.<sup>106</sup> Beyond the

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<sup>102</sup> Iris Marion Young, *Justice and the Politics of Difference* (PUP 1990) 5 (*‘Justice’*).

<sup>103</sup> John Rawls, *A Theory of Justice* (1st edn, OUP 1971) 20, 48–51; Using this method, see Shreya Atrey, *Intersectional Discrimination* (1st edn, OUP 2019) 26-7.

<sup>104</sup> Eric Brandstedt and Johan Brännmark, ‘Rawlsian Constructivism: A Practical Guide to Reflective Equilibrium’ (2020) 24 *The Journal of Ethics* 358.

<sup>105</sup> Emma Smith, ‘Pitfalls and Promises: The Use of Secondary Data Analysis in Educational Research’ (2008) 56 *British Journal of Educational Studies* 320; Deborah Grady et al, ‘Research Using Existing Data’ in Stephen B Hulley (ed), *Designing clinical research* (3rd ed, Lippincott Williams & Wilkins 2007) 192.

<sup>106</sup> ‘Statement on the Nature of Research’ (Council of Australian Law Deans 2005) 3 <<https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf>> accessed 21 May 2022, cited

Constitution and applicable legislation, the Thesis draws on cases from the Supreme Court of India and State High Courts. I arrived at the initial list of cases by using relevant search terms<sup>107</sup> to parse through Indian case-law databases.<sup>108</sup> I then cross-checked the list with recent casebooks on reproductive rights in India,<sup>109</sup> to ensure that it was comprehensive. Once I had a final list, I carefully read through all the cases to discern trends in interpretation, as described below.

Typically, per the doctrine of *stare decisis*, Supreme Court decisions are binding on State High Courts,<sup>110</sup> and in effect on later Supreme Court benches of either the same or lower bench strength.<sup>111</sup> High Court decisions from a specific State are, in contrast, not binding on High Courts of other States (or the Supreme Court), though they may be referred to in decision-making. However, unless explicitly specified, in using cases the Thesis does not attempt to cull out the binding principle of law on a given issue, which depends on the precedential value of cases. Rather, the Thesis draws on cases as points of principle, using individual cases (or a line of cases) to illustrate a specific trend in interpretation. In this sense, the Thesis does not retain a vertical, hierarchical structure, where the interpretation by the Supreme Court is treated as supreme. Instead, the Thesis places all cases on a horizontal plane, acknowledges the courts they come from,

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in Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 111.

<sup>107</sup> For instance, 'reproductive rights', 'abortion', 'maternal mortality', 'termination of pregnancy', 'maternal death', 'obstetric care', 'equality', 'non-discrimination', 'gender', 'stereotypes' and combinations of these.

<sup>108</sup> For instance, Manupatra, Indiankanoon, and SCCOnline.

<sup>109</sup> For instance, Aparna Chandra et al, 'Securing Reproductive Justice in India: A Casebook' (2019) <<https://reproductiverights.org/securing-reproductive-justice-in-india-a-casebook/#:~:text=Securing%20Reproductive%20Justice%20in%20India%3A%20A%20Casebook%20brings%20together%20judgements,securing%20reproductive%20justice%20for%20women.>> accessed 21 May 2022 ('Casebook').

<sup>110</sup> Constitution of India 1950, art 141.

<sup>111</sup> *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673 [12]; *Sub-Committee of Judicial Accountability v Union of India* (1992) 4 SCC 97 [5]; Discussing this rule, see Shrutanjaya Bhardwaj and Ayush Baheti, 'Precedent, *Stare Decisis* and the Larger Bench Rule: Judicial Indiscipline at the Indian Supreme Court' (2022) 6 Indian Law Review 58.

brings them into conversation with one another, and discerns patterns in interpretation, which are then traced back to the constitutional role of a given provision where appropriate. This ‘horizontal’ method of reading cases also has a temporal component. The Thesis explores cases from the point of introduction of the Constitution (or relevant legislations) to the present day, without treating recent cases as more authoritative simply because they are later in time. Rather, irrespective of when the cases were decided, they are used (once again) to illustrate identified trends instead of dictate the binding position of law. This also means that the Thesis, in its final form, may not cite *all* applicable cases in the area. Instead, it showcases a range of trends—drawn from its initial review of cases—which underlie the arguments made, and refers to cases relevant to *these* trends. At the same time, the Thesis does not cherry-pick by identifying only trends that support its claims. Instead, it explicitly engages with trends that run contrary to its arguments, while reasoning why they ought not be treated as authoritative lines of interpretation.

In its doctrinal analysis, the Thesis focuses on India, specifically on interpreting the Constitution of India. India’s international obligations, including those on reproductive rights,<sup>112</sup> form an interpretative framework for constitutional analysis.<sup>113</sup> While the arguments in this Thesis are located compatibly with these obligations, the Thesis does not specifically employ international law as a tool for constitutional interpretation. Instead, it looks *within* the Constitution, to its text, history and structure,<sup>114</sup> to interpret it. Through this, the Thesis builds a robust internal reading of the Constitution, which can then support not just reproductive rights but other rights on which international law may be less explicit. In some contexts, this also allows the Thesis to go further than international law currently does. For instance, some argue that reproductive rights under

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<sup>112</sup> For a comprehensive review of India’s international obligations with respect to reproductive rights, including under the CEDAW (n 48), see Chandra et al, Casebook (n 109) 6-11.

<sup>113</sup> Lavanya Rajamani, ‘International Law and the Constitutional Schema’ in Khosla, Mehta and Choudhury (eds) (n 22) 143-60.

<sup>114</sup> On methods of constitutional interpretation adopted, see Chapter 2, Part IV(A).

international law are motivated by public health and harm reduction concerns, failing to ‘affirm reproductive autonomy within a fully integrated understanding of mutually reinforcing reproductive rights’.<sup>115</sup> In contrast, the Thesis cements the place of reproductive decision-making within the Constitution, acknowledging its public health implications, but intentionally going beyond it. Similarly, within a comparative constitutional context, it might be easy to see the Thesis as simply responding to developments in the United States on reproductive rights.<sup>116</sup> I do not deny the relevance of Thesis’ arguments to these developments. However, the Thesis is, simultaneously, both more local—rooted firmly within the Indian Constitution—and more global—in effect, speaking to several constitutional players beyond the United States—in its reach.

Finally, the feminist legal method runs through the Thesis. In developing its normative foundation and conducting its doctrinal analysis, the Thesis explicitly asks the ‘woman question’.<sup>117</sup> It identifies bias against women built into legal rules that appear ‘neutral and objective’ and exposes how the law excludes women’s experiences.<sup>118</sup> At the same time, it goes beyond issues of gender bias to unveil other bases of exclusion: ‘What assumptions are made by law about whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible and peripheral? How might excluded viewpoints be identified and taken into account?’<sup>119</sup> To bring into legal discourse these excluded perspectives—thus ‘expand[ing] and transform[ing] the law’s common

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<sup>115</sup> Albertyn (n 74) 89, 90-97; See also Joanna Erdman, ‘Abortion in International Human Rights Law’ in Sam Rowlands (ed), *Abortion Care* (CUP 2014) 248.

<sup>116</sup> See (n 15).

<sup>117</sup> Katherine Bartlett, ‘Feminist Legal Methods’ (1990) 103(4) *Harvard Law Review* 829.

<sup>118</sup> Lydia A. Clougherty, ‘Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability’ (1996) 75(1) *Nebraska Law Review* 3; Heather Ruth Wishik, ‘To Question Everything: The Inquiries of Feminist Jurisprudence’ (1985) 1(1) *Berkeley Journal of Gender, Law & Justice*.

<sup>119</sup> Bartlett (n 117) 848.

knowledge about the world'<sup>120</sup>—the Thesis relies on empirical literature documenting women's reproductive experiences, as described above. Through this, the Thesis embodies a process of 'feminist consciousness raising', creating knowledge by 'exploring common experiences and patterns that emerge from shared telling of life events': 'What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression'.<sup>121</sup>

Some might argue that the standpoint adopted by the Thesis is 'overtly political', going 'far beyond the "neutral" [method] of ascertaining the facts and law and applying one to the other'.<sup>122</sup> To respond briefly, in asking the 'woman question' the Thesis does not pretend to be neutral or apolitical; in fact, it identifies neutrality itself as a political choice of preserving the status quo which benefits some groups over others.<sup>123</sup> No stance, then, is *really* neutral. At the same time, in asking the 'woman question' the Thesis also does not propose a results-oriented method. It does not mandate a decision in favour of women. Nor does it place undue emphasis on the rights of women. Instead, it gives them *due* emphasis, which the law often does not (as the examples on abortion and preventable maternal mortality and morbidity will show). It demands that the decision-maker pay attention to a 'set of interests and concerns that otherwise may be, and historically have been, overlooked',<sup>124</sup> the inclusion of which may *or* may not modify the overall result. And, it requires that the decision-maker screen legal rules for pernicious assumptions about women, to arrive at a

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<sup>120</sup> Rosemary Hunter, 'Analysing Judgments from a Feminist Perspective' <[https://sas-space.sas.ac.uk/5840/1/Rosemary\\_Hunter\\_Analysing\\_Judgments\\_from\\_a\\_Feminist\\_Perspective\\_LIM.pdf](https://sas-space.sas.ac.uk/5840/1/Rosemary_Hunter_Analysing_Judgments_from_a_Feminist_Perspective_LIM.pdf)> accessed 21 May 2022.

<sup>121</sup> Bartlett (n 117) 849.

<sup>122</sup> *ibid* 844.

<sup>123</sup> Sunstein, *Neutrality* (n 70) 3-12; Bartlett (n 117) 847.

<sup>124</sup> Bartlett (n 117) 846.

decision that does not reflect these assumptions.<sup>125</sup> The Thesis thus unapologetically remains an exercise in ‘feminist constitutionalism’:

examining, challenging, and redefining the very idea of constitutionalism from a feminist perspective<sup>126</sup>...[by asking] whether the state and the law, its quintessential tool, are socially hegemonically male in ways that, at the least, call for investigation of the container as well as the content.<sup>127</sup>

From this position of intellectual and ideological transparency, I now move to Chapter 1.

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<sup>125</sup> *ibid.*

<sup>126</sup> Beverley Baines, Daphne Barak-Erez and Tsvi Kahana, ‘Introduction’ in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism* (CUP 2012) 1; Baines Beverley and Rubio-Marin Ruth, ‘Feminist Constitutionalism in Canada’ in Peter Oliver et al (ed), *The Oxford Handbook of the Canadian Constitution*, vol 1 (OUP 2017) 966.

<sup>127</sup> MacKinnon, Foreword (n 16) x.

**PART I**  
**THE FOUNDATION**

## CHAPTER 1

### **Independent yet Interrelated: The Individual and Social Dimensions**

#### **I. Introduction**

In the Introduction, the Thesis located reproductive decision-making at the core of reproductive rights: constitutional reproductive rights seek to guarantee ‘real and effective’ reproductive decision-making. In this Chapter, I ask a central question that follows: why should reproductive decision-making be valued? I argue, in the sections below, that reproductive decision-making ought to be valued because it is undergirded by two sets of interests represented by the individual and the social dimensions. The individual dimension represents an individual’s interest in reproductive decision-making because such decision-making is central to an individual’s sense of self, a function of the interaction between one’s body and mind. The social dimension represents a woman’s interest in reproductive decision-making because women, as a group, have been denied such decision-making within the patriarchal institution of motherhood, perpetuating their historical disadvantage. Such denial takes different forms depending on women’s membership of other social groups. The two dimensions are independent: they identify two distinct interests as underlying reproductive decision-making. The two dimensions are also interrelated: they reinforce the value that ought to be attributed to reproductive decision-making by women, and guarantee it to them in a ‘real and effective’ fashion by acknowledging and redressing group-based disadvantage. This Chapter forms the normative backbone of the Thesis. As reproductive decision-making is undergirded by two interests, and constitutional reproductive rights aim to ensure ‘real and effective’ reproductive decision-making, the appropriate constitutional home for reproductive rights must be capable of protecting both these interests and capturing their interrelationship.

In proposing a conception of the individual and social dimension, my starting point is feminist theory on pregnancy and reproduction which uses similar formulations. I find Petchesky’s

framing to be the most persuasive. Petchesky identifies the two ‘essential ideas’ underlying a ‘feminist account of reproductive freedom’. The first, which Petchesky terms the ‘individual dimension’, is derived from the:

*biological connection between women's bodies, sexuality, and reproduction.* It is an extension of the general principle of “bodily integrity,” or “bodily self-determination,” to the notion that women must be able to control their own bodies and procreative capacities—that is, the reproductive and sexual uses to which their bodies are put.<sup>128</sup>

The second, which Petchesky calls the ‘social dimension’, offers a ‘historical argument’ based on the ‘social position of women’: ‘under the existing division of labor between the sexes, [women] are the ones most affected by pregnancy, since they are still the ones responsible for the care and rearing of children’, generating reproductive freedom as a ‘socially determined need’.<sup>129</sup> Petchesky’s social dimension thus emphasises the ‘historical agency of social groups’, recognising that:

Social divisions, based on differing relationships to power and resources, mediate the institutional and cultural arrangements through which biology, sexuality, and reproduction among human beings are expressed.<sup>130</sup>

Petchesky acknowledges that while at a preliminary level the social dimension speaks to gender relations, it also extends beyond gender to race and class relations, and their intersection with gender.<sup>131</sup> Rapp and Ginsburg similarly identify reproduction relations as embedded within local and global ‘social arrangements’. The local social arrangements refer to everyday activities—kinship, marriage, inheritance patterns, and rituals—through which power is structured and enacted. The global social arrangements touch upon the ‘intersecting interests of states and other powerful institutions such as multinational and national corporations, international development agencies, and religious groups as they construct the contexts within which local reproductive

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<sup>128</sup> Rosalind Petchesky, ‘Reproductive Freedom: Beyond a Woman’s Right to Choose’ (1980) 5(4) Summer 662-63 (‘Reproductive Freedom’) (emphasis added).

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.* 674.

<sup>131</sup> *ibid.* 674-75.

relations are played out'.<sup>132</sup> For Almeling, reproduction is a biological process—affecting genes, cells and organs—and an individual process—impacting a person's identity, experience and embodiment. At the same time, it is also a 'social process', that is 'interactional'—involving family, friends, educators, employers and clinicians—and 'historical, structural, and cultural'—involving states, markets, medicine, media, religions, social movements, and cultural norms.<sup>133</sup> Along the same lines, Murphy sees reproduction as both 'material'—involving the body—and 'political' or 'social', with questions of 'state, race, freedom, individuality, and economic prosperity' being bound up with the material.<sup>134</sup> Tremayne similarly highlights the biological aspects of procreation and the 'broader social and cultural context of reproduction', with the latter speaking to the 'relationship between power, reproduction, and gender' which affects the interaction between individuals, the community, and the State.<sup>135</sup>

Across these accounts, the individual dimension emerges primarily from the biological component of pregnancy, specific to each individual person with the ability to become pregnant. The social dimension, in contrast, locates reproduction within broader relations of power, a product of the cooperation between the State and the institutions of marriage and family (and the division of labour within it), the neo-liberal market, the international development agenda, and religion. Most accounts also identify patriarchy, racism and capitalism (amongst others) as lying at the root of these specific manifestations of power. In other words, they point to group membership and its role in distributing power and resources, which in turn affects one's experiences of reproduction. Crucially, these accounts also emphasise the 'necessity of a

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<sup>132</sup> Rayna Rapp and Faye Ginsburg, 'The Politics of Reproduction' (1991) 20 *Annual Review of Anthropology* 312.

<sup>133</sup> Rene Almeling, 'Reproduction' (2015) 41 *Annual Review of Sociology* 431.

<sup>134</sup> Michelle Murphy, *Seizing the Means of Reproduction: Entanglements of Feminism, Health, and Technoscience* (Duke University Press 2012) 6.

<sup>135</sup> Soraya Tremayne, 'Introduction: Special Issue on Fertility and Reproduction' (2000) 31 *Journal of the Anthropological Society of Oxford* 12.

synthesis’,<sup>136</sup> between the individual and social dimensions: ‘the very nature of reproduction itself is *irreducibly social and individual* at the same time; that is, it operates “at the core of social life” as well as within and upon women’s individual bodies’.<sup>137</sup>

In line with the above accounts, the individual dimension, within the Thesis, has a biological component premised on the impact pregnancy has on the body of persons with the ability to become pregnant. In contrast, the social dimension, within the Thesis, views reproduction as nestled within India’s broader social and cultural context, including but not limited to the expectation that women from certain groups ought to become mothers, the assumption that others ought not, the pressure to bear male children and women’s unilateral responsibility of childcare.

At the same time, the Thesis’ conception of the individual dimension goes beyond the above accounts. It takes into consideration not just the impact of pregnancy on a person’s body but also the centrality of reproductive decision-making to the person’s sense of self, which involves both the person’s mind *and* their body, in relationship with one another. Crucially, the individual here is explicitly understood as different from the ‘abstract’ individual under traditional liberal reproductive choice. The Thesis’ conception of the social dimension, in turn, narrows in on the role of group membership in fundamentally structuring one’s reproductive experiences. It emphasises how reproductive decision-making has been denied to women as a group, with this denial taking different forms depending on the other groups to which women belong, and such denial perpetuating the group’s historical disadvantage.

I now turn to discussing the identity and bodily components of the individual dimension in **Parts II and III**, and the historical and intersectional components of the social dimension in

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<sup>136</sup> Tremayne (n 135) 9.

<sup>137</sup> Petchesky, Reproductive Freedom (n 128) 663 (emphasis added).

**Parts IV and V.** Across these dimensions, I ask two questions: *What* interests does each dimension identify as underlying reproductive decision-making? *Why* does each dimension value these interests? The answers to these questions, I argue, distinguish between the dimensions, highlight their independent contributions, and shape their interrelationship, making reproduction ‘irreducibly’ individual and social.

## II. Individual Dimension: Identity Component

Each of us creates a radically different conception of how to live *our* notion of the ‘good life’ aligned with our preferences, capabilities, constraints and aspirations.<sup>138</sup> Reproduction decision-making is part of this process:

For some, decisions to reproduce may constitute a *critical part of their life plan* and allow them to foster a sense of belonging, stability and love...For others, conversely, reproduction may threaten, *disrupt or thwart one’s idea of and pursuit of the good life*.<sup>139</sup>

Reproductive decision-making is thus intimate,<sup>140</sup> a form of ‘self-authorship’<sup>141</sup> going to the ‘heart of personhood’, and ‘deeply affect[ing]’ one’s sense of self.<sup>142</sup> Reproductive decisions are central

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<sup>138</sup> Nicolette Prilau, ‘Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters’ (2008) 16(2) Medical Law Review 176.

<sup>139</sup> *ibid* 175 (emphasis added); Similarly, Emily Jackson, *Regulating Reproduction* (Hart Publishing 2001) 7.

<sup>140</sup> Jackson (n 139) 7.

<sup>141</sup> Tsachi Keren-Paz, ‘Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law’ (2019) 27 Feminist Legal Studies 36, drawing on Joseph Raz, ‘Autonomy, Toleration, and the Harm Principle’ in Susan Mendus (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (1st edn, CUP 1988) 155-75.

<sup>142</sup> Jill Marshall, *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Brill 2008) 186; Prilau (n 138) 180.

to an individual's 'personal identity' and to the 'meaning of one's life'.<sup>143</sup> These decisions can indeed be amongst the 'most momentous choices' that we will ever make.<sup>144</sup>

Parenthood is often a consequence of this choice, though not always. Desired parenthood can be—though it need not be—a 'rewarding and fulfilling experience'<sup>145</sup> that is 'intrinsically worthwhile' and contributes to a flourishing life.<sup>146</sup> Through parenting, one enters a new world, 'suffused with responsibility' and often 'thick with love'.<sup>147</sup> Crucially, parenting is a 'transformative experience' that can 'radically alter one's conception of oneself':<sup>148</sup>

In becoming parents, we do not merely gain loved ones; *we expand our selves*... Your preferences change. The way you live your life will change. What and who you care about will change. The typical attachments you form to your child alter the very way you are in the world, indeed alter *who* you are.<sup>149</sup>

Reproductive decision-making is thus *intrinsically* valuable for going to the heart of who we are. At the same time, it has a profound *instrumental* impact upon a 'broader series of interests which form the architecture of our lives',<sup>150</sup> and are also, in themselves, constitutive of one's sense of self. The decision to parent often brings with it financial, legal and social responsibilities, fundamentally

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<sup>143</sup> John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (PUP 1994) 24 ('Children of Choice'); See also L. Purdy, 'Women's Reproductive Autonomy: Medicalisation and Beyond' (2006) 32(5) *Journal of Medical Ethics* 287; Robert Pralat, 'Sexual identities and reproductive orientations: Coming out as wanting (or not wanting) to have children' (2021) 24(1-2) *Sexualities* (discussing the idea of 'reproductive orientation' which affects identity formation).

<sup>144</sup> Jackson (n 139) 7.

<sup>145</sup> John A. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) *Virginia Law Review* 410.

<sup>146</sup> Rosalind Hursthouse, 'Virtue Theory and Abortion' (1991) 20(3) *Philosophy & Public Affairs* 241.

<sup>147</sup> Sarah Goering, 'Mothers and Others: Relational Autonomy in Parenting' in Leslie Francis (ed) *The Oxford Handbook of Reproductive Ethics* (OUP 2017) 285.

<sup>148</sup> *ibid* 287-88.

<sup>149</sup> *ibid* (emphasis added).

<sup>150</sup> Prilau (n 138) 176; Jackson (n 139) 7.

impacting the individual's social, psychological and emotional interests.<sup>151</sup> It could affect 'partner and peer relationships, leisure habits and work-life, and prior interests or cherished worldviews'.<sup>152</sup>

Being denied reproductive decision-making, then, interferes with an individual's desire to live according to their own beliefs and practices.<sup>153</sup> This impacts upon the individual's 'psychological and social identity' *and* their 'social and moral responsibilities', thus affecting their 'self-definition in the most basic sense'.<sup>154</sup> It also indicates to an individual that others do not value them as decision-makers:<sup>155</sup> 'our sense of being the author of our own actions, *especially when they pertain to something as personal as reproduction*, is profoundly valuable to us'.<sup>156</sup> This impairs the individual's 'self-trust', which is relational and depends on recognition by others,<sup>157</sup> thus impeding future decision-making, in the reproductive sphere and outside of it. The identity component of the individual dimension, therefore, identifies an individual's interest in designing their life plan (including through reproduction) as underlying reproductive decision-making. And, it values this interest because it is central to an individual's sense of self.

### III. Individual Dimension: Bodily Component

For a pregnant person, or a person with the ability to become pregnant, reproduction is a distinctly physical experience,<sup>158</sup> involving 'all the body systems, displacing body parts, depleting the body

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<sup>151</sup> Prilaux (n 138) 176.

<sup>152</sup> Aurélie M. Athan, 'Reproductive Identity: An Emerging Concept' (2020) 75(4) *American Psychologist* 448.

<sup>153</sup> Jackson (n 139) 7.

<sup>154</sup> Robertson, *Children of Choice* (n 143) 24.

<sup>155</sup> Rebecca J. Cook, 'Human Rights and Reproductive Self-Determination' (1995) 44 *American University Law Review* 976.

<sup>156</sup> Prilaux (n 138) 175 (emphasis added).

<sup>157</sup> Carolyn McLeod, *Self-Trust and Reproductive Autonomy* (MIT Press 2002) 90.

<sup>158</sup> Christyne L. Neff, 'Woman, Womb and Bodily Integrity' (1991) 3 *Yale Journal of Law and Feminism* 327.

of its necessary elements and changing its chemical balance'.<sup>159</sup> Pregnancy increases blood volume by 50%, stroke volume of the heart by 35% and renal function by 50-60%. It decreases lung volume by 20% and the respiratory rate by 15% (2-3 breaths per minute). The pituitary gland enlarges 135% and the production of growth hormones increases dramatically. A whole new organ, the placenta, is generated by the body. The excess progesterone produced by the placenta can cause fluid retention, increase in blood pressure, weight gain and inability to sleep. The size and position of the heart and the uterus change, the latter displacing and compressing other organs in the gastro-intestinal tract. The resulting pressure may affect the circulation of blood, sometimes causing irreversible varicose veins, haemorrhoids and disabling thrombophlebitis. The interference with the gastro-intestinal tract can also cause constipation. The displacement of the urinary tract can result in urinary tract infections. The weight of the uterus can create sacroiliac strain, backache and pressure on the cervical spine, potentially resulting in numbness, tingling, and proprioceptive acuity reduction in the hands. Metabolically, the pregnant person is in an accelerated stage of starvation due to the nutritional demands of a growing foetus. Increase in oestrogen levels can cause nausea and vomiting in the first four months, resulting in dehydration, extreme fatigue, headaches, confusion, fainting, low blood pressure, rapid heart rate, and anxiety or depression. Childbirth frequently damages the pelvic organs which might then require corrective surgery. Bladder control may be permanently lost. Notably, these are the biological indications of a medically 'normal' pregnancy. Complications during pregnancy could result in a worsening of these conditions or an exacerbation of pre-existing health conditions such as asthma, high-blood pressure or thyroid disease.<sup>160</sup>

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<sup>159</sup> Regan (n 68) 1579-81.

<sup>160</sup> *ibid* 1579-81; Eileen McDonagh, 'The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion' (2007) 56 *Emory Law Journal* 1188 ('Next Step After Roe'); Amy Mullin, *Reconceiving Pregnancy and Childcare: Ethics, Experience, and Reproductive Labor* (CUP 2005) 61.

At the outset, the bodily component of the individual dimension values an individual's interest in reproductive decision-making because failing to do so could have a profound impact on the body of a pregnant person. The bodily component is thus a 'material necessity'.<sup>161</sup> It represents a perspective that is often overlooked, with pregnancy being treated as a routine bodily occurrence for those with the ability to become pregnant. By redirecting attention to the biological effects of pregnancy, the immense physical undertaking involved in even a medically normal pregnancy is given its due. However, this perspective does not go far enough as it simply sees the body as a series of physiological systems affected by the process of pregnancy.

An alternate (and additional) perspective, which I endorse in this Thesis, sees the body as 'sacred, inviolable, inalienable, and fundamental'<sup>162</sup> because it is the site of integration between a person's subjectivity—or, sense of self—and the remainder of the world.<sup>163</sup> An individual's perceptions of the world, their engagement with it, the formulation of their preferences and values, and the shaping of their relationships—for instance, through sport, speech or sex—are all mediated through the body, though not reducible to it.<sup>164</sup> In other words, the body is the vehicle through which the individual lives their life,<sup>165</sup> and a 'constitutive part' of *who* the individual is.<sup>166</sup> It

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<sup>161</sup> Petchesky, *Reproductive Freedom* (n 128) 667.

<sup>162</sup> Neff (n 158) 337.

<sup>163</sup> Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *The Cambridge Law Journal* 576.

<sup>164</sup> *ibid* 579-80.

<sup>165</sup> Catriona Mackenzie, 'On Bodily Autonomy' in S.K. Toombs (ed) *Handbook of Phenomenology and Medicine* (Kluwer Academic Publishers 2001) 417-439; Anita M Superson, 'The Right to Bodily Autonomy and the Abortion Controversy' in Andrea Veltman and Mark Piper (eds) *Autonomy, Oppression and Gender* (OUP 2014) 319.

<sup>166</sup> E.F. Kittay, 'Forever Small: The Strange Case of Ashley X' (2011) 26(3) *Hypatia* 617; Marshall (n 142) 170.

is thus not simply a descriptor of the individual's physicality but a sense of self, 'a stable platform for pursuing one's plans';<sup>167</sup> the boundaries of the body are also boundaries of the self.<sup>168</sup>

When understood this way, to touch, constrain, or intrude upon the body of an individual without consent, including through ignoring the reproductive decisions of a pregnant person, does not simply affect the individual physically or thwart their interests about their body. Rather it is a violation of their *very person*. It deprioritises their subjective experience of the world, experiences that are located in the body.<sup>169</sup> It not only communicates that a certain interest that the individual has does not count but also conveys that the individual is a kind of being whose interests—any and all of them—do not count.<sup>170</sup> It invokes the feeling of 'being an inferior kind of human being', a non-active citizen, 'a nobody', a person who does not matter.<sup>171</sup> The felt experience of being reduced to one's physiological self, inherent in being forced to submit one's body to the reproductive desires of another, thus profoundly harms the individual's sense of self. The bodily component of the individual dimension therefore values an individual's interest in reproductive decision-making not only because its denial harms the body of the pregnant person, but also because such harm causes a 'radical diminution' of personhood.<sup>172</sup>

When the identity and bodily components are brought together, it becomes clear that reproductive decision-making is central to an individual's sense of self, understood expansively as

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<sup>167</sup> Priaulx (n 138) 187.

<sup>168</sup> Superson (n 165) 319.

<sup>169</sup> Herring and Wall (n 163) 583.

<sup>170</sup> Superson (n 165) 312; Helga Varden, 'A Feminist, Kantian Conception of the Right to Bodily Integrity' in Sharon Crasnow and Anita M. Superson (eds) *Out from the Shadows: Analytical Feminist Contributions to Traditional Philosophy* (OUP 2012) 37.

<sup>171</sup> Priaulx (n 138) 185-86.

<sup>172</sup> Superson (n 165) 319; Mervi Patosalmi, 'Bodily Integrity and Conceptions of Subjectivity' (2009) 24(2) *Hypatia* 135, building on the work of Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, 1995).

going beyond the mind alone: '[their] embodiment, self-formative processes, life projects, and self-understanding are *all* at stake'.<sup>173</sup> The individual dimension, then, identifies *this* set of interests as justifying the value that ought to be attributed to reproductive decision-making. In doing so, the individual dimension does not place undue emphasis on 'proper' or 'rational' self-governance which has traditionally been used to exclude certain groups—women, racial minorities, persons with disabilities—from decision-making. Members of these groups are seen as 'unable to put aside immediate bodily desires' to reflect 'dispassionately and rationally' on circumstances, and thus incapable of being trusted with decision-making.<sup>174</sup> Instead, through its bodily component, the individual dimension firmly draws attention to the centrality of the body in shaping one's sense of self, ensuring that the body is not subordinated to the mind.<sup>175</sup> Individuals are thus recognised as embodied, and the interrelationship between the body and the mind in developing one's sense of self is acknowledged.<sup>176</sup>

It also important to distinguish between the individual dimension and traditional liberal reproductive choice. Liberal reproductive choice is premised on three fundamental limbs: the individual as acontextual, the individual as atomistic or insular and concomitantly the State as bearing purely negative duties of non-intervention.<sup>177</sup> The three limbs together create the 'abstract' individual who lies at the heart of liberal reproductive choice. However, the individual within the individual dimension is not atomistic and acontextual, in line with traditional liberalism. Instead,

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<sup>173</sup> Hursthouse (n 146) 241 (emphasis added).

<sup>174</sup> Jennifer M. Denbow, *Governed through Choice: Autonomy, Technology, and the Politics of Reproduction* (NYU Press 2015) 25; Elizabeth Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart Publishing 2016) 13; Anne Phillips, *Our Body: Whose Property?* (PUP 2013) 26.

<sup>175</sup> Wicks (n 174) 9 citing Descartes' body-mind dualism wherein 'the body comes to be perceived as a machine under the control of the superior mind. It is desacralised. It is a machine to be controlled'.

<sup>176</sup> *ibid* 13-15; Varden (n 170) 37; Herring and Wall (n 163) also use this notion of the embodied individual to contest traditional, exclusionary notions of mental capacity that underlie medical decision-making in general, beyond the reproductive context.

<sup>177</sup> Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1(7) *Yale Journal of Law and Feminism* 8.

they are relational and interdependent, ‘historically determined, *concrete*, and particular in their needs’.<sup>178</sup> They are located within their social contexts, including networks of relationships, which contribute to, shape, and sometimes constrain, their selfhood, and in turn their decisions (including reproductive decisions).<sup>179</sup> When so understood, the responsibility on the State in guaranteeing the interests represented by the individual dimension does not simply stop at non-interference with pre-formed decisions. Instead, the State is required to provide resources and services to assist individuals both to determine their own priorities and to realise them.<sup>180</sup> The individual dimension thus rejects the notion of the ‘abstract’ individual, the unit of liberal reproductive choice. Instead, it endorses the notion of the ‘concrete’ individual,<sup>181</sup> therein offering a ‘deeper understanding of what it means to be self-determining’ in reproductive decision-making.<sup>182</sup>

At the same time, the individual dimension retains a central focus on the individual by bringing awareness to the ‘positive potential of individual conduct and eccentricity’, including in the reproductive context:

*it is precisely the focus on the individual that is important to its liberatory potential...*the individual is valued and stressed precisely because of the potentially dangerous effects of custom and dominant norms.<sup>183</sup>

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<sup>178</sup> Petchesky, *Reproductive Freedom* (n 128) 665 (emphasis added).

<sup>179</sup> Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000) 4; Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (OUP 1989) 19-90; Albertyn (n 74) 101.

<sup>180</sup> Jackson (n 139) 8; Josephine Johnston and Rachel Zacharias, ‘The Future of Reproductive Autonomy’ in *Just Reproduction: Reimagining Autonomy in Reproductive Medicine* (The Hastings Center Report 2017); Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing 2013) 34.

<sup>181</sup> A term used by Petchesky, *Reproductive Freedom* (n 128) 665. The Thesis continues to use the term ‘concrete’ across its later Chapters. Throughout, the term is understood in the sense set out here: ‘concrete’ as opposed to ‘abstract’. The use of the term ‘concrete’ does not signal that the individual (or the woman) is being objectified in any sense.

<sup>182</sup> Nelson (n 180) 36.

<sup>183</sup> Denbow (n 174) 9 (emphasis added).

In other words,

*Some degree of individuation of persons is important...* It may be the case that many individuals make autonomous decisions on the basis of the value they place on their relationships with others and their concern for what others care about. ***But there must still be a space in which we are each free to decide what matters most to us as individuals and to determine how we wish to behave.***<sup>184</sup>

And, the individual dimension, in the context of the Thesis, preserves this space for reproductive decision-making. Through this, the individual dimension retains the potentiality of liberal choice—the significance of an individual’s decisions as an expression of their core personality—without being entrapped by its pitfalls.

At this stage, it is important to remember that pregnancy is not a biological process involving just one individual. Becoming pregnant requires either the involvement of another individual or medical intervention. In centering the individual, the individual dimension does not deny this. However, it does bring focus to decision-making about pregnancy—‘I would like to have a child’—which it identifies as key to a (‘concrete’) individual’s sense of self. Once the decision is made, then others (partners or medical professionals) automatically come into the picture.

To conclude, the identity and bodily components of the individual dimension together identify an individual’s interest in reproductive decision-making *because* of the centrality of reproductive decision-making to an individual’s sense of self, a function of the interaction between one’s body and mind. The identity component of the individual dimension speaks to *all* individuals: women, men, non-binary persons. All individuals have reproductive desires in some form, whether to reproduce, to not reproduce or feelings of ambivalence about reproduction, all of which may vary with time. The bodily component of the individual dimension, in turn, highlights the interests of individuals who are pregnant or who have the biological ability to become pregnant. In contrast,

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<sup>184</sup> Nelson (n 180) 49 (emphasis added).

the social dimension narrows in on women, as a group, and especially women from certain groups.

I now move to discussing the role of the social dimension.

#### IV. Social Dimension: Historical Component

Central to the historical component of the social dimension is the denial of reproductive decision-making to women (as a group) within the patriarchal institution of motherhood. Rich distinguishes between the institution of ‘motherhood’ and the experiences of ‘mothering’:

I try to distinguish two meanings of motherhood, one superimposed on the other: The potential relationship of any woman to her powers of reproduction and to children; and *the institution, which aims at ensuring that that potential—and all women—shall remain under male control.*<sup>185</sup>

Rich argues that the institution of motherhood, as a form of patriarchal social control, has ‘ghettoised and degraded’ female potentialities.<sup>186</sup> Patriarchal motherhood is informed by several ideological standpoints: ‘essentialisation’, placing maternity as crucial to female identity; ‘individualisation’, conceptualising reproductive labour to be the responsibility of one person; ‘naturalisation’ and ‘biologicalisation’, assuming that that person is the woman, due to her reproductive ability; ‘idealisation’, setting unattainable benchmarks for ‘good’ mothering; ‘privatisation’, positioning reproductive labour solely within the home; and, ‘depoliticisation’, characterising child-rearing as private, with no social value.<sup>187</sup> Though women do not make these rules, they are compelled to follow them, vesting in them ‘powerless responsibility’.<sup>188</sup>

These rules operate independently, and in conjunction, to deny women reproductive decision-making. To see how, take the example of India. The fact that women *can* reproduce is translated, within India’s patriarchal institution of motherhood, into the essentialist, universal

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<sup>185</sup> Adrienne Rich, *Of Woman Born: Motherhood as an Experience and Institution* (WW Norton and Company 1976) 13.

<sup>186</sup> *ibid.*

<sup>187</sup> Andrea O’Reilly, ‘It Saved my Life’ (2013) 4(1) *Journal of the Motherhood Initiative* 187.

<sup>188</sup> Rich (n 185) 52.

assumption that women *must*.<sup>189</sup> Through explicit and implicit signals, the institution conveys to women that ‘to be a mother is to be normal, and properly feminine’.<sup>190</sup> While having children is rewarded,<sup>191</sup> infertile women are treated as ‘[in]complete women’ with ‘defective and useless’ bodies.<sup>192</sup> Worse still, women who opt not to have children are labelled selfish, lazy and deviant, and face ‘inquisitive questions, biased judgments, and a phenomenal amount of pressure’, with their reproductive systems becoming exhibits for the public.<sup>193</sup> Simultaneously, the patriarchal institution of motherhood in India values women as mothers only if they are mothers of sons,<sup>194</sup> with women being compelled (or in some cases, ‘choosing’) to abort female fetuses.<sup>195</sup> The institution also retains the traditional role dichotomy between women as nurturers and men as providers.<sup>196</sup> Women are thus expected to assume primary responsibility for the care of children, forming the basis of the organisation of the family.<sup>197</sup> Yet, childcare—women’s contribution in the

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<sup>189</sup> Evelyn Glenn, Grace Chang and Linda Forcey, *Mothering: Ideology, Experience, and Agency* (Routledge 1993) 3.

<sup>190</sup> Mary Boulton, *On Being a Mother* (Tavistock Publications 1983) 17.

<sup>191</sup> Diane Richardson, *Women, Motherhood and Child Rearing* (Macmillan 1993) 1.

<sup>192</sup> Sabiha Hussain, ‘Motherhood and female identity: Experiences of Childless Women of Two Religious Communities in India’ (2009) 15(3) *Asian Journal of Women's Studies* 82-103.

<sup>193</sup> Amrita Nandy, ‘Outliers of Motherhood: Incomplete Women or Fuller Humans’ (2013) 48(44) *Economic and Political Weekly* 53-59; Maitreyi Das and Ieva Zumbyte, ‘The Motherhood Penalty and Female Employment in Urban India’ (2017) World Bank Group Policy Research Working Paper 8004, 5 <[https://www.researchgate.net/publication/316086648\\_The\\_Motherhood\\_Penalty\\_and\\_Female\\_Employment\\_in\\_Urban\\_India](https://www.researchgate.net/publication/316086648_The_Motherhood_Penalty_and_Female_Employment_in_Urban_India)> accessed 29 September 2019.

<sup>194</sup> Radha Hegde, ‘Marking Bodies, Reproducing Violence: A feminist reading of female infanticide in South India’ (1999) 5(5) *Violence Against Women* 510; Sukumari Bhattacharjee, ‘Motherhood in Ancient India’ (1990) 25(42/43) *Economic and Political Weekly* 54; Maithreyi Krishnaraj, *Motherhood in India: Glorification without Empowerment?* (Routledge 2010) 4; Jasodhara Bagchi (ed), *Interrogating Motherhood* (Sage 2017) 65.

<sup>195</sup> Maya Unnithan-Kumar, ‘Female Selective Abortion – beyond “Culture”’: Family Making and Gender Inequality in a Globalising India’ (2010) 12(2) *Culture, Health & Sexuality* 153-66.

<sup>196</sup> Preeti Suppal and Jaipaul Roopnarine, ‘Paternal Involvement in Child Care as a Function of Maternal Employment in Nuclear and Extended Families in India’ (1999) 40(9/10) *Sex Roles* 732.

<sup>197</sup> Rich (n 185) 11; Richardson (n 191) 3; Nancy Chodorow, *The Reproduction of Mothering* (University of California Press 1999) 3; Tina Miller, *Making Sense of Motherhood: A Narrative Approach* (CUP 2005) 148; Krishnaraj (n 194) 1; Das and Zumbyte (n 193) 4; Usha Rout, Sue Lewis and Carolyn Kagan, ‘Work and Family Roles: Indian Career Women in India and the West’ (1999) 6(1) *Indian Journal of Gender Studies* 95.

home—is invisibilised and ‘inferiorised’.<sup>198</sup> Though ‘reproduction entails incredible liabilities and workload, [it] is still considered to be of lesser value compared to men’s engagement in production that yields market value’.<sup>199</sup> Women are thus denied equal status and a sense of worth.<sup>200</sup> Evident here is the essentialisation of women’s role as mothers, the individualisation, naturalisation and biologicalisation of childcare based on women’s reproductive ability and the depoliticisation of childcare by devaluing it. Through this, the patriarchal institution of motherhood in India denies women power over several crucial reproductive decisions: whether to have a child or not, the gender of the child and the shape of their role as a parent, within the home and outside of it.

Such denial of reproductive decision-making perpetuates women’s historical disadvantage. The unilateral responsibility of child-care confines women to the domestic sphere and maintains the distinction, and the hierarchy, between the public and private spheres.<sup>201</sup> Motherhood and paid employment are typically constructed as incompatible, with women being required to choose between the two, or, if they have to undertake paid work, choose work which conflicts least with their role as a mother.<sup>202</sup> The presence of young children in the house is associated with lower female workforce participation in India, with women quitting paid work after childbirth.<sup>203</sup>

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<sup>198</sup> Bagchi (n 194) 45; Julie Novkov, ‘A Deconstruction of (M)otherhood and a Reconstruction of Parenthood’ (1991) 19 *New York University Review of Law and Social Change* 169; Richardson (n 191) 22; Miller (n 197) 148.

<sup>199</sup> Chandni Bhambhani and Anand Inbanathan, ‘Not a mother, yet a woman: Exploring experiences of women opting out of motherhood in India’ (2018) 24(2) *Asian Journal of Women's Studies* 176.

<sup>200</sup> Sonalde Desai and Devaki Jain, ‘Maternal Employment and Changes in Family Dynamics: The Social Context of Women's Work in Rural South India’ (1994) 20(1) *Population and Development Review* 131; Kuntala Lahiri-Dutt and Pallabi Sil, ‘Women's ‘double day’ in middle-class homes in small-town India’ (2014) 22(4) *Contemporary South Asia* 401.

<sup>201</sup> Krishnaraj (n 194) 9.

<sup>202</sup> Sanghamitra Buddhapriya, ‘Work-Family Challenges and their Impact on Career Decisions: A Study of Indian Women Professionals’ (2009) 34(1) *Vikalpa* 32; Ann Phoenix and Anne Woollett, *Motherhood: Meanings, Practices and Ideologies* (Sage 1991) 8.

<sup>203</sup> Ratna Sudarshan and Shrayana Bhattacharya, ‘Through the Magnifying Glass: Women’s Work and Labour Force Participation in Delhi’ (2008) ILO Asia-Pacific Working Paper Series, 21 <[http://www.oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_098839.pdf](http://www.oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_098839.pdf)> accessed 17 May 2019; Steven Kapos, Andrea Silberman, Evangelia Bourmpoula, ‘Why is female labour force participating declining so sharply in India’ (2014) ILO Research Paper 10, 31 <[http://ilo.ch/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_250977.pdf](http://ilo.ch/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_250977.pdf)> accessed

Women's confinement to the domestic sphere contributes to their low status within the family as they are unable to earn income independently, making them dependent on their husbands or other male members.<sup>204</sup>

Those women who do undertake paid work experience the 'double day' burden, as they attempt to juggle their roles in the workplace along with their childcare responsibilities.<sup>205</sup> This affects their physical and mental health. It also hampers their ability to meet work targets, lowering their chances of advancement within the workplace.<sup>206</sup> The difficulty in scaling this 'maternal wall'<sup>207</sup> is a crucial reason inhibiting Indian women's rise to top positions in management.<sup>208</sup> Employers also tend to discriminate against female employees by viewing them as potential mothers (and therefore, non-committed employees).<sup>209</sup> This is reflected in their wages, with women being paid lesser wages than men for comparable work.<sup>210</sup> Thus, parenting, within the

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17 May 2019; Piritta Sorsa et al, 'Determinants of the Low Female Labour Force Participation In India' (2015) OECD Economics Department Working Paper 1207, 23 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2015\)25&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2015)25&docLanguage=En)> accessed 17 May 2019; Das and Zumbyte (n 193) 13.

<sup>204</sup> Desai and Jain (n 200) 119.

<sup>205</sup> Suppal and Roopnarine (n 196) 741; Sudarshan and Bhattacharya (n 203) 22; Lahiri-Dutt and Sil (n 200) 389-98.

<sup>206</sup> Gnana Kumar and Vishnu Priya, 'The Causes of Stress and Its Coping Strategies Adopted by Working Women in Southern Part of Tirupur City - A Study' (2016) 11(3) Journal of Contemporary Research in Management 35.

<sup>207</sup> Diksha Madhok, 'What happened to the women who graduated from the IITs in the 90s?' *Quartz India* (15 June 2015) <<https://qz.com/india/424276/what-happened-to-the-women-who-graduated-from-iits-in-the-90s/>> accessed 17 May 2019.

<sup>208</sup> Buddhapriya (n 202) 31; Reimara Valk and Vasanthi Srinivasan, 'Work family balance of Indian women software professionals: A qualitative study' (2011) 23 IIMB Management Review 39.

<sup>209</sup> Das and Zumbyte (n 193) 5.

<sup>210</sup> Maitreyi Das, 'Do Traditional Axes of Exclusion Affect Labor Market Outcomes in India?' (2006) Social Development Papers: South Asia Series 97 <<http://documents.worldbank.org/curated/en/195941468034790110/pdf/369630sdp970web.pdf>> accessed 17 May 2019; Anindita Sengupta and Panchanan Das, 'Gender Wage Discrimination Across Social and Religious Groups in India: Estimates with Unit Level Data' (2014) XLIX(21) Economic and Political Weekly 72; Sorsa et al (n 203) 16; Erin Fletcher, Rohini Pande and Charity Moore, 'Women and Work in India: Descriptive Evidence and a Review of Potential Policies' (2017) Centre for International Development Working Paper 339, 10 <[https://www.hks.harvard.edu/sites/default/files/centers/cid/files/publications/faculty-working-papers/women\\_work\\_india\\_cidwp339.pdf](https://www.hks.harvard.edu/sites/default/files/centers/cid/files/publications/faculty-working-papers/women_work_india_cidwp339.pdf)> accessed 17 May 2019.

patriarchal institution of motherhood in India, places a ‘penalty’ on female workers.<sup>211</sup> It is also responsible for the low rates of female labour force participation in India, one of the lowest in the world, and lower than that in most countries of a similar income level.<sup>212</sup> Working women with children are moreover subject to social stigma,<sup>213</sup> labelled ‘career-minded’ or ‘un-woman-like’,<sup>214</sup> and experience guilt for not spending adequate time with their children, creating stress and role conflict.<sup>215</sup>

At the same time, women in middle or upper class families have the financial flexibility to opt out of employment.<sup>216</sup> Or, if they do undertake paid work, they rely on the caring labour of women from disadvantaged socio-economic backgrounds, who could also be mothers, to assist with their domestic responsibilities,<sup>217</sup> allowing them to avoid the double-day. In poorer households, economic necessity compels women to work.<sup>218</sup> Many of these women belong to marginalised groups, such as the Scheduled Castes, Scheduled Tribes, or Other Backward Classes,<sup>219</sup> whose poverty drives their participation in the labour market.<sup>220</sup> These women often

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<sup>211</sup> Das and Zumbyte (n 193) 4.

<sup>212</sup> World Bank Group, ‘India: Women, Work and Employment’ (2014) Report Number ACS7935, 2 <<https://openknowledge.worldbank.org/bitstream/handle/10986/18737/ACS79350ESW0wh00Box385252B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 17 May 2019.

<sup>213</sup> Desai and Jain (n 200) 128; Sorsa et al (n 203) 22.

<sup>214</sup> Buddhapriya (n 202) 38.

<sup>215</sup> *ibid* 33; Krishnaraj (n 194) xv.

<sup>216</sup> Das and Zumbyte (n 193) 45; Sorsa et al (n 203) 22.

<sup>217</sup> Valk and Srinivasan (n 208) 46; Lahiri-Dutt and Sil (n 200) 401; Das and Zumbyte (n 193) 6; Shellee Colleen, ‘Like a mother to them’ in Faye Ginsburg and Rayna Rapp (eds), *Conceiving the New World Order* (University of California Press 1995) 97 (‘Like a mother’).

<sup>218</sup> Desai and Jain (n 200) 119; World Bank Group (n 212) 11.

<sup>219</sup> Races or tribes delineated under Constitution of India 1950, arts 366(24), (25), 341, 342. For their definition, evolution and history of disadvantage, see BR Ambedkar, *Annihilation of Caste* (Arnold Press 1990); Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (CUP 2008) 8-10; Marc Galanter, ‘Who are the Other Backward Classes’ (1978) *Economic and Political Weekly* 13(43) 1812-28.

<sup>220</sup> Sorsa et al (n 203) 21; Das and Zumbyte (n 193) 13.

work in the informal sector,<sup>221</sup> which remains unregulated in India. They are thus not offered child-care friendly options like flexible work hours.<sup>222</sup> In fact, hardly ten percent of women in India have access to such policies.<sup>223</sup> Women from these groups also often cannot afford paid help. Consequently, they provide care for their children entirely on their own, or rely on either female relatives or older female children to assist them. The responsibility of household chores and care of siblings in turn prevents girls from these families from attending school,<sup>224</sup> perpetuating the cycle of poverty. Thus, while women, as a group, are denied reproductive decision-making within the patriarchal institution of motherhood, exacerbating their historical disadvantage, all women are not affected in the same way, or to the same extent: 'If one imagines gender as a force field pulling women back into domesticity's "traditional roles", the force field differs depending on one's placement in other fields of social power'.<sup>225</sup> I explore this idea further below through the intersectional component of the social dimension.

However, the above does not imply that the Thesis understands women's disadvantage as simply stemming from their reproductive function.<sup>226</sup> Nor does the Thesis see pregnancy as 'barbaric' for imprisoning the female body, and call for an elimination of child bearing and rearing for women's emancipation.<sup>227</sup> To the contrary, the Thesis identifies that mothering, divorced from

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<sup>221</sup> Uma Rani and Jeemol Unni, 'Do Economic Reforms Influence Home-Based Work? Evidence from India' (2009) 15(3) *Feminist Economics* 194.

<sup>222</sup> Das and Zumbye (n 193) 7.

<sup>223</sup> Valk and Srinivasan (n 208) 45; Krishnaraj (n 194) xviii; Das and Zumbye (n 193) 7.

<sup>224</sup> Das and Zumbye (n 193) 7.

<sup>225</sup> Sarah Hardy and Caroline Wiedmer, *Motherhood and Space* (Palgrave Macmillan 2005) 5.

<sup>226</sup> This is a perspective endorsed by some schools of feminist thought, see Shulamith Firestone, *Dialectic of Sex* (The Women's Press 1979) 74; See also Simone de Beauvoir, *Second Sex* (Knopf 1953) 117.

<sup>227</sup> Firestone discussed in Ashley Mack, 'Critical Approaches to Motherhood', *Encyclopaedia for Communication and Critical Studies* (OUP 2018).

patriarchal motherhood, can be a source of satisfaction, pleasure<sup>228</sup> and self-expression for women.<sup>229</sup> As Krishnaraj observes:

It is not the fact of mothering that makes women vulnerable, but [its] social construction, the implications for women flowing from the meaning attached to the idea of motherhood, and the terms and conditions under which it is allowed to express itself. ***Becoming a mother is an emotionally fulfilling experience. However in reality, it becomes a burden to be borne by women because they do not get adequate support from society.***<sup>230</sup>

The historical component of the social dimension thus does not essentialise reproduction as intrinsically, and inevitably, oppressive for women. It also does not essentialise women as innately disadvantaged. This would treat women's historical disadvantage as 'natural' and 'inevitable',<sup>231</sup> conditions for which others social actors bear no responsibility,<sup>232</sup> thereby maintaining and legitimising women's subordination.<sup>233</sup> Instead, in recognising women's disadvantage, the historical component of the social dimension traces it back to the denial of reproductive decision-making within the patriarchal institution of motherhood. That is, women are disadvantaged *because* of such denial, and not because they are women.

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<sup>228</sup> Andrea O'Reilly, 'Outlaw(ing) Motherhood' in *Twenty-first Century Motherhood: Experience, Identity, Policy and Agency* (Columbia University Press 2010) 370.

<sup>229</sup> Margret Simons, 'Motherhood, feminism and identity' (1984) 7(5) *Women's Studies International Forum* 357; Claudia Card, 'Against motherhood and marriage' (1996) 11(3) *Hypatia* 16; Claire Ichou, 'Sex Roles and Stereotyping: Experiences of Motherhood in South Africa' (2006) 69 *Agenda: Empowering Women for Gender Equity* 102; Fiona Green, 'Feminist Mothering: Challenging Gender Inequality by Resisting the Institution of Motherhood and Raising Children to be Critical Agents of Social Change' (2009) 1(1) *Socialist Studies* 84; Bagchi (n 194) 37; Geetanjali Chanda, 'Mapping Motherhood' (2002) 4(2) *Journal of the Association for Research on Mothering* 74.

<sup>230</sup> Krishnaraj (n 194) 7 (emphasis added); Aparna Nath, 'Baby Halder's A Life Less Ordinary: Domestic Work, Motherhood and the Dalit Woman' (2018) 3(2) *Indian Journal of Woman and Social Change* 235; Veena Poonacha, 'Rites de Passage of Matrescence and Social Construction of Motherhood: Coorgs in South India' (1997) 32(3) *Economic and Political Weekly* 101.

<sup>231</sup> Novkov (n 198) 182.

<sup>232</sup> Reva Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) *Faculty Scholarship Series* 274 ('Reasoning from the Body').

<sup>233</sup> Greda Neyer and Laura Bernadi, 'Feminist Perspectives on Motherhood and Reproduction' (2011) Working Paper 4, 6 <[https://www.su.se/polopoly\\_fs/1.18714.1320939635!/WP\\_2011\\_4.pdf](https://www.su.se/polopoly_fs/1.18714.1320939635!/WP_2011_4.pdf)> accessed 17 May 2019.

At this point, it becomes important to acknowledge that women are not homogeneously disadvantaged within patriarchal motherhood, as I briefly alluded to above. The heterogeneity in women's reproductive experiences is captured by the intersectional component of the social dimension.

## V. Social Dimension: Intersectional Component

The intersectional component recognises that the denial of reproductive decision-making to women occurs in varying forms, and to varying extents, depending on women's location within other social groups. It emphasises the effect of intersecting social identities on women's experiences of reproduction<sup>234</sup> and unveils the 'reproductive caste system'.<sup>235</sup> The reproductive labour of bearing and raising children is 'differentially experienced, valued and rewarded' amongst different groups of women.<sup>236</sup> While reproductive desires and practices of some groups are encouraged and supported, those of other groups are despised and discouraged.<sup>237</sup> Some women, by virtue of their race, class, or disability, are seen as 'reproductive sinners', or 'reproductive threats'.<sup>238</sup> These groups of women are forcibly sterilised<sup>239</sup> or mistreated during childbirth,<sup>240</sup> to

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<sup>234</sup> Zakiya Luna and Kristin Luker, 'Reproductive Justice' (2013) 9(3) *Annual Review of Law and Social Science* 327; Barbara Gurr, *Reproductive Justice for Native Women* (Rutgers University Press 2014) 32; Loretta Ross, 'Reproductive Justice as Intersectional Feminist Activism' (2017) 19(3) *Souls* 287.

<sup>235</sup> Dorothy Roberts, 'Race, Gender and Genetic Technologies: A New Reproductive Dystopia?' (2009) 34(4) *Signs* 785; Ross (n 234) 290.

<sup>236</sup> Colleen, *Like a mother* (n 217) 78.

<sup>237</sup> Karen McCormack, 'Stratified Reproduction and Poor Women's Resistance' (2005) 19(5) *Gender and Society* 661; Rayna Rapp, 'Reproductive Entanglements: Body, State and Culture in the Dys/Regulation of Childbearing' (2011) 78(3) *Social Research* 10-11; Rayna Rapp and Faye Ginsburg, 'Enlarging Reproduction and Screening Disability' in Marcia Inhorn (ed), *Reproductive Disruptions* (Berghahn Books 2009) 98; LH Harris and TJ Wolfe, 'Stratified Reproduction, Family Planning Care and the Double Edge of History' (2014) 26(6) *Current Opinion in Obstetrics and Gynecology* 540

<sup>238</sup> Amy Agigian, 'Stratified Reproduction' *The Blackwell Encyclopedia of Sociology* (John & Wiley Sons Ltd 2007) 2.

<sup>239</sup> Andrea Smith, 'Beyond Pro-Choice versus Pro-Life: Women of Color and Reproductive Justice' (2005) 17(1) *NWSA Journal* 130; Ross (n 234) 298.

<sup>240</sup> Barbara Gurr, 'Complex Intersections: Reproductive Justice and Native American Women' (2011) 5(8) *Sociology Compass* 728.

regulate reproduction of the ‘unfit’ by the ‘unfit’.<sup>241</sup> Other groups of women are seen as potential ‘reproductive saviours’ of the State, ethnic group, religion, and/or normative family.<sup>242</sup> These women are encouraged to give birth to children through, for instance, restrictive abortion laws.<sup>243</sup> Thus, varying vulnerabilities mould women’s reproductive experiences. The power to make reproductive decisions, then, ought to extend not just to women’s right *not to have* children, but also their right *to have* children, and their right to be treated with respect and dignity once they become pregnant (and post-pregnancy).<sup>244</sup>

The intersectional component further recognises that reproduction amongst certain groups has historically been constructed as a social problem.<sup>245</sup> Controlling women’s reproduction then becomes a way of controlling entire communities<sup>246</sup> to produce a collective, homogenous national identity.<sup>247</sup> Denial of reproductive decision-making thus not only reflects but also reinforces and exacerbates the inequalities on which the initial denial is based.<sup>248</sup> In essence, the intersectional component locates individual women within groups of which they are a part: ‘The ability of a woman to determine her reproductive destiny is directly tied to conditions in her community. *The emphasis is on individuality without sacrificing collective or group identity*’.<sup>249</sup>

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<sup>241</sup> Asian Communities for Reproductive Justice (‘ACRJ’), ‘A New Vision’ (2005), 3 <<https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf>> accessed 17 May 2019; Harris and Wolfe (n 237) 542.

<sup>242</sup> Agigian (n 238) 2.

<sup>243</sup> Luna and Luker (n 234) 331; Nicola Beisel and Tamara Kay, ‘Abortion, Race and Gender in Nineteenth-Century America’ (2004) 69(4) *American Sociological Review* 498.

<sup>244</sup> Luna and Luker (n 234) 327; Rickie Solinger, ‘Reproductive Justice 101’ (2016) 41(4) *Signs*.

<sup>245</sup> Luna and Luker (n 234) 333.

<sup>246</sup> ACRJ (n 241) 2.

<sup>247</sup> Gurr, *Reproductive Justice for Native Women* (n 234) 27.

<sup>248</sup> Colleen (n 217) 78.

<sup>249</sup> Zakiya Luna, ‘From Rights to Justice’ (2009) 4(3) *Societies without Borders* 358 (emphasis added).

To illustrate the operation of the intersectional component of the social dimension, I use the example of India's history with contraception and sterilisation. Sterilisation is, and has always been, part of the larger poverty reduction program in India,<sup>250</sup> which, reflective of the neo-Malthusian ethic, holds the growing population responsible for delaying economic growth, increasing poverty and straining welfare services.<sup>251</sup> Sterilisation camps are common in India, even in 2021.<sup>252</sup> 80-90 sterilisation surgeries are typically performed per day at these camps, well beyond the maximum regulatory limit of 30 surgeries,<sup>253</sup> resulting in death or morbidity amongst women.<sup>254</sup> The camps are commonly held in abandoned hospitals without running water, clean beds, or sterile equipment.<sup>255</sup> Informed consent is rarely obtained,<sup>256</sup> and medical care post-sterilisation is not provided. At a sterilisation camp in West Bengal, for instance, the unconscious bodies of 100 women who had been sterilised were dumped onto a field because the hospital did not have sufficient space.<sup>257</sup>

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<sup>250</sup> Prajakta Gupta, 'India: The Emergency and Politics of Mass Sterilisation' (2017) 22(3) *Demographics, Social Policy and Asia* 40.

<sup>251</sup> N Sarojini et al, 'Bilaspur sterilisation deaths: evidence of oppressive population control policy' (2015) 12(1) *Indian Journal of Medical Ethics* 2-4.

<sup>252</sup> Sweta Dash, 'Despite Tragic History of Sterilisation Camps, Chhattisgarh Has Not Learnt Its Lessons' *The Wire* (17 September 2021) <<https://thewire.in/rights/tragic-history-sterilisation-camps-chhattisgarh-lessons-not-learnt>> accessed 8 February 2022.

<sup>253</sup> The limit has been prescribed by the Family Planning Division, Ministry of Health and Family Welfare, Government of India, 'Standards and Quality Assurance in Sterilization Services' (2016) <[http://www.nhmmp.gov.in/WebContent/FW/Guideline2017/FAQsl\\_Standards\\_and\\_Quality\\_Assurance.pdf](http://www.nhmmp.gov.in/WebContent/FW/Guideline2017/FAQsl_Standards_and_Quality_Assurance.pdf)> accessed 8 February 2022.

<sup>254</sup> Dinesh Sharma, 'India's Sterilisation Scandal' (2014) 384(9961) *The Lancet* 68-9; S. Anukriti and Shareen Joshi, 'The Emergency Lives on? How one political event affected sterilization rates in India over decades' (2016) <<https://www2.bc.edu/s-anukriti/emergency.pdf>> accessed 17 May 2019.

<sup>255</sup> Priyanka Pulla, 'Why are women dying in India's sterilization camps?' (2014) 349 *BMJ*.

<sup>256</sup> Marie Brault et al, 'Multilevel Perspectives on Female Sterilization in Low-Income Communities in Mumbai, India' (2016) 26(11) *Qualitative Health Research* 1553; Srinivas Kosgi, 'Women reproductive rights in India: Prospective Future' (2011) 10(1) *Online Journal of Health and Allied Sciences* 2.

<sup>257</sup> Pulla (n 255).

The Indian State either offers women financial incentives to participate in these camps or makes welfare benefits contingent on sterilisation.<sup>258</sup> It is then no surprise that women who avail of sterilisation in these camps are typically from households below the poverty line, and belong to vulnerable communities.<sup>259</sup> Women with disabilities are also often targeted, with hysterectomies being conducted amongst inmates of State run homes for women with intellectual disabilities, to ‘safeguard’ them from unwanted pregnancies, and eliminate the ‘monthly bother’ of menstruation.<sup>260</sup> These groups of women are seen as unable to make proper contraceptive choices, with government physicians remarking: ‘For those who are illiterate, there will be 100% failures in using the condoms’,<sup>261</sup> and ‘I don’t understand why it is wrong to put pressure on women from poor families’.<sup>262</sup> This method of poverty eradication thus presents a ‘technocratic fix’ through assaulting the bodies of these women,<sup>263</sup> in the process devaluing, or disregarding, their desire to be parents.

The Indian State also fails to ensure that women from these groups are able to access non-permanent methods of contraception, in effect pushing them towards sterilisation.<sup>264</sup> Emergency contraception remains expensive.<sup>265</sup> Male partners refuse to use cheaper contraceptives, like

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<sup>258</sup> Anukriti and Joshi (n 254); Gupta (n 250) 42.

<sup>259</sup> Kalpana Wilson, ‘The “New” Global Population Control Policies: Fueling India’s Sterilisation Atrocities’ (2015) 87 *Different Takes* 4; Rebecca Williams, ‘Storming the Citadels of Poverty: Family Planning under the Emergency in India, 1975–1977’ (2014) 73(2) *The Journal of Asian Studies* 477; Anukriti and Joshi (n 254).

<sup>260</sup> Anu Aneja and Shubhangi Vaidya, *Embodying motherhood: Perspectives from contemporary India* (Sage 2016).

<sup>261</sup> Brault et al (n 256) 1553.

<sup>262</sup> Kosgi (n 256) 2.

<sup>263</sup> Williams (n 259) 471.

<sup>264</sup> Manas Pradhan and Usha Ram, ‘Female sterilization and ethical issues: the Indian experience’ (2009) 39(3) *Social Change* 370; Brault et al (n 256) 1550.

<sup>265</sup> Nayantara Sheoran, ‘Stratified Contraception: Emergency Contraceptive Pills and Women’s Differential Experiences in Contemporary India’ (2015) 34(3) *Medical Anthropology: Cross- Cultural Studies in Health and Illness* 251.

condoms,<sup>266</sup> fearing that they would ‘lose their role as head of the family’, ‘their partners will become promiscuous or adulterous’, and ‘they will be ridiculed by other members of the community’.<sup>267</sup> Awareness about temporary contraception continues to be low. One study shows that amongst the users of sterilisation, the majority (71%) were not informed of other methods of contraception before being sterilised.<sup>268</sup> Finally, primary healthcare centres—relied upon by women from marginalised groups—either often run out of temporary methods of contraception,<sup>269</sup> or offer poor quality contraception.<sup>270</sup>

India’s contraceptive environment thus clearly illustrates that the denial of reproductive decision-making takes a different avatar amongst poor women from marginalised groups. They are viewed by the State as ‘irresponsible’, ‘excessively reproductive’ ‘breeders’<sup>271</sup> and discouraged from reproducing, rather than glorified, ‘deified and idealised’ as mothers<sup>272</sup> and compelled to reproduce. This simultaneously reflects the global politics of population control, which blames third world women for poverty, war, environmental damage, and social unrest.<sup>273</sup> India has received aid from, and been pressured by, several international agencies—the World Bank, International Planned Parenthood Federation, United Nations Fund for Population Activities, and

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<sup>266</sup> *ibid* 253; Dipika Jain and Natassia Rozario, ‘Voices from the Field: Access to Contraceptive Services and Information in Haryana, India’ (2013) 11 <[https://www.academia.edu/11797009/Voices\\_From\\_the\\_Field\\_Access\\_to\\_Contraceptive\\_Services\\_and\\_Information\\_in\\_the\\_State\\_of\\_Haryana\\_India](https://www.academia.edu/11797009/Voices_From_the_Field_Access_to_Contraceptive_Services_and_Information_in_the_State_of_Haryana_India)> accessed 17 May 2019.

<sup>267</sup> Jain and Rozario (n 266) 17.

<sup>268</sup> Pradhan and Ram (n 264) 372; Jain and Rozario (n 266) 27; Brault et al (n 256) 1554.

<sup>269</sup> Pulla (n 255).

<sup>270</sup> Jain and Rozario (n 266) 27.

<sup>271</sup> Sharma (n 254).

<sup>272</sup> Krishnaraj (n 194) 16; Bhattacharjee (n 194) 54; Bagchi (n 194) 46.

<sup>273</sup> Smith (n 239) 132.

USAID—to implement sterilisation programs to control its population.<sup>274</sup> Through this, social problems are privatised, with the State and the international community relinquishing responsibility by redirecting attention onto the bodies of women from marginalised groups.<sup>275</sup>

Drawing the historical and intersectional components together, it becomes evident that the social dimension represents a woman's interest in reproductive decision-making *because* women have been denied such decision-making within patriarchal motherhood—perpetuating their historical disadvantage—with such denial takes different forms depending on women's membership of other social groups. Group membership is thus key to the social dimension. The individual dimension, through its notion of the 'concrete' individual, locates an individual within their relevant social context. The social dimension, however, goes beyond this. It narrows in on, and carefully draws out from the broader social context, the role of group membership in denying women reproductive decision-making, and the impact of such denial in perpetuating their disadvantage. This specific focus is crucial because group membership, and attendant advantage or disadvantage, often lies at the root of the broader contextual factors shaping one's reproductive environment as identified by the individual dimension. For instance, factors like access to education, availability of food, water and sanitation and lack of financial independence influence reproductive health and decision-making.<sup>276</sup> These factors are, however, in a large part shaped by the groups to which one belongs, such that members of certain groups have access to education,

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<sup>274</sup> *ibid* 133; Sheoran (n 265) 248; Williams (n 259) 478; Gupta (n 250) 42.

<sup>275</sup> Wilson (n 259) 4; Bagchi (n 194) 73.

<sup>276</sup> Jean Dreze and Mamta Murthi, 'Fertility, Education, and Development: Evidence from India' (2001) 27(1) *Population and Development Review* 33-63; Shivanand C Mastiholi et al, 'Food Insecurity and Nutritional Status of Preconception Women in a Rural Population of North Karnataka, India' (2018) 15 *Reproductive Health* 90; Kelly K Baker et al, 'From Menarche to Menopause: A Population-Based Assessment of Water, Sanitation, and Hygiene Risk Factors for Reproductive Tract Infection Symptoms over Life Stages in Rural Girls and Women in India' (2017) 12 *PLOS ONE* e0188234; Elizabeth Reed et al, 'Access to Money and Relation to Women's Use of Family Planning Methods Among Young Married Women in Rural India' (2016) 20 *Maternal and Child Health Journal* 1203.

healthcare and other resources while others do not.<sup>277</sup> Even emerging contextual factors like climate change or the pandemic, both of which significantly affect reproductive decision-making, have a disproportionate impact on members of certain groups.<sup>278</sup> That is, to a certain (noteworthy) extent, the broader social context of reproduction is a manifestation of the advantages or disadvantages arising out of group membership. This also means that redressing group-based disadvantage in its various manifestations enables ‘real and effective’ reproductive decision-making by eliminating (or at least reducing the force of) contextual barriers to such decision-making, including lack of access to education, water, sanitation, healthcare etc. Acknowledging the explicit role of group membership, as the social dimension does, is therefore central. It brings a heightened focus to group-based disadvantage, otherwise decentred in simply locating an individual within context, as under the individual dimension.

In using the concept of ‘group’, this Chapter (and the Thesis as a whole) does not treat groups as fixed, or clearly delineated. To the contrary, as the Introduction clarifies, the boundaries of ‘woman’ as a group have explicitly been identified as porous. Similarly, the intersectional component resists the risk of homogenisation that the reliance on ‘groups’ brings. ‘Groups’, then, are permeable and intersectional categories, and the Thesis understands them so.

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<sup>277</sup> Mukesh Hamal et al, ‘Social Determinants of Maternal Health: A Scoping Review of Factors Influencing Maternal Mortality and Maternal Health Service Use in India’ (2020) 41 *Public Health Reviews* 13; Linda Sanneving et al, ‘Inequity in India: The Case of Maternal and Reproductive Health’ (2013) 6 *Global Health Action* 19145; Usha Jayachandran, ‘Socio-Economic Determinants of School Attendance in India’ (Centre for Development Economics) Working Paper No. 103 <<http://www.cdedse.org/pdf/work103.pdf>> accessed 23 May 2022; Christian K Darko and Nicholas Vasilakos, ‘Picking Winners: An Empirical Analysis of the Determinants of Educational Outcomes in India’ (2020) 46 *British Educational Research Journal* 1445.

<sup>278</sup> For the pandemic, see (n 6), (n 12), (n 13); For climate change, see ‘The Link between Climate Change and Reproductive Health and Rights: An Evidence Review’ (Women Deliver 2021) <<https://womendeliver.org/wp-content/uploads/2021/02/Climate-Change-Report.pdf>> accessed 23 May 2022; Linda C Giudice et al, ‘Climate Change, Women’s Health, and the Role of Obstetricians and Gynecologists in Leadership’ (2021) 155 *International Journal of Gynecology & Obstetrics* 345.

## VI. Conclusion: Independence and Interrelatedness

I began the Chapter by asking two questions: What interests does the individual and the social dimension identify as underlying reproductive decision-making? Why does each dimension value these interests? The previous sections cumulatively answer these questions. The individual and social dimensions identify strong and independent interests as underlying reproductive decision-making, justifying the value that ought to be attributed to it. In centring the concrete individual, the individual dimension transcends the limitations of traditional liberal reproductive choice. At the same time, it speaks to the centrality of reproductive decision-making to an individual's sense of self, a function of the interaction between one's body and mind. It shines the spotlight on the individual's aspirations regarding reproduction as an expression of individual personality, though like all decisions these might be shaped by the web of relationships and the social context the 'concrete' individual is in. This is an important perspective because it preserves the space for each individual's unique desires, their 'eccentricity' if you may: I might desire a reproductive outcome which another individual, in the same context as me, abhors. The individual dimension identifies that ultimately, one part of reproductive-decision making remains deeply intimate, a mode of self-expression reflecting an individual's notions of who they are. This is especially significant for those with the ability to become pregnant, for whom reproductive decision-making involves a level of immediate reality—their bodies—which is absent for others. This also implies that the interests represented by the individual dimension would hold true even under 'new, revolutionary social relations of reproduction'. That is, even in a society where the 'collective responsibility for reproduction and child rearing is taken seriously at all levels of public and interpersonal life, *[there would] still be aspects of reproductive relations that remain a "personal affair"*'.<sup>279</sup>

The social dimension, in turn, refocuses the lens by shining the spotlight on the group to which the individual belongs, and crucially, what group membership implies for how the

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<sup>279</sup> Petchesky, *Reproductive Freedom* (n 128) 685 (emphasis added); See also MacKinnon, *Reflections* (n 66) 1326.

individual's reproductive decisions are, and will be, treated. This is important because it identifies that acts of denying reproductive decision-making to members of certain groups are not simply random occurrences with no meaning beyond the (undoubtedly severe) impact on the individual's sense of self. Rather they are part of an abiding historical pattern, often occurring *because of* group membership. As a result, the denial of reproductive decision-making to members of these groups not only harms the individual on an identity and bodily level but *also* harms the individual by perpetuating her disadvantage as a member of the group, which in turn cements the group's overall disadvantage. The individual and social dimensions thus *independently* represent the two central interests an individual has in reproductive decision-making. One cannot replace the other, and one without the other is partial, deficient and lacking. Reproductive decision-making, thus, ought to be valued because it involves *both* sets of interests.

At the same time, the interests represented by the two dimensions do not simply operate independently, in isolation from one another. Instead, they interrelate in two senses. In the first sense, working together, they reinforce the value that ought to be attributed to reproductive decision-making by women. On the one hand, reproductive decision-making is *so* central to *any* individual's sense of self that being denied *such* decision-making—when compared to decision-making in other contexts—is especially egregious. On the other, the denial of reproductive decision-making has played a pivotal role in perpetuating the historical disadvantage of women, especially women from certain groups. Against this history, a fresh act of denial of reproductive decision-making to women takes on a new, added significance that an isolated act of denial, to an individual who is not so disadvantaged, does not have. This does not mean that the reproductive decisions of such individuals ought not be valued. In fact, the individual dimension, in isolation, would always value and respect their decisions. But, when the two dimensions interrelate, it does imply that a denial of reproductive decision-making to these individuals is qualitatively different

from a denial to women, and especially women from disadvantaged groups, who have a history of such denial.

In the second sense, the interrelationship between the individual and social dimensions affirms that preserving the space for individual ‘eccentricity’—valued by the individual dimension—in a ‘real and effective’ manner requires, as a precondition, two steps: *first*, the acknowledgment and *second*, the redressal of group based disadvantage, identified by the social dimension. Put simply, an individual woman cannot make ‘real and effective’ reproductive decisions *unless* the disadvantage associated with her group membership—whether as a woman, or a woman from marginalised groups—is redressed by the State. To some extent, in viewing the individual as concrete rather than abstract, the individual dimension independently acknowledges the role of the individual’s broader social context in constraining her decision-making. In turn, it identifies the removal of such constraints by the State as necessary. The social dimension, then, buttresses this conclusion. It concretely draws out the role of group membership in denying women ‘real and effective’ reproductive decision-making, with group membership often lying at the heart of the plethora of contextual factors shaping such decision-making. The social dimension thus reinforces the concreteness of the individual within the individual dimension. It functions as a fail-safe, preventing the individual dimension from collapsing into traditional liberal choice. And, it narrows in on redressing group disadvantage as a *specific* site for State action, which the individual dimension, in more broadly locating the individual within the relevant social context, might de-emphasise. In this manner, the individual and social dimension feed into one another to build a robust network of interests at the heart of reproductive decision-making.

If so, constitutional reproductive rights, which seek to guarantee ‘real and effective’ reproductive decision-making, must be capable of protecting both sets of interests *and* capturing their interrelationship. I now turn to interrogating Article 21, the current constitutional home for

reproductive rights in India. I examine whether doctrinally and constitutionally Article 21 is, and will be, up to this task.

**PART II**  
**THE PILLARS**

## CHAPTER 2

### Important yet Incomplete: The Role of Article 21

#### I. Introduction

Chapter 2 aims to understand whether Article 21, as the constitutional home for reproductive rights, protects (or possesses the potential to protect) the independent interests represented by the individual and the social dimension and captures their interrelationship. In **Part II** of the Chapter, I look carefully at the interests protected by Article 21 in constitutionally grounding reproductive rights. I identify two sets of interests, emerging from its ‘right to life’ clause and the ‘personal liberty’ clause. In **Part III**, I argue that these interests closely correlate with the interests represented by the individual dimension, at two stages. I then conclude that Article 21 is the constitutional manifestation of the individual dimension, and is thus central in framing reproductive rights constitutionally.

However, I observe that in enshrining reproductive rights, Article 21 does not, at present, protect the interests represented by the social dimension. This raises an important question. Is this simply a limitation of the existing jurisprudence? Put differently, can Article 21 be interpreted to extend its protection to the interests represented by the social dimension? In **Part IV**, I argue that Article 21 cannot and should not be so interpreted. Article 21 *cannot* be so interpreted because such interpretation would not bear fidelity to Article 21’s text, history and structure, discerned through constitutional interpretation. Moreover, Article 21 *should not* be so interpreted because such interpretation is undesirable—as it may dilute the core of Article 21’s protection—and unnecessary—in light of the non-discrimination guarantee under Article 15, explored in Chapter 3. I conclude that while Article 21 robustly protects the interests represented by the individual dimension, it fails to protect the interests represented by the social dimension. As a consequence, it fails to capture the interrelationship between the dimensions. Article 21 therefore offers an important yet incomplete constitutional home for reproductive rights in India.

My overall aim in this Chapter is to draw out the strengths and limitations of Article 21 in its role as the constitutional home for reproductive rights, and crucially, identify *why* it plays this role. I find that the key to unlocking its strengths and its limitations, and in essence to defining its role, are the interests it regards as worthy of constitutional protection, and the extent to which these interests correlate to the interests represented by the individual and the social dimension. I now turn to discerning the relevant interests. For this purpose, I use cases from the Supreme Court of India and State High Courts, reading them ‘horizontally’—as understood in the Introduction to the Thesis—to pinpoint trends rather than indicate the binding position of law.

## II. Interest Identification: Article 21 and Reproductive Rights

To draw out the interests protected by Article 21 in constitutionally grounding reproductive rights, I look independently at Article 21’s ‘right to life’ clause and ‘personal liberty’ clause. Under both clauses, I consider cases on abortion and/or obstetric care which house reproductive rights within Article 21.

Below, I often use the term ‘woman’ or ‘pregnant woman’ in describing the interests protected by Article 21. This is because the judicial decisions I rely on to make my claim use these terms. However, this does not mean that the interests protected by Article 21 are relevant *only* to women, as defined in the Introduction to the Thesis. The interest in ‘bodily integrity’ underlying reproductive decision-making, for instance, is relevant to all pregnant persons, or persons with the ability to become pregnant. The interest in decisional autonomy, in contrast, is potentially relevant to all individuals, as reproductive decisions are intimate decisions reflective of any individual’s personhood. This caveat runs through the entire Chapter. At the same time, the examples I cite show how in guaranteeing *women* reproductive rights, Article 21 protects a woman’s interest in making intimate decisions which are an expression of her personality, developing through an interaction of her body and mind. It also protects the woman against the harm to life and health from being denied such decision-making. While these interests correlate closely with the interests

represented by the individual dimension, they are starkly different from the interests protected by the social dimension, set out in Chapter 1. I build on this claim in Part III of the Chapter.

#### A. The 'Right to life' Clause

In this section, I examine cases locating a right to obstetric care and a right to abortion within the 'right to life' under Article 21. I show that in constitutionally enshrining these rights, the 'right to life' clause grants constitutional protection to a pregnant woman's interests in preserving her 'life', interpreted to mean not just survival but also physical and mental health.

I start with the emphasis on survival. *Laxmi Mandal*<sup>280</sup> identified maternal mortality as a violation of Article 21. In highlighting the deficiencies in implementation of maternal health schemes, leading to the death of one petitioner and forcing the other petitioner to give birth beneath a tree, the Delhi High Court narrowed in on:

[the] two *inalienable survival rights* that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the *reproductive rights* of the mother.<sup>281</sup>

A similar focus on survival was identified by the Madhya Pradesh High Court in *Sandesh Bansal*.<sup>282</sup>

The Court held the State responsible for the shortage of infrastructure and manpower:

which in turn is costing the *life of mothers* in the course of mothering... *the inability of women to survive pregnancy and child birth violates her fundamental right to live* as guaranteed under Article 21 of the Constitution of India. And *it is the primary duty of the government to ensure that every woman survives pregnancy and child birth*, for...the State...is under [an] *obligation to secure their life*.<sup>283</sup>

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<sup>280</sup> *Laxmi Mandal* (n 38).

<sup>281</sup> *ibid* [2] (emphasis added).

<sup>282</sup> *Sandesh Bansal v Union of India* W.P. No. 9061/2008 (Madhya Pradesh High Court, 6 February, 2012) ('*Sandesh Bansal*').

<sup>283</sup> *ibid* [22] (emphasis added).

In *Kali Bali*,<sup>284</sup> where a pregnant woman died due to poor quality obstetric care facilities, the Punjab and Haryana ('P&H') High Court emphasised that:

[the] **preservation of human life is of seminal and paramount importance in the context of right to life** guaranteed under Article 21 of the Constitution. **Failure on the part of Government hospitals to provide timely medical treatment to a person in need of such treatment results in violation of right to life** of that person guaranteed under that Article.<sup>285</sup>

On similar lines, the Delhi High Court, in *High Court on its Own Motion*,<sup>286</sup> took suo moto cognizance of the death of a destitute woman after giving birth to a child on the street. Recognising a violation of Article 21, the Court observed that allowing 'destitute pregnant women and lactating women to die' on the streets 'cannot be countenanced and is not possible to visualize in the backdrop of Article 21'.<sup>287</sup> These judicial observations indicate the interests protected by Article 21's 'right to life' clause in constitutionally grounding reproductive rights: a woman's interests in preservation of her life during pregnancy and childbirth.<sup>288</sup>

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<sup>284</sup> *Kali Bali v Union of India* 2017 SCC OnLine Chh 1081 ('*Kali Bali*').

<sup>285</sup> *ibid* [10] (emphasis added).

<sup>286</sup> *High Court on its own Motion v Union of India* W.P. (C) 5913/2010 (Delhi High Court, 12 January 2011) ('*Court v UoI*').

<sup>287</sup> *ibid*.

<sup>288</sup> A similar role for Article 21 has been identified in a series of petitions challenging the failure of the State to implement existing schemes for obstetric care, leading to the death of pregnant women. Across these petitions, the petitioners argue that the 'basic, fundamental and human right to life under Article 21' has been violated, as women have a 'right to survive pregnancy and childbirth' and the State has a corresponding obligation to ensure that 'women do not experience death or morbidity from wholly preventable causes': *Rupasingh Majhi v State of Orissa* W.P. (C) No. 15159/2016 (Orissa High Court) <https://hrln.org/negligence-and-poor-implementation-of-maternal-benefit-provisions-leads-to-maternal-death-husband-files-petition/> (accessed 6 March 2022) ('*Rupasingh Majhi*'); *Trinath Swain v Union of India* W.P. (C) No. 15159/2016 (High Court of Orissa) <https://hrln.org/with-the-death-of-a-pregnant-woman-after-failure-of-state-machinery-petition-filed-for-failure-of-implementation-of-the-national-food-security-act-2013-and-violation-of-right-to-health/> (accessed 6 March 2022) ('*Trinath Swain*'); *Smt. Kabita Barik v State of Orissa* W.P. (C) No. 5429/2016 (Orissa High Court) <https://hrln.org/petition-in-case-of-maternal-death-due-to-non-implementation-of-healthcare-schemes/> (accessed 6 March 2022) ('*Kabita Barik*'); *Sambhunath Munda v Union of India & Others* W.P.(C) No.16706/2016 (Orissa High Court) <https://hrln.org/petition-filed-in-case-of-maternal-death-due-to-negligence-and-poor-implementation-of-maternity-benefit-schemes/> (accessed 6 March 2022) ('*Sambhunath Munda*'); *Suresh Rout v Union of India & Others* W.P. (C) No.17958/2016 (Orissa High Court) <https://hrln.org/after-pregnant-lady-dies-due-to-negligence-and-poor-treatment-husband-files-petition-against-non-implementation-of-the-welfare-schemes-and-violation-of-reproductive-rights-right-to-health-of-the-mot/> (accessed 6 March 2022); *Alin Kumar Sasmal v State of Orissa & Others* W.P. (C) No. 5428/2016 (High Court of Orissa) <https://hrln.org/maternal-death-due-to-negligence-and-non-conformity-to-welfare-provisions-petition-filed-for-the-same/> (accessed 6 March 2022) ('*Alin*'); *Nirmal Chandra Bebera v Union of India & Others* W.P. (C) No. 17383/2016 (Orissa High Court) <https://hrln.org/maternal-death-due-to-non-implementation-of-healthcare-schemes-in-odisha/> (accessed 6 March

A similar focus on survival can be discerned within cases on abortion. Here, in granting pregnant women permission to terminate pregnancy, courts draw on the ‘right to life’ clause as constitutionally protecting women’s interests in avoiding death. The Bombay High Court, in *X v Union of India*,<sup>289</sup> granted a minor rape victim permission to terminate a 25 week-old pregnancy because ‘continuing the pregnancy would then lead to maternal mortality, and violate her right to live a life’ under Article 21. Similarly, in *Meera Santosh Pal*,<sup>290</sup> the Supreme Court held, ‘given the danger to her life, there is no doubt that she has a right to protect and preserve her life’ under Article 21 through terminating her pregnancy.<sup>291</sup>

However, other cases on obstetric care and abortion have interpreted ‘life’, under Article 21, as going beyond protecting an individual’s interest in survival alone. In *Snehalatha Singh*,<sup>292</sup> the Allahabad High Court observed: ‘The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21 ***enlarges its sweep to encompass human personality in its full blossom with invigorated health***’.<sup>293</sup> Prompted by this expansive interpretation of the interests protected by Article 21, the Court required the State not only to prevent the death of women during childbirth but also provide ‘appropriate’ obstetric care, a form of positive duty discussed further in Chapter 5, which would invigorate the health of women: ‘Poor, shabby and inadequate health care institutions, if are maintained by State, it is nothing but a blatant invasion on

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2022) (*Nirmal Chandra*); *National Alliance for Maternal Health and Human Rights v State of Chhattisgarh* W.P. (PIL) No. of 2014 (Chhattisgarh High Court) <https://hrln.org/wp-content/uploads/2017/12/NAMHHR-v-State.pdf> (accessed 6 March 2022).

<sup>289</sup> *X v Union of India* 2017 SCC OnLine Bom 9334.

<sup>290</sup> *Meera Santosh Pal* (n 35).

<sup>291</sup> *ibid* [11].

<sup>292</sup> *Snehalatha Singh @ Salenta v State of Uttar Pradesh* W.P. (PIL) No. 14588/2009 (Allahabad High Court, 9 March 2018) (*Snehalatha Singh*).

<sup>293</sup> *ibid* [21] (emphasis added).

fundamental right of persons, which is a part of Article 21 of Constitution'.<sup>294</sup> A similar obligation to provide quality healthcare was identified by the Bombay High Court in *Dinanath Waghmare*:<sup>295</sup>

The right to health would also include the facilities to be provided by the State Government which are *conducive of maintenance of health and not detrimental to the maintenance of health*<sup>296</sup>...The State cannot run away from its obligation to provide *proper* medical facilities to the citizens.<sup>297</sup>

An identical shift away from survival alone occurred with respect to abortion as well. At the same time, this line of cases focuses not just on physical health, as in the obstetric care context, but also on mental health, with the 'right to life' clause being interpreted to protect a woman's interest in preserving her physical *and* mental health harmed by the continuation of an unwanted pregnancy. In *Nand Kishore Sharma*,<sup>298</sup> the Rajasthan High Court held that the Medical Termination of Pregnancy Act, 1971 ('MTPA') furthers these interests, and is thus in consonance with Article 21: 'The object of the Act being to save the life of the pregnant woman *or relieve her of any injury to her physical and mental health*, and no other thing, it would appear *the Act is* rather *in consonance with Article 21 of the Constitution of India*'.<sup>299</sup> Along the same lines, in *A v State of UP*,<sup>300</sup> the Allahabad High Court held:

"life" indicates something *more than mere animal existence*...The inhibitions contained in Article 21 against its deprivation *extends even to those faculties by which life is enjoyed*... Any act which *damages or injures or interferes with the use of any*

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<sup>294</sup> *ibid* [24].

<sup>295</sup> *Dinanath Waghmare v The District Collector, Nagpur District* W.P. (C) No. 19303/2013 (Bombay High Court, 10 December 2014) ('*Dinanath Waghmare*').

<sup>296</sup> *ibid* [5].

<sup>297</sup> *ibid* [8].

<sup>298</sup> *Nand Kishore Sharma v Union of India* AIR 2006 Raj 166 ('*Nand Kishore*').

<sup>299</sup> *ibid* [6], [7] (emphasis added).

<sup>300</sup> *A v State of Uttar Pradesh* 2015 (10) ADJ 602 ('*A v UP*').

*limb or faculty of a person* either permanently or even temporarily, would be within the inhibition of Article 21.<sup>301</sup>

The Court read into ‘life’ the preservation of *all* faculties by which life is enjoyed, including physical and mental health, which would be injured by the continuation of a pregnancy arising out of rape. Similarly, in *Poornima Devu*,<sup>302</sup> the Bombay High Court held that ‘life’ means ‘something [more] than just physical survival’: ‘The right to life includes the right to live with human dignity and all that goes along with it’.<sup>303</sup> Dignity refers to ‘the *intrinsic value* of *every human being*, by virtue of his existence’.<sup>304</sup> In other words, ‘human dignity is the dignity of *each human being as a human being*’.<sup>305</sup> Such dignity is ‘infringed if a person’s life, *physical or mental welfare* is harmed.’<sup>306</sup>

This careful reading of the cases points to a clear conclusion. In constitutionally grounding reproductive rights, Article 21’s ‘right to life’ clause protects a woman’s interests in preserving her ‘life’, interpreted to mean not just survival but also physical and mental health.

#### B. The ‘Personal Liberty’ Clause

Moving on, in this section I draw out the interests constitutionally protected by Article 21’s ‘personal liberty’ clause. Here I focus on abortion because courts have typically developed the ‘personal liberty’ clause in relation to abortion rather than obstetric care. As an example, consider the landmark Supreme Court decision in *Suchitra Srivastava*,<sup>307</sup> the first case to provide constitutional recognition to reproductive rights in India in 2009. The Court understood the right

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<sup>301</sup> *ibid* [24], [25] (emphasis added).

<sup>302</sup> *Poornima Devu Mandarkar v Union of India* WP 10835/2018 (Bombay High Court, 3 April 2019) (*‘Poornima Devu’*).

<sup>303</sup> *ibid* [81].

<sup>304</sup> *ibid* [82] (emphasis added).

<sup>305</sup> *ibid* [83] (emphasis added).

<sup>306</sup> *ibid* [83] (emphasis added).

<sup>307</sup> *Suchitra Srivastava* (n 34).

to make reproductive choices, including those to ‘abstain from procreating’ (that is, a right to abortion) as a ‘dimension of personal liberty...under Article 21 of the Constitution of India’.<sup>308</sup>

In constitutionally grounding reproductive rights, Article 21’s ‘personal liberty’ clause protects a woman’s interests in making intimate decisions, including reproductive decisions. This is best captured by *Puttaswamy*,<sup>309</sup> a 2017 decision of the Supreme Court constitutionally enshrining the right to privacy under Article 21. The Court in *Puttaswamy* identified various facets of the right to privacy: spatial privacy, informational privacy and decisional autonomy.<sup>310</sup> Decisional autonomy, the Court held:

protects for the individual a *zone of choice and self-determination*...[recognizing] the ability of each individual to make choices and to take decisions governing matters *intimate and personal*.<sup>311</sup>

Making ‘*intimate* decisions...[about] one’s sexual or procreative nature’,<sup>312</sup> the Court observed, is an exercise of decisional autonomy, because reproductive decisions pertain to a person’s ‘*most personal* life choices’<sup>313</sup> including ‘whether to bear a child or abort her pregnancy’.<sup>314</sup> A similar interest was identified by the P&H High Court in *Mangal Dogra*.<sup>315</sup> In rejecting the argument of the petitioner that a woman requires the consent of her husband for termination, the Court held: ‘It

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<sup>308</sup> *ibid* [11]. It should however be noted that *Suchitra Srivastava* itself was not about the right to have an abortion but the right to not be compelled to have an abortion.

<sup>309</sup> *Puttaswamy* (n 31).

<sup>310</sup> *ibid* [141] (Chandrachud J.).

<sup>311</sup> *ibid* [168] (Chandrachud J.) (emphasis added).

<sup>312</sup> *ibid* [142] (Chandrachud J.) (emphasis added).

<sup>313</sup> *ibid* [227] (Chelameshwar J.) (emphasis added); *ibid* [361] (Nariman J.) (‘freedom to act in an autonomous fashion’).

<sup>314</sup> *ibid* [229] (Chelameshwar J.); *ibid* [239] (Nariman J.) (‘protecting an individual’s interests in making vital personal choices such as the right to abort a fetus...[and] rights as to procreation, contraception’).

<sup>315</sup> *Dr. Mangal Dogra v Anil Kumar Malhotra* ILR (2012) 2 P&H 446 (‘*Mangal Dogra*’).

is a **personal right** of a woman to give birth to a child...Nobody can interfere in the **personal decision** of the wife to carry on or abort her pregnancy.<sup>316</sup>

At the same time, in enshrining reproductive rights, the ‘personal liberty’ clause also protects a woman’s interests in decision-making involving her body, through recognising the ‘sacrosanct right’ to bodily integrity.<sup>317</sup> In *Z v Bihar*,<sup>318</sup> the Supreme Court accepted the ‘fundamental concept relating to **bodily integrity**...and **sovereignty over her body**’,<sup>319</sup> as lying at the heart of the right to abortion under Article 21. Elaborating upon this, the Bombay High Court in *High Court on its Own Motion*<sup>320</sup> observed:

Let us not lose sight of the basic right of women: the right to autonomy and **to decide what to do with their own bodies**, including whether or not to get pregnant<sup>321</sup>... **Woman owns her body and has right over it**...and **woman alone should be the choice maker**.<sup>322</sup>

In *Marimuthu*,<sup>323</sup> the Tamil Nadu High Court recognised the woman’s interest in ‘**decid[ing] what to do with their own bodies**, including whether or not to get pregnant, and if pregnant whether to retain the pregnancy and to deliver the child’.<sup>324</sup> In *R v State of Haryana*,<sup>325</sup> the P&H High Court similarly held that the ‘woman has an **exclusive and inalienable right over her body** and her

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<sup>316</sup> *ibid* [21] (emphasis added).

<sup>317</sup> *Sarmishta Chakraborty v Union of India* (2018) 13 SCC 339 [11] (‘*Sarmishta*’); *Neelam Choudhary v Union of India* 2019 (1) BomCR 681 [18] (‘*Neelam*’).

<sup>318</sup> *Z v Bihar* (n 37).

<sup>319</sup> *ibid* [58] (emphasis added).

<sup>320</sup> *High Court on its own Motion v State of Maharashtra* 2017 CriLJ 218 (‘*High Court on its own Motion*’).

<sup>321</sup> *ibid* [15].

<sup>322</sup> *ibid* [20] (emphasis added).

<sup>323</sup> *Marimuthu v Inspector of Police* (2016) 6 CTC 90 (‘*Marimuthu*’).

<sup>324</sup> *ibid* [39] (emphasis added).

<sup>325</sup> *R v State of Haryana* 2016 SCC OnLine P&H 7425 (‘*R v Haryana*’).

reproduction...that cannot be transferred to her family or the State'.<sup>326</sup> This, then, implies that 'how she wants to deal with this pregnancy must be a decision *she, and she alone*, can make'.<sup>327</sup> In other words, a woman cannot be compelled to terminate a pregnancy: '*the foetus cannot be ordered to be aborted against the wishes of the victim girl*...Whether the foetus carried is a pain or pleasure is [*her*] *subjective opinion*'.<sup>328</sup> Nor can she be compelled to continue an unwanted pregnancy: 'even in the best circumstances, this Court believes that *no law or a person can ethically compel a woman to carry on pregnancy that she does not want*'.<sup>329</sup> How these emphatic statements grounding a right to abortion actually interact with the law governing abortion in India will be explored in Chapter 4.

From the example of the right to abortion, it is therefore evident that in constitutionally grounding reproductive rights, Article 21's 'personal liberty' clause protects a woman's interest in intimate decision-making, especially extending to reproductive decision-making involving the woman's body. If so, why is this interest protected? *Puttaswamy* provides a compelling response. *Puttaswamy* identifies that Article 21's 'personal liberty' clause protects this interest *because* intimate decision-making (including reproductive decision-making) 'lies at the core of human personality': 'The inviolable nature of the human personality is manifested in the ability to make decisions on matters *intimate to human life*...These are *crucial aspects of personhood*'.<sup>330</sup> Crucially, such personhood develops through an interaction of the body and mind:

The body and the mind are *inseparable* elements of the human personality. The integrity of the body *and* the sanctity of the mind [exists] on the foundation that each

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<sup>326</sup> *ibid* [33.4] (emphasis added).

<sup>327</sup> *High Court on its own Motion* (n 320) [15] (emphasis added).

<sup>328</sup> *Marimuthu* (n 323) [39], [40] (emphasis added).

<sup>329</sup> *R v Haryana* (n 325) [33.4] (emphasis added).

<sup>330</sup> *Puttaswamy* (n 31) [168] (Chandrachud J.) (emphasis added).

individual possesses an *inalienable ability and right to preserve a private space in which the human personality can develop*.<sup>331</sup>

When the ‘right to life’ and ‘personal liberty’ clauses are put together, Article 21, in its role as the constitutional home for reproductive rights in India, thus protects two sets of interests. *First*, a woman’s interests in preserving her ‘life’, interpreted to mean not just her survival but also her physical and mental health. And *second*, a woman’s interest in making intimate decisions in furtherance of her core personality, which develops through an interaction between her body and mind. I now examine how these interests interact with the interests represented by the individual dimension.

### III. Locating the Individual Dimension

The individual dimension, as understood in Chapter 1, has an identity component which recognises the interest an individual has in reproductive decision-making because reproduction is central to an individual’s sense of self. The individual dimension also has a bodily component which recognises the interest a pregnant person, or a person with the ability to become pregnant, has in reproductive decision-making due to the impact of pregnancy on their body. The body, within the individual dimension, however is not simply seen as a group of physiological organs. It is instead also identified as the site through which the individual’s sense of self is expressed and developed. The identity and bodily components of the individual dimension thus together identify an individual’s interest in reproductive decision-making *because* of the centrality of reproductive decision-making to an individual’s sense of self, a function of the interaction between one’s body and mind. In this section I argue that the interests protected by Article 21 in constitutionally guaranteeing reproductive rights correlate with the interests represented by the individual dimension through its identity and bodily components.

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<sup>331</sup> *ibid* [168] (emphasis added).

This correlation occurs in two stages. The first stage hones in on the role of the ‘personal liberty’ clause. As the previous section shows, at the core of Article 21’s protection of a person’s ‘personal liberty’ lies their personhood or personality. From this core, constitutional recognition radiates outwards to decisions which are an expression of such personality. These decisions can also involve the person’s body, because the body and mind are ‘inseparable elements of human personality’.<sup>332</sup> Reproductive decisions clearly fall within this matrix, as they are both personal decisions in exercise of an individual’s personality, and are decisions intimately involving the body of a pregnant person, or a person with the ability to become pregnant. Now, place the interests protected by Article 21’s ‘personal liberty’ clause and the interests represented by the identity and bodily components of the individual dimension side by side. The correlation between the two is readily evident. Both the ‘personal liberty’ clause and the individual dimension identify identical interests—intimate decision-making involving the body and mind—as underlying reproductive decision-making. *And*, both value these interests because they are a reflection of an individual’s personality or sense of self. Article 21’s ‘personal liberty’ clause is thus, without doubt, the constitutional manifestation of the individual dimension.

Article 21, however, goes one step further in the second stage of correlation. Through its ‘right to life’ clause, Article 21 identifies the harm caused by the denial of ‘personal liberty’. Such denial can occur through the State failing to respect reproductive decisions, for instance by refusing to terminate an unwanted pregnancy. Or, it can occur through the State failing to enable ‘real and effective’ reproductive decision-making, for instance by maintaining poor quality obstetric care. As the cases on abortion and obstetric care discussed in Part II(A) show, such denial of personal liberty threatens a woman’s life and health, causing harm to her body and mind. In protecting a woman’s interest in preserving her life, interpreted to also include physical and mental health, the ‘right to life’ clause presents a constitutional bulwark against such harm. Put differently, the ‘right

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<sup>332</sup> *ibid.*

to life' clause constitutionally prohibits the harm occurring from a denial of interests protected by the 'personal liberty' clause, which in turn closely correlate with the interests represented by the individual dimension. In this sense, the 'right to life' clause *reinforces* the interests represented by the identity and bodily components of the individual dimension. And, through the combined operation of the two stages, Article 21 captures the individual dimension.

Crucially, in doing so, Article 21 sees the woman (or the individual) as 'concrete' rather than 'abstract', as understood in Chapter 1. She is not atomistic, 'an autonomous moral agent unconnected to the larger community in any meaningful sense...the image of a woman alone, isolated and independent, and bounded by little more than self-interest.'<sup>333</sup> Instead, she is relational:

The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community.<sup>334</sup>

Her relationships 'may and do often pose questions to autonomy and free choice'.<sup>335</sup> For instance, her decision to undergo a termination of pregnancy may be:

a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child.<sup>336</sup>

She is also not acontextual, abstracted from her relevant social context. Instead, the 'constitutional understanding of...liberty [places] an individual in the context of a social order'.<sup>337</sup> As an example,

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<sup>333</sup> Fredman, *Comparative Human Rights Law* (n 57) 222 (describing the view of the individual under the United States Constitution and its jurisprudence).

<sup>334</sup> *Puttaswamy* (n 31) [169] (Chandrachud J.).

<sup>335</sup> *ibid* [2] (Chandrachud J.).

<sup>336</sup> *High Court on its own Motion* (n 320) [14].

<sup>337</sup> *Puttaswamy* (n 31) [2] (Chandrachud J.).

consider *Laxmi Mandal*.<sup>338</sup> Shanti died because she was unable to access timely and quality obstetric care. In identifying a violation of her right to life under Article 21, she was located within her ‘social order’: ‘her dismal socio-economic status which denied access to needed resources and services, and her poor health condition which is a culmination of anaemia, tuberculosis and repeated, unsafe pregnancies’.<sup>339</sup>

Emerging from the relational and contextual understanding of the woman (or the individual) are duties on the State to not just abstain from interfering in reproductive decision-making—say through enacting restrictive abortion laws—but also to positively enable such decision-making in a ‘real and effective’ manner. While the nature and scope of the State’s positive duties under Article 21 are explored in greater detail in Chapter 5, the obstetric care cases demonstrate, sufficiently for current purposes, the *existence* of positive duties on the State under Article 21. For instance, in *Kali Bali*,<sup>340</sup> the Court recognised the overarching obligation on the State to provide ‘adequate medical facilities’, a ‘minimum standard of treatment and care’ and ‘timely medical treatment’, and to ensure ‘access to public health facilities’. On this basis, the Court identified the following concrete obligations on the State, as ‘indefeasible components of access to protection and enforcement of *reproductive rights* of the mother’:<sup>341</sup>

- a. Identification of high risk pregnancies, followed by *appropriate* and *prompt* referral of cases needing specialist care<sup>342</sup>
- b. ensuring the availability of Doctors with *due* acumen at the Government hospitals<sup>343</sup>

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<sup>338</sup> *Laxmi Mandal* (n 38).

<sup>339</sup> *ibid* [28.10].

<sup>340</sup> *Kali Bali* (n 284).

<sup>341</sup> *ibid* [7].

<sup>342</sup> *ibid*.

<sup>343</sup> *ibid* [10].

- c. providing equipment *of required standard* and medicines, blood supplies and other requisites<sup>344</sup>

Moreover, the duty on the State to go beyond non-intervention alone is reinforced through the specific conception of privacy adopted under Article 21.<sup>345</sup> Literature on reproductive rights has typically shied away from endorsing privacy as the constitutional hook for reproductive rights. This is for two reasons: *first*, what traditional conceptions of privacy protect, and *second* the nature of responsibilities on the State under these conceptions. Traditional conceptions of privacy protect private spaces and relationships rather than individual decision-making, *and* they require the State to abstain from interfering in these spaces or relationships. Private spaces (like the home) and private relationships (like marriage) have historically been sites of patriarchal oppression of women. The operation of the patriarchal institution of motherhood, explored in Chapter 1, is a manifestation of such oppression. If so, shielding private spaces and relationships from State intervention perpetuates such oppression in the name of privacy; for women, privacy (in its traditional sense) is then an ‘injury got up as a gift’.<sup>346</sup> Moreover, even if privacy were to protect individual decision-making in the reproductive sphere, simply requiring the State to abstain from intervening in decisions does not offer ‘real and effective’ protection for such decision-making by women from marginalised groups. These women require the State to positively provide, for instance through maintaining good quality obstetric care facilities, to be able to both make reproductive decisions in a ‘real and effective’ sense, and exercise them. Thus, traditional

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<sup>344</sup> *ibid*; See also *Snehalatha Singh* (n 292) and *Dinanath Wagbmare* (n 295) setting out the State’s positive duties under Article 21 to provide timely and quality obstetric care.

<sup>345</sup> Jain and Shah (n 77) 20-24 term privacy a ‘fragile’ right to ground reproductive rights in, pointing out that there is no explicit right to privacy under the Constitution of India. They also argue that privacy is not an absolute right. At the outset, a 9-judge bench in *Puttaswamy* (n 31) located a right to privacy within the Constitution of India, cementing its constitutional status. Even if this status was to be challenged, the Thesis does not house reproductive rights solely within the right to privacy under Article 21. Rather, reproductive rights are housed within Article 21 more broadly, drawing on both its ‘right to life’ and ‘personal liberty’ clauses. Finally, while privacy is not an absolute right, most other constitutional rights, including the right to non-discrimination, are also not absolute. In other words, the fact that the right to privacy can be limited does not make it especially fragile. What is relevant is *how* the limitations analysis is conducted, explored further in Chapters 4 and 5.

<sup>346</sup> MacKinnon, *Beyond Roe v Wade* (n 70) 100; MacKinnon, *Reflections* (n 66) 1311.

conceptions of privacy are limited in their scope and harmful in their application as the constitutional frame for reproductive rights.<sup>347</sup>

Alternate conceptions of privacy however exist. These emphasise the value of women's reproductive self-determination; they thus attach privacy to the individual rather than spaces or relationships. And, they require the State to facilitate reproductive decision-making through positive duties.<sup>348</sup> Article 21 aligns with these alternate conceptions of privacy,<sup>349</sup> in turn bypassing common critiques of privacy as the constitutional home for reproductive rights. The Supreme Court, in *Puttaswamy*, refused to endorse the 'spatial' notion of privacy, which simply shields the private sphere, or decisions made within the private sphere, from State interference. The Court recognised that this conception has served as a 'vener for patriarchal domination and abuse of women'.<sup>350</sup> Instead, the Court understood privacy as decisional autonomy, as described above in Part II(B) of the Chapter.<sup>351</sup> Intimate decisions, including those around reproduction, are thus protected by this conception of privacy not because they are decisions made within a sacred private space but because they are an expression of an individual's personality. And as Albertyn powerfully notes:

The rhetorical power of a private sphere of decisional autonomy where women are free to make decisions about their destiny, taking into account their needs and

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<sup>347</sup> West (n 56) 1394-1432; Loretta Ross, 'Understanding Reproductive Justice: Transforming the Pro-Choice Movement' 36(4) *Off Our Backs* 14-19; Colker, *Equal Protection Analysis* (n 70) 324-64.

<sup>348</sup> See Michele Gilman, 'Welfare, Privacy, and Feminism' (2008) 39 *University of Baltimore Law Forum*; Anita Allen, 'Still Uneasy: A Life with Privacy' in Aviva de Groot and Bart van der Sloot (eds) *The Handbook of Privacy Studies: An Interdisciplinary Introduction* (Amsterdam University Press 2018) 409; Rhonda Copelon, 'Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom' (1990) *NYU Review of Law and Social Change* 15-50; Albertyn (n 74) 86-119; Sumi Madhok, Maya Unnithan, and Carolyn Heitmeyer, 'On Reproductive Justice: 'Domestic Violence', Rights and the Law in India' (2014) 16(10) *Culture, Health & Sexuality* 1231- 1244.

<sup>349</sup> Jain and Shah (n 77) 15-18; Aparna Chandra, 'Privacy after Puttaswamy' (2017) LII(51) *Economic and Political Weekly* 46-50.

<sup>350</sup> *Puttaswamy* (n 31) [140] (Chandrachud J.); *Joseph Shine v Union of India* (2019) 3 SCC 39, [50] (Chandrachud J.) (*Joseph Shine*).

<sup>351</sup> *Puttaswamy* (n 31) [141] (Chandrachud J.)

priorities, cannot be underestimated in affirming women's personhood and citizenship.<sup>352</sup>

Crucially, in endorsing this conception of privacy, the Court in *Puttaswamy* did not limit the State's responsibilities to non-intervention in intimate decision-making. Instead, the State was required to positively facilitate these decisions:

The right to privacy can be both negatively and positively defined. The negative right to privacy entails the individuals are protected from unwanted intrusion by both the state and private actors into their private life, *especially features that define their personal identity* such as sexuality, religion and political affiliation, i.e. *the inner core of a person's private life*...The positive right to privacy entails an *obligation of states to remove obstacles for an autonomous shaping of individual identities*.<sup>353</sup>

Thus, like the individual dimension, Article 21 is also located far from the three limbs of traditional liberalism's reproductive choice, which in turn shape conceptions of privacy: the acontextual individual, the atomistic individual, and a State bearing purely negative duties. Instead, in line with the individual dimension, the individual (woman or otherwise) at the centre of Article 21 is 'concrete'. To clarify, I do not claim that Article 21 *always* centres the 'concrete' individual. My claim is simply that Article 21, at its best, certainly possesses the potential to do so.

Through its emphasis on the ('concrete') individual's decisional autonomy and bodily integrity, Article 21 then draws attention to the significance of reproductive decision-making as an expression of core personality, made at a deeply individual level, varying from person to person. In identifying the harm to life, physical and mental health from being denied decisional autonomy and bodily integrity, and constitutionally prohibiting it, Article 21 reinforces the constitutional mandate to respect reproductive decision-making. Article 21's central contribution as the

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<sup>352</sup> Albertyn (n 74) 100.

<sup>353</sup> *Puttaswamy* (n 31) [140] (Chandrachud J.) (emphasis added).

constitutional home for reproductive rights thus lies in preserving the ‘positive potential of individual conduct and eccentricity’,<sup>354</sup> pivotal to the individual dimension’s ‘concrete’ individual.

However, even in centring the ‘concrete’ woman and moving beyond traditional liberal conceptions of privacy and reproductive choice, Article 21 does not protect the interests represented by the social dimension. As I concluded in Chapter 1, the social dimension identifies a woman’s interest in reproductive decision-making because women, *as a group*, have been denied reproductive decision-making within the patriarchal institution of motherhood, perpetuating their historical disadvantage, with such denial taking different forms depending on women’s membership of other social groups. Even with a relational and contextual (and thus ‘concrete’) woman at its core, the interests protected by Article 21 in constitutionally grounding reproductive rights remain the interests represented by the individual dimension: the woman’s interests in preserving life, physical and mental health and her interest in making decisions central to her sense of self, including decisions involving her body. Consider *Laxmi Mandal*<sup>355</sup> where Shanti Devi died during childbirth because she was unable to obtain access to timely and quality obstetric care. In recognising a violation of Shanti’s reproductive rights under Article 21, the Delhi High Court located her within her ‘social order’, as noted above.<sup>356</sup> Yet, the *interest* the Court identified as underlying the reproductive right, termed an ‘inalienable survival right’,<sup>357</sup> was Shanti’s interest in preservation of her life. Article 21 made no reference to her interest in reproductive decision-making as a poor, Dalit woman, and the impact of denial of such decision-making in perpetuating her disadvantage. Shanti’s example thus confirms that despite centring a ‘concrete’ woman in constitutionally grounding reproductive rights, and moving past traditional liberal reproductive

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<sup>354</sup> Denbow (n 174) 9.

<sup>355</sup> *Laxmi Mandal* (n 38).

<sup>356</sup> *ibid* [28.10].

<sup>357</sup> *ibid* [2].

choice, Article 21's protection does not extend to the interests represented by the social dimension. This is not a surprising conclusion. As I argued in Chapter 1, the social dimension goes beyond simply locating the individual within her relevant social context. It specifically highlights the role of group membership in denying women reproductive decision-making, and the impact of such denial in perpetuating disadvantage of the individual woman and of the group. Article 21, even at its *most* 'concrete', does not go this far.

This however raises an important question. Is this limitation in Article 21's scope merely a feature of the existing jurisprudence on reproductive rights? In other words, *can* Article 21 be interpreted expansively to protect the interests represented by the social dimension?

#### **IV. A Case Against Expansive Interpretation of Article 21**

In this section, I argue against interpreting Article 21 expansively to extend the scope of its protection to interests represented by the social dimension. I make a 'cannot argument': that Article 21 *cannot* be so interpreted because such interpretation would not bear fidelity to Article 21's constitutional text, history and structure. I then make a 'should not argument': that Article 21 *should not* be so interpreted, as such interpretation is both undesirable and unnecessary.

##### **A. The 'Cannot' Argument**

Courts in India do not rely on a single method of constitutional interpretation.<sup>358</sup> They instead adopt a 'fusion of different interpretive approaches, with different levels of emphasis'.<sup>359</sup> The three most common interpretative techniques used by Indian courts are textualism, historicism and structuralism, with some approaches dominating during certain phases, and all approaches pointing to the same conclusion in several cases.<sup>360</sup> In the absence of a single overriding approach

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<sup>358</sup> Aravind P Datar and Rahul Unnikrishnan, 'Interpretation of Constitutions' (2017) 29(2) National Law School of India Review 143.

<sup>359</sup> Chandrachud, *Constitutional Interpretation* (n 41) 76.

<sup>360</sup> *ibid*; Datar and Unnikrishnan (n 358); Sathe (n 21).

to constitutional interpretation, here I use textual, historical and structural arguments to draw out the interests protected by Article 21 in its role within the Constitution.

I show that constitutionally, Article 21 protects a person's interests in life and personal liberty. In protecting these interests, Article 21 centres the individual as an individual. By this, I do not mean that the individual is understood in an 'abstract' sense. In fact, the Constituent Assembly Debates offer glimpses of a contextual understanding of an individual. Rather, I mean that the interests are protected *because* of the importance attributed to the core personality of the individual, therein centring the individual *as an individual*. The argument then goes that the role Article 21 *can* play in the reproductive context (or in any context) is determined by its constitutional contours, that is, its text, history and structure. Article 21 cannot be interpreted to protect interests going beyond these contours. Interpreting Article 21 to extend its protection to interests represented by the social dimension would amount to such interpretation, which, then, cannot be legitimised.

*i. Textual Interpretation*

A textual argument draws on the reasonable meaning of the words of the provision,<sup>361</sup> assessed in the present sense rather than what it was intended to mean.<sup>362</sup> That is, a textual claim sees the true nature of the Constitution as contained in its language, and deems the intention of the drafters irrelevant.<sup>363</sup> The Supreme Court of India relied heavily on textualism in its initial phase, reading the Constitution 'word for word'.<sup>364</sup> A textual argument is most helpful when the words of the

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<sup>361</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (PUP 1997) 144.

<sup>362</sup> Philip Bobbitt, *Constitutional Fate: Theory of Constitution* (OUP 1984) 7.

<sup>363</sup> Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP 2013) 44.

<sup>364</sup> Chandrachud, *Constitutional Interpretation* (n 41) 74.

Constitution speak for themselves, such that the meaning and application of the provision is ‘clear and obvious’.<sup>365</sup>

Article 21 is one such provision. It states that ‘no *person*’ shall be deprived of ‘*life* and *personal liberty*’ except according to procedure established by law. At the outset, the text points clearly to the interests considered relevant, and worthy of constitutional protection: a person’s interests in ‘life’ and ‘personal liberty’. The text also suggests that in protecting these interests, Article 21 centres the ‘person’ as the holder of these interests. These are helpful starting points. They are, however, brief, and do not provide further guidance on Article 21’s constitutional role. I now interpret Article 21 historically and structurally to affirm, and flesh out, these conclusions.

*ii. Historical Interpretation*

The historical argument regards as prominent the intent of the drafters of the Constitution,<sup>366</sup> as it best embodies principles which the ‘people’ desired to instantiate in their Constitution.<sup>367</sup> These arguments draw legitimacy from the ‘social contract negotiated from an original position’:<sup>368</sup> the fact that the Constitution was accepted as a ‘legitimate pre-commitment at its founding’.<sup>369</sup> The argument is thus that ‘[t]he Framers of the Constitution proposed a compact to limit the power of government; the people signified their agreement to that compact by their ratification of the Constitution, and that agreement is what gives the Constitution its authority’.<sup>370</sup> Historical

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<sup>365</sup> Robert Post, ‘Theories of Constitutional Interpretation’ (1990) 30 *Representations* 14.

<sup>366</sup> Bobbitt (n 362) 7.

<sup>367</sup> Post (n 365) 17.

<sup>368</sup> Bobbitt (n 362) 26

<sup>369</sup> Chandrachud, *Constitutional Interpretation* (n 41) 75.

<sup>370</sup> Post (n 365) 21.

arguments, drawing on the Constituent Assembly Debates, have commonly been used in Indian courts as a tool for constitutional interpretation.<sup>371</sup>

One version of the historical argument sees courts as merely ‘passive enforcers’ of the democratic will that ‘ordained and established’ the Constitution, which is expressed through the intent of the framers and treated as a ‘simple historical fact’ resisting interpretation.<sup>372</sup> This version ties current interpretations of the Constitution to the *specific* ways in which the drafters sought to vindicate constitutional ends.<sup>373</sup> The second version of the historical argument, in contrast, relies on framer’s intent to identify the broader purposes or values that motivate the Constitution or its particular provisions. In other words, drafting debates are used to pinpoint ‘the animating aims behind the constitutional document or the mischief it was meant to avoid’.<sup>374</sup> Courts then adapt these values, and apply them to contemporary circumstances as necessary.<sup>375</sup> Indian courts have, in this past, used this second type of historical argument.<sup>376</sup> It avoids critiques of originalism as ‘static and lifeless’,<sup>377</sup> and brings flexibility to historicism.<sup>378</sup> In examining reproductive rights constitutionally, I adopt this version of historicism. Reproductive rights were not discussed, even tangentially, at the time of constitutional drafting in India. Strict originalism is thus of limited use to my claim. Instead, I rely on the Constituent Assembly Debates to identify the broad contours

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<sup>371</sup> See for example *Indra Sawhney v Union of India* AIR 1993 SC 477 (*‘Indra Sawhney’*); *R. Chaudhuri v State of Punjab* (2001) 7 SCC 126.

<sup>372</sup> Post (n 365) 21-22.

<sup>373</sup> Yvonne Tew, ‘Comparative Originalism in Constitutional Interpretation in Asia’ (2017) 29 Singapore Academy of Law Journal 719, 723.

<sup>374</sup> *ibid* 723.

<sup>375</sup> Sujith Choudhry, ‘Living Originalism in India: “Our Law” and Comparative Constitutional Law’ (2013) 25(1) Yale Journal of Law & the Humanities 3.

<sup>376</sup> See for example *AK Gopalan* (n 21); *Naz Foundation v Government of NCT of Delhi* (2009)160 DLT 277 (*‘Naz Foundation’*).

<sup>377</sup> Post (n 365) 18; Datar and Unnikrishnan (n 358) 140.

<sup>378</sup> Post (n 365) 22.

of the interests the drafters viewed as constitutionally protected by Article 21. How these interests apply to a claim of reproductive rights under Article 21 has already been discussed in Part II of the Chapter.

From its earliest drafts, Article 21—Draft Article 15—identified the relevance of two core interests: those in ‘life’ and ‘personal liberty’. The drafters were in agreement that ‘Article 15 concerns the *most vital* of all the Fundamental Rights, viz., the right to *life* and *personal liberty*’.<sup>379</sup> The initial draft of Article 21 simply protected ‘liberty’. In introducing the word ‘personal’ before ‘liberty’, the drafters sought to definitively centre the person or the individual within Article 21, as the holder of the interests protected by the provision:

in the word ‘liberty’ that we have used, we have added the word ‘personal’ and made it ‘*personal* liberty’ to make it clear that this article does not refer to any kind of liberty of contract or anything of that kind, but *relates only to life and liberty of [a] person*.<sup>380</sup>

This is further reflected in several other statements by the drafters. RK Sidhva observed: ‘*Article 15 gives liberty*. It says that a *person* shall have liberty to do anything, subject to the laws of the land’.<sup>381</sup> Mahavir Tyagi similarly pointed out: ‘life, liberty and pursuit of happiness are the three chief fundamental rights *of every individual*’.<sup>382</sup>

This conclusion is strengthened by the debates around the phrase ‘procedure established by law’, which replaced the phrase ‘due process of law’ under Article 21. This replacement was severely criticised by members of the Constituent Assembly, who observed that this would dilute

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<sup>379</sup> BM Gupta, CAD (Volume IX, 16 September 1949) [9.142.69].

<sup>380</sup> Chimanlal Chakkubhai Shah, CAD (Volume VII, 6 December 1948) [7.67.216]; KM Munshi, CAD (Volume VII, 6 December 1948) [7.67.230] (emphasis added).

<sup>381</sup> RK Sidhva, CAD (Volume IX, 15 September 1949) [9.141.174] (emphasis added).

<sup>382</sup> Shri Mahavir Tyagi, CAD (Volume IX, 16 September 1949) [9.142.40] (emphasis added).

the protection granted to ‘individual liberty’ by prioritising State interest in its security. As Ram Chandra Gupta remarked:

Article 21 of the Constitution relating to *protection of life and personal liberty of an individual* is a clause which has attracted the attention of a large section of the public, especially lawyers and judges. Their contention is that the clause, as enacted, will not safeguard the rights of the *individual* sufficiently.<sup>383</sup>

Offering a contrary opinion, and supporting the replacement of ‘due process of law’ by ‘procedure established by law’, Alladi Krishnaswamy Ayyar stated:

if you guarantee personal liberty in the Constitution either by the use of the words “due process” or procedure or any such thing, the State will be hampered even with regard to detention and in regard to deportation. It is agreed on all hands that the security of the State is as important as the *liberty of the individual*.<sup>384</sup>

Thus, both sides of the debate were concerned with ensuring that ‘individual liberty’ is adequately guaranteed without compromising the State interest. As summed up by KM Munshi:

the essence of democracy is that a balance must be struck between *individual liberty* on the one hand and social control on the other. We must not forget that the majority in a legislature is more anxious to establish social control than to serve *individual liberty*. Some scheme therefore must be devised to adjust the needs of *individual liberty* and the demands of social control.<sup>385</sup>

Replacing ‘due process of law’ with ‘procedure established by law’ may or may not be legitimate in preserving individual liberty. This, however, is not of relevance to my argument here. Rather what is important is the continued affirmation of the interests protected by Article 21—here, personal liberty—and centring of the individual in protecting these interests.

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<sup>383</sup> Ram Chandra Gupta, CAD (Volume XI, 24 November 1949) [11.164.241] (emphasis added).

<sup>384</sup> Alladi Krishnaswamy Ayyar, CAD (Volume IX, 15 September 1949) [9.141.230].

<sup>385</sup> KM Munshi, CAD (Volume VII, 6 December 1948) [7.67.230].

Yet, this still leaves questions unanswered. Why does Article 21 protect these interests? And why does Article 21 centre the individual in doing so? A structural reading of Article 21 offers helpful responses.

### *iii. Structural Interpretation*

Structural arguments interpret a given provision by locating it amongst other relevant provisions. Inferences are then drawn from this constitutional scheme, that is, the ‘structures and relationships created by the constitution in all its parts or in some principal part’,<sup>386</sup> rather than an ‘exegesis of a particular textual passage’.<sup>387</sup> A structuralist interpretation is thus systematic,<sup>388</sup> and looks at the Constitution holistically, or ‘as an organic whole, rather than as a collection of autonomous provisions that are isolated from their natural environment’.<sup>389</sup> Structuralism has routinely been employed by the Supreme Court of India.<sup>390</sup> In *GVK Industries v Income Tax Officer*,<sup>391</sup> the Supreme Court clearly set out the structuralist principle:

No provision, and indeed no word or expression, of the Constitution exists in isolation - they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. Our Constitution is...an intricate matrix of meanings, *purposes* and structures. It is only by ***locating a particular constitutional provision under consideration within that constitutional matrix*** could one hope to be able to discern *its true meaning, purport and ambit*.

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<sup>386</sup> Bobbit (n 362) 7.

<sup>387</sup> Mark A. Graber, *A New Introduction to American Constitutionalism* (OUP 2013) 81.

<sup>388</sup> Gerhard Casper, ‘Book Review (reviewing Charles L. Black, *Structure and Relationship in Constitutional Law* (1969))’ (1969) 37 *University of Chicago Law Review* 200.

<sup>389</sup> Chandrachud, *Constitutional Interpretation* (n 41) 76; Bobbitt (n 362) 74, 80; Sathe (n 21) 226; Cf Michael Dorf, ‘Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity’ (2004) 82 *Cornell Law Faculty Publications* 835-37 (arguing that the ‘structures’ and ‘relationships’ Black referred to in defining structuralism pointed to the structure of the government and the relationship amongst its constituent parts rather than interpretative holism).

<sup>390</sup> Chandrachud, *Constitutional Interpretation* (n 41) 80, 85; Sathe (n 21) 227; As examples see *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 and *Minerva Mills v Union of India* AIR 1980 SC 1789.

<sup>391</sup> *GVK Industries v Income Tax Officer* (2011) 4 SCC 36 (*‘GVK Industries’*).

[The] Constitution [may be viewed] as [being] composed of constitutional topological spaces ...with certain *core functions and purposes*...*Within such a constitutional topological space, one would expect each provision therein to be intimately related to, gathering meaning from, and in turn transforming the meaning of, other provisions therein.* By locating the transformative effects within such constitutional topological space, we would then be able to gather what *the core, and untransformed features are*.<sup>392</sup>

Here, I infer the interests protected by Article 21 by drawing on the constitutional structure of which it is a part. The first step is to pinpoint the relevant ‘topological space’ within which Article 21 is located. The space I identify is the ‘liberty code’. Along with Article 21, the ‘liberty code’ includes Article 19, protecting the freedom of speech and expression, assembly, association, movement, residence and profession; Article 22, guaranteeing protection against deprivation of freedom by putting in place safeguards applicable during arrest and detention; and Article 25, which guarantees the freedom of conscience and religion. These provisions together protect a whole range of freedoms.

The existence of the ‘liberty code’ is not contested. For instance, Annie Mascarene observed during the Constituent Assembly Debates:

freedom of the individual, freedom of opinion, freedom of religion and expression, security of life, liberty and property and pursuit of happiness, have been ensured and secured to every individual in the framework of our Constitution.<sup>393</sup>

Similarly, the Supreme Court, in *Maneka Gandhi*,<sup>394</sup> saw Articles 19, 21 and 22 as ‘parts of an *integrated scheme* in the Constitution’.<sup>395</sup> Building on this, in *Puttaswamy* Justice Chandrachud identified Articles 19, 21 and 25 as guaranteeing freedoms fundamental to various aspects of one’s life:

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<sup>392</sup> *ibid* [30] (emphasis added).

<sup>393</sup> Annie Mascarene, CAD (Volume XI, 18 November 1949) [11.159.29].

<sup>394</sup> *Maneka Gandhi v Union of India* AIR 1978 SC 597.

<sup>395</sup> *ibid* [13] (emphasis added).

*The freedoms under Article 19* can be fulfilled where the individual is entitled to decide upon his or her preferences. **Read in conjunction with Article 21**, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the **freedom of religion under Article 25** has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world.<sup>396</sup>

And, in the *Sabarimala* decision, Justice Chandrachud eloquently drew out the interrelationship amongst these freedoms:

*The freedoms which find an elaboration in Part III...have linkages which cannot be ignored...*our interpretation of the freedoms is now governed by a sense of realism which notices their open- textured content and indeed, their fluid nature. **One freedom shades into and merges with another.** This reading of the fundamental rights as constellations emanating from a cosmos of freedom and as having paths which intersect and merge enhances the value of freedom itself.<sup>397</sup>

Thus, Articles 19, 21, 22 and 25 together constitute the ‘liberty code’, the relevant topological space within which Article 21 is located. This space, then, assists in discerning the interests constitutionally protected by Article 21. For this, it is important to first understand the interests protected by Articles 19, 22 and 25. I go back to the Constituent Assembly Debates to assist me here. From a reading of the Debates, it is evident that each of these provisions protects an individual’s interest in freedom or liberty, and centres the individual in protecting these interests.

This is best captured by Mohammad Ismail Khan’s comment, identifying the core thrust of Article 19:

[Article 19] has **nothing to do with the minority or the majority**. It concerns itself with the **right of every citizen. Personal liberty is the core of the whole freedom**. It is the basis upon which the freedom of the land must be built.<sup>398</sup>

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<sup>396</sup> *Puttaswamy* (n 31) [169] (Chandrachud J.).

<sup>397</sup> *Indian Young Lawyers Association v State of Kerala* 2018 SCC OnLine SC 1690 [191] (Chandrachud J.) (*‘Indian Young Lawyers’*).

<sup>398</sup> Mohammad Ismail Khan, CAD (Volume VII, 1 December 1948) [7.64.106] (emphasis added).

Article 19 was thus unambiguously recognised by the drafters as securing ‘individual freedom’,<sup>399</sup> guaranteeing ‘various freedoms of citizens’,<sup>400</sup> and ensuring ‘individual liberties’.<sup>401</sup> Along these lines, in proposing that an additional clause be added to Article 19 to guarantee ‘liberty of the person’ by ensuring that arrest, detention in custody or imprisonment take place only in accordance with the ‘due process of law’, KT Shah highlighted the ‘just claims of the *individual*...in regard to *his personal freedom*’, emphasising ‘the *sacredness and sanctity of personal liberty*’.<sup>402</sup>

A similar focus is observable within debates on Article 22. Article 22 was introduced as a form of ‘compensation’ for adopting the phrase ‘procedure established by law’ in Article 21.<sup>403</sup> It sought to ‘undo the harms’ which might result from the removal of ‘due process of law’ in Article 21.<sup>404</sup> As BR Ambedkar remarked, ‘those who are fighting for the protection of *individual freedom*’ under Article 21 ought to welcome the introduction of Article 22, as it ‘certainly saves a great deal which had been lost by the non-introduction of the words “due process of law”’.<sup>405</sup> PK Sen similarly described Article 22 as answering the ‘old question’ of:

how far and to what extent [the] *individual right*, the fundamental right *to liberty and freedom*, and safety and security of the person, should be circumscribed in the interests of the security and safety of the State as a whole.<sup>406</sup>

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<sup>399</sup> Damodar Seth, CAD (Volume VII, 1 December 1948) [7.64.15]; Brajeshwar Parasad, CAD (Volume VII, 2 December 1948) [7.65.64].

<sup>400</sup> Khan (n 398) [7.64.113].

<sup>401</sup> Sardar Hukum Singh, CAD (Volume VII, 1 December 1948) [7.64.177]; Maulana Hasrat Mohani, CAD (Volume VII, 2 December 1948) [7.65.51].

<sup>402</sup> KT Shah, CAD (Volume VII, 1 December 1948) [7.64.129], [7.64.130] (emphasis added).

<sup>403</sup> HV Pataskar, CAD (Volume IX, 15 September 1949) [9.141.146].

<sup>404</sup> HV Kamath, CAD (Volume IX, 15 September 1949) [9.141.115].

<sup>405</sup> BR Ambedkar, CAD (Volume IX, 15 September 1949) [9.141.40] (emphasis added).

<sup>406</sup> Dr PK Sen, CAD (Volume IX, 16 September 1949) [9.142.55] (emphasis added).

On the other hand, Article 22 was criticised by HV Kamath for ‘water[ing] down the principle embodied in the Preamble regarding *individual liberty*...[by fettering] *individual liberty*’.<sup>407</sup> Bakshi Tek Chand described it as ‘nothing but a cloak for denying the *liberty of the individual*’,<sup>408</sup> and TT Krishnamachari observed that it denoted a ‘subtraction of the rights conceded to the *individual*’.<sup>409</sup> As with ‘procedure established by law’ under Article 21, there existed vociferous disagreement on whether Article 22 sufficiently guaranteed individual liberty or not. Yet, a common theme that emerges across the responses of the proponents and opponents of Article 22 is the interest protected by the provision—the individual’s interest in freedom or liberty—and the focus on the individual as the holder of this interest.

This is replicated within debates on the role of Article 25. As Mohammad Ismail Khan observed:

The question of professing, practising and propagating one's faith is a right which the human being had from the very beginning of time and that has been recognised as an *inalienable right of every human being*, not only in this land but the whole world over and I think that nothing should be done to affect that *right of man as a human being*.<sup>410</sup>

Practising and professing religion was also described, by several participants, as a ‘personal affair’,<sup>411</sup> a ‘private affair’<sup>412</sup> or ‘matter of purely personal concern’<sup>413</sup>: ‘citizens have their own religion and its communities have their own religions’.<sup>414</sup>

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<sup>407</sup> HV Kamath, CAD (Volume XI, 19 November 1949) [11.160.11] (emphasis added).

<sup>408</sup> Bakshi Tek Chand, CAD (Volume IX, 15 September 1949) [9.141.127] (emphasis added).

<sup>409</sup> TT Krishnamachari, CAD (Volume XI, 25 November 1949) [11.165.237].

<sup>410</sup> Mohammad Ismail Khan, CAD (Volume VII, 6 December 1948) [7.67.75].

<sup>411</sup> Lakshmi Maitra, CAD (Volume VII, 6 December 1948) [7.67.89].

<sup>412</sup> Tajmul Hussain, CAD (Volume VII, 3 December 1948) [7.66.256].

<sup>413</sup> KT Shah, CAD (Volume VII, 3 December 1948) [7.66.289].

<sup>414</sup> Lakshmi Maitra, CAD (Volume VII, 6 December 1948) [7.67.89].

Reading these provisions together shows that the ‘liberty code’ protects an individual’s interest in a range of liberties or freedoms. And, crucially, it centres the individual in protecting these interests. This does not imply that the individual is understood in an abstract sense within the ‘liberty code’. In fact, my reading of the Debates indicates the contrary. Brajeshwar Prasad, for instance, remarked in the context of Article 19: ‘Individual freedom is risky in a community where more than 80 per cent of the people are sunk in the lowest depths of poverty [and] illiteracy’<sup>415</sup> as the enjoyment of these rights is ‘dependent on the fulfilment of certain social conditions’,<sup>416</sup> including ‘economic equality’ and ‘the growth and development of education to communal dimensions’.<sup>417</sup> This suggests a contextual, or ‘concrete’, view of the individual.

Why, then, does the ‘liberty code’ centre the (‘concrete’) individual as the holder of these interests? It does so *because* ‘the personality of the individual is found to be inviolable’.<sup>418</sup> That is, the ‘sacredness of the personality of the individual’<sup>419</sup> implies that ‘the individual will occupy the centre of the stage and the development of the individual personality will be the main aim of our social good’. This is why ‘every individual Indian has an “inalienable right to Life, Liberty and pursuit of Happiness”’.<sup>420</sup> An individual thus exercises the ‘multitude of freedoms’ under the ‘liberty code’ as a ‘composite part of the human personality.’<sup>421</sup> And, in protecting an individual’s

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<sup>415</sup> Brajeshwar Prasad, CAD (Volume CII, 2 December 1948) [7.65.67].

<sup>416</sup> *ibid* [7.65.68].

<sup>417</sup> *ibid* [7.65.69].

<sup>418</sup> *ibid*.

<sup>419</sup> Rev. Jerome D’Souza, CAD (Volume VII, 9 December 1948) [7.70.102].

<sup>420</sup> MR Masani, CAD (Volume I, 17 December 1946) [1.7.13].

<sup>421</sup> *Indian Young Lawyers* (n 397) [14] (Chandrachud J.). Jain and Shah (n 77) 24–28 caution against housing reproductive rights in Article 21 alone, pointing out that the right to privacy could always collapse back into traditional conceptions of privacy, abandoning privacy as decisional autonomy. However, Article 21, when constitutionally interpreted as Part IV(A) of the Chapter does, bears close resemblance to decisional autonomy, with the focus of the provision being on guaranteeing individual liberty in exercise of core personality. This would, in theory, forestall the provision from collapsing into traditional notions of privacy.

interest in freedom *because* of the importance attributed to the core personality of the individual, the ‘liberty code’ centres the individual *as an individual*.

Article 21 is constitutionally located within the ‘liberty code’. Structuralism discerns its ‘true meaning, purport and ambit’ when viewed against this ‘constitutional matrix’.<sup>422</sup> Seen through this structural lens, the interests protected by Article 21 in the reproductive context readily appear to be a reflection of the constitutional interests protected by the ‘liberty code’ as a whole. In other words, in guaranteeing reproductive rights in the form it currently does, Article 21 is fulfilling its true constitutional potential. In interpreting Article 21 expansively in the reproductive context (or otherwise), a court can push its outer boundaries, for instance by adopting a broad reading of ‘life’ as going beyond survival alone. Courts have in fact endorsed this approach in constitutionally grounding reproductive rights, as Part II(A) shows. However, courts cannot simply *abandon* the function or role performed by Article 21 within the constitutional scheme to interpret the provision as protecting *any and all* interests. Such interpretation of Article 21 would not bear fidelity to the provision’s constitutional contours, determined by its text, history and structure. And, it would threaten the very purpose of enshrining different fundamental rights, with varying ambits of protection. Extending the scope of Article 21’s protection to the interests represented by the social dimension would require such interpretation because the interests protected by Article 21 constitutionally, which mirror the interests it protects in grounding reproductive rights, correlate with the individual rather than the social dimension. In light of these limits set by Article 21’s constitutional role, extending its protection to the interests represented by the social dimension through its expansive interpretation cannot be legitimised.

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<sup>422</sup> *GVK Industries* (n 391).

## B. The ‘Should Not’ Argument

Here, I argue that Article 21 should not be interpreted expansively to capture the social dimension. The ever expanding interpretation of ‘life’ and ‘personal liberty’ under Article 21 has been subject to critique for diluting the content of Article 21,<sup>423</sup> rendering it a toothless right with mere rhetorical flourish. Yet, such interpretation simply pushes the constitutionally determined outer boundaries of Article 21; it does not move past them. In contrast, interpreting Article 21 to capture a wholly different range of interests represented by the social dimension moves past the provision’s constitutional contours. Such interpretation would, then, have an *even* stronger diluting effect, taking Article 21 further away from the core of its protection. This is a significant loss because Article 21, in its current form, plays a crucial role within the constitutional home for reproductive rights. As I argued earlier in Part III of the Chapter, Article 21 preserves the ‘positive potential of individual conduct and eccentricity’,<sup>424</sup> through protecting a woman’s interest in making decisions that are an expression of her sense of self, which develops through her body and mind in interaction. Article 21 also reinforces the protection granted to this interest by constitutionally prohibiting the harm to life and health caused by the denial of such decision-making. Diluting this core through limitless expansion would interfere with Article 21’s ability to capture the individual dimension, making such expansion undesirable.

Moreover, watering down Article 21’s protection through expansion is unnecessary if there is another constitutional right that can capture the social dimension. In Chapter 3, I introduce the right to non-discrimination under Article 15 as capable of protecting the interests represented by the social dimension. A quick look at the only two reproductive rights cases in India which identify a claim of discrimination, though very briefly, points in this direction. In *Devika Biswas*,<sup>425</sup> which

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<sup>423</sup> Surendranath (n 22) 744.

<sup>424</sup> Denbow (n 174) 9.

<sup>425</sup> *Devika Biswas v Union of India* (2016) 10 SCC 733.

dealt with the State practice of conducting sterilisation camps as a method of contraception, the Supreme Court observed:

It is necessary to re-consider the impact that policies such as the setting of informal targets and provision of incentives by the Government *can have on the reproductive freedoms of the most vulnerable groups of society whose economic and social conditions leave them with no meaningful choice in the matter and also render them the easiest targets of coercion*...the policies of the Government must not mirror the systemic discrimination prevalent in society but must be aimed at remedying this discrimination and ensuring substantive equality.<sup>426</sup>

Examining the issue of sterilisation camps through the lens of non-discrimination allowed the Court to identify how these camps exacerbated the existing disadvantage of ‘vulnerable groups’ whose ‘economic and social conditions’ rendered them vulnerable in the first place. Similarly, in *Snehalatha Singh*,<sup>427</sup> the Allahabad High Court recognised the poor quality of public sector obstetric care as a form of ‘class discrimination’:

Poor, inadequate and understaffed state medical services...remain to be utilized by the *poor rural folk...[who] get their plight aggravated* due to lack of adequate medical services. In our view...[the] apathy and lack of serious endeavour and attention on the part of higher authorities for not providing quality medical service is for the reason that they themselves are not affected at all. For them, State Medical Services, in particular, rural health service programmes are meant only for *poor rural class. They belong to different class. It is a class discrimination which is not allowing the system to improve in the last several decades*.<sup>428</sup>

Once again, the Court recognised that the denial of adequate obstetric care ‘aggravated’ the disadvantage of ‘poor rural folk’. Across both these cases, the right to non-discrimination thus emphasised the interests of members of disadvantaged groups in reproductive decision-making *because* of the impact the denial of such decision-making—through involuntary sterilisation and provision of poor quality obstetric care—had in perpetuating the historic disadvantage of these groups. Note how different this interest is from the interests protected by Article 21 in

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<sup>426</sup> *ibid* [87] (emphasis added).

<sup>427</sup> *Snehalatha Singh* (n 292).

<sup>428</sup> *ibid* [116], [120], [137] (emphasis added).

constitutionally grounding reproductive rights. Crucially, this interest appears, at least on the face of it, to correlate closely with the interests represented by the social dimension. While I explore these claims further in Chapter 3, this brief preview is, for now, sufficient to indicate that Article 15 possesses the potential to capture the social dimension. In the presence of Article 15, an expansive interpretation of Article 21 to encompass the interests represented by the social dimension is unnecessary.

## **V. Conclusion**

In Chapter 2, I drew out the interests Article 21 protects in constitutionally grounding reproductive rights. I found that these interests hold the key to defining Article 21's role as the constitutional home for reproductive rights. I traced both the strengths and limitations of Article 21 in its role as the constitutional home back to these interests. And finally, I showed that Article 21 cannot and should not be interpreted expansively to move beyond these interests, by extending the scope of its protection to the interests represented by the social dimension.

Thus, in bypassing traditional liberal reproductive choice, Article 21 robustly protects the interests represented by the individual dimension. Yet, it fails to protect the interests represented by the social dimension, and consequently, fails to capture the interrelationship between the dimensions. As a result, Article 21 offers an important yet incomplete constitutional home for reproductive rights in India.

At the end of Chapter 2, I hinted at the potential of the non-discrimination guarantee under Article 15 to protect the interests represented by the social dimension. I now move onto Chapter 3, where I substantiate this claim.

## CHAPTER 3

### Irreplaceable yet Ignored: The Role of Article 15

#### I. Introduction

Chapter 2 ended with the promise that Article 15, in constitutionally grounding reproductive rights, possesses the potential to protect the interests represented by the social dimension. In Chapter 3, I argue that this potential depends on the conception of equality underlying Article 15, whether formal or substantive. My central task in the Chapter is thus to draw out India's constitutional conception of equality, develop how it responds to pregnancy and reproduction, and apply it doctrinally. I spend the vast majority of the Chapter conducting this exercise. This exercise is intrinsically valuable. As I indicated in the Introduction, both formal and substantive understandings of equality can be traced within India's non-discrimination jurisprudence. In anchoring the constitutional conception of equality to substantive equality, I therefore offer a constitutionally mandated response for why one line of jurisprudence ought to prevail over the other. Through this, I make a significant addition to existing literature which tracks, though not comprehensively, the differing interpretations of Article 15.<sup>429</sup> I also conduct a robust conceptual, constitutional and doctrinal development of Article 15, bringing out its 'distinct character which has for long been buried under Article 14 and the general promise of equality it offers'.<sup>430</sup> Most importantly, I offer a reading of Article 15 that mirrors a substantive equality approach to

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<sup>429</sup> For example, see Ratna Kapur and Brenda Cossmann, 'On Women, Equality and the Constitution: Through the Looking Glass of Feminism' in Nivedita Menon (ed), *Gender and Politics in India* (OUP 1999) 197-261; Kalpana Kannabiran, 'Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India' (2009) 44(44) *Economic and Political* 91 ('Judicial Meanderings'); Indira Jaising, 'Gender Justice and the Supreme Court' in BN Kirpal et al (eds), *Essays in Honour of the Supreme Court of India* (OUP 2000) 288-320; Vikraman Nair, 'The Search for Equality through Constitutional Process: The Indian Experience' (2001) *Acta Juridica* 255-72; Bhatia, *Transformative Constitution* (n 78) 3-74; Christine Forester and Jaya Sagade, 'Right to Equality and Non-Discrimination' in *Women's Human Rights in India* (Routledge 2019); Christine Forester and Vedna Jivan, 'The Application of Sex Protection in India' in *Sex as a Protected Ground in International and Domestic Law* (Brill 2020) 87-99.

<sup>430</sup> Tarunabh Khaitan, 'Reading Swaraj into Article 15 — A New Deal for All Minorities' (2009) 2 *NUJS Law Review* 419. This is also why the Chapter (and the Thesis) focuses specifically on Article 15 rather than Article 14 (or both).

pregnancy and reproduction, which has so far not been attempted comprehensively within the jurisprudence or the literature. At the same time, the advancement of Article 15 is instrumentally valuable to the argument in the Thesis. In the penultimate section of the Chapter, I go back to where Chapter 2 left off, and examine whether, in light of the substantive conception of equality underlying Article 15, it possess the potential to capture the social dimension.

I begin by setting out the limitations of formal equality in grappling with discrimination claims involving pregnancy. **Part II** shows that formal equality's two central tenets render it a deficient conception of equality to deal with the challenges posed by pregnancy. **Part III** then demonstrates, through an exercise in constitutional interpretation, that the constitutional conception of equality deviates from both these tenets of formal equality. In **Part IV**, I identify this constitutional conception of equality as substantive equality. I draw on literature to build its central features and develop a conceptual approach to pregnancy and reproduction reflecting this conception. In **Part V**, I translate substantive equality from a conceptual paradigm to a doctrinal one by building a doctrinal response to pregnancy under Article 15 in line with substantive equality. Finally, in **Part VI**, I answer the question posed at the end of Chapter 2 in the affirmative: Article 15, when interpreted substantively, does possess the potential to capture the social dimension.

## II. The Failures of Formal Equality

Formal equality, as commonly understood, subscribes to the Aristotelian notion of treating likes alike. Dissimilar treatment of similar classes is considered unreasonable and is prohibited by law. By implication, dissimilar treatment of different classes is consistent with equality.<sup>431</sup> The problem formal equality seeks to solve is thus misclassification,<sup>432</sup> with the central enquiry under formal

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<sup>431</sup> Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011) 9; Catherine MacKinnon, 'Sex equality under the Constitution of India: Problems, prospects, and "personal laws"' (2006) 4(2) *International Journal of Constitutional Law* (2006) 181 ('Sex Equality'); Kapur (n 78) 743.

<sup>432</sup> MacKinnon, *Sex Equality* (n 431) 182.

equality being whether you are similar to the group from whom you have been treated differently.<sup>433</sup>

Under this view, pregnancy is often seen as rendering women different from men. Such difference may be on account of the very biological fact of pregnancy.<sup>434</sup> It may also be due to the assumptions attached to women's reproductive ability—women as mothers—or the material implications of reproduction within the patriarchal institution of motherhood—women's lower educational qualifications, their financial dependence on men or their status as part-time workers. When sameness is the entitling criteria for equality,<sup>435</sup> the 'recognition of difference [is a] threat to...equality. If to be equal you must be the same, then to be different is to be unequal'.<sup>436</sup> In other words, the very existence of these differences leads to an automatic rejection of women's claims to equality in relation to pregnancy. By dismissing claims of sex discrimination on the grounds that the sexes are differently situated in matters of reproduction, formal equality thus 'rationalizes differential treatment of the sexes as legitimate and as merely "reflecting" the fact of biological difference'.<sup>437</sup> Formal equality also easily maps onto existing social hierarchies, 'ratifying rather than

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<sup>433</sup> Jaising (n 429) 293.

<sup>434</sup> This approach has been taken in comparative jurisdictions like Canada and the United States: *Bliss v Canada (AG)* (1976) 1 SCR 183; *Geduldig v Aiello, General Electric Cov. Gilbert* 429 US 125 (1976).

<sup>435</sup> Kapur and Cossman (n 429) 198.

<sup>436</sup> Martha Minow, 'Learning to Live with the Dilemma of Difference: Bilingual and Special Education' (1985) 48 *Law and Contemporary Problems* 157, 207; Eileen Kaufman, 'Women And Law: A Comparative Analysis Of The United States And Indian Supreme Courts' Equality Jurisprudence (2006) 34(3) *Georgia Journal Of International And Comparative Law* 559; Kapur and Cossman (n 429) 199; Savitri Goonesekere, 'The Concept of Substantive Equality and Gender Justice in South Asia' (2011) *United Nations Entity for Gender Equality and the Empowerment of Women* 8; MacKinnon, *Sex Equality* (n 431) 183.

<sup>437</sup> Dawn Johnsen, 'The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection' (1986) 95 *Yale Law Journal* 599, 621.

challenging them’:<sup>438</sup> ‘the worse the inequality gets, the more disparate its social reality becomes, the less this legal approach can do about it, hence the more [it] operates to institutionalise it’.<sup>439</sup>

The only way pregnant women can circumvent the limitations of formal equality is by claiming that they are in fact not different from men. To establish this, they are compelled to point to a similarly situated male. On a practical, adjudicative level this is difficult because pregnancy is a unique biological experience for which finding an apt comparator is a challenge.<sup>440</sup> ‘laws governing reproductive biology, by definition, govern ways in which men and women are not similarly situated’.<sup>441</sup> Women are therefore required to mischaracterise their experience of pregnancy by, for instance, comparing themselves to a sick man (pregnancy is not a sickness!) to claim equality under the law.<sup>442</sup>

At the same time, on a normative level, the search for a similarly situated male fails to challenge the male norm.<sup>443</sup> Instead, it continues to retain ‘the man as the measure of all things... [with] women being measured according to [their] correspondence with men’.<sup>444</sup> In taking the ‘wombless male body’ as the law’s standard, formal equality also suggests that pregnant women

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<sup>438</sup> MacKinnon, *Sex Equality* (n 431) 184.

<sup>439</sup> Catherine MacKinnon, ‘Substantive Equality: A Perspective’ (2011) 96 *Minnesota Law Review* 386-9 (‘Substantive Equality’).

<sup>440</sup> MacKinnon, *Reflections* (n 66) 1297; Kauffman (n 436) 604; Sunstein, *Neutrality* (n 70) 42; Hendricks, *Body and Soul* (n 72) 3, 10; Katarzyna Sękowska-Kozłowska, ‘A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of *Mellet v. Ireland* and *Whelan v. Ireland*’ (2018) 26(54) *Reproductive Health Matters* 27, 30; Sandra Fredman, ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10(4) *International Journal of Law in Context* 445 (‘Reversing Roles’); Donna M. Eansor, ‘To Bespeak the Obvious: A Substantive Equality Analysis of Reproduction and Equal Employment’ (1992) 6 *Notre Dame Journal of Law, Ethics & Public Policy* 423.

<sup>441</sup> *Law* (n 65) 1009.

<sup>442</sup> Fredman, *Reversing Roles* (n 440) 445; Sally Kenney, ‘Pregnancy Discrimination: Towards Substantive Equality’ (1995) 10 *Wisconsin Women’s Law Journal* 352; This line of reasoning was also adopted in *Webb v EMO Cargo (UK) Ltd* (1994) C-32/93.

<sup>443</sup> Fredman, *Discrimination Law* (n 431) 11; Kauffman (n 436) 604; Kapur (n 78) 748; Sunstein, *Neutrality* (n 70) 43; Sękowska-Kozłowska (n 440) 27; Kenney (n 442) 356.

<sup>444</sup> Fredman, *Discrimination Law* (n 431) 11 citing Catherine MacKinnon, *Feminism Unmodified* (HUP 1987) 34.

can claim equality *only* if they ‘deny their fertility and reject their children’, thus seeing the ‘path to equality in being like a man, in particular being free of caretaking responsibility for children’.<sup>445</sup> This approach devalues and denigrates pregnancy, childcare and parenting by seeing them as ‘burdens’ or obstacles to equality.<sup>446</sup> It also accepts the patriarchal institution of motherhood as given, providing women the option of exiting this institution by being like men.<sup>447</sup> However, it offers no option for women (and men) who wish to parent, while participating outside the home,<sup>448</sup> ‘legitimising, with a vengeance’ the supposed inconsistency between the two.<sup>449</sup> In this sense, formal equality mirrors traditional liberal reproductive choice which protects one’s autonomy to make choices while leaving untouched the structural conditions—here, patriarchal motherhood—under which choices are made.<sup>450</sup>

Even if pregnant women do manage to establish that they are similar to men, and are therefore entitled to be treated equally, all formal equality offers them is identical treatment with men. This fails to recognise that pregnancy has real biological consequences, which need to be taken into account and met: simply being treated like men will not suffice.<sup>451</sup> More generally, against women’s history of disadvantage, identical treatment could also, in effect, perpetuate women’s inequality: ‘consistency in treatment of two individuals who appear alike but in fact differ in terms of access to power, opportunities, or material benefits, results in unequal outcomes’.<sup>452</sup> Yet, formal

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<sup>445</sup> Hendricks, *Body and Soul* (n 72) 26.

<sup>446</sup> Bachiochi (n 72) 919, 941; Sandra Fredman, ‘A Difference with Distinction: Pregnancy and Parenthood Reassessed’ (1994) 110 *Law and Quarterly Review* 112 (‘Difference with a Distinction’).

<sup>447</sup> Hendricks, *Body and Soul* (n 72) 27, 28.

<sup>448</sup> Bachiochi (n 72) 895.

<sup>449</sup> Hendricks, *Body and Soul* (n 72) 27.

<sup>450</sup> West (n 56).

<sup>451</sup> Law (n 65) 969; Bachiochi (n 72) 895.

<sup>452</sup> Fredman, *Discrimination Law* (n 431) 2.

equality fails to recognise as suspect facially neutral laws having a discriminatory effect on women: ‘so long as laws treat everyone the same, it does not matter [to formal equality] if this sameness of treatment reinforces hierarchy’.<sup>453</sup>

Moreover, with like treatment entrenching disadvantage, differential treatment might be necessary to achieve ‘genuine equality’,<sup>454</sup> an option formal equality fails to offer. In fact, as identical treatment is the gold standard under formal equality, *any* difference in treatment between similarly situated individuals on protected grounds constitutes discrimination under this model.<sup>455</sup> That is, formal equality offers a symmetric understanding of discrimination.<sup>456</sup> And, even if formal equality were to allow differential treatment, such treatment would, under its sameness-difference paradigm, immediately serve to reinforce—and essentialise as innate—women’s difference from men, serving as a basis for future discrimination against women.<sup>457</sup>

Finally, because formal equality understands equality to mean identical treatment of similar groups, it is satisfied both by treating the groups equally badly and by treating them equally well. In other words, an equality claim raised by pregnant women can be met by retracting the benefit enjoyed by the relevant comparator group instead of extending it to pregnant women: levelling down instead of levelling up.<sup>458</sup>

Summing up, the foundations of formal equality rest on two tenets: the search for sameness (and the exclusion of difference), and the insistence on identical treatment for those

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<sup>453</sup> Martha Nussbaum, ‘Is Privacy Bad for Women? What the Indian Constitutional Tradition can Teach about Sex Equality’, Boston Review <<http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women>> (accessed 29 March 2022); See also Eansor (n 440) 423.

<sup>454</sup> Fredman, *Discrimination Law* (n 431) 13.

<sup>455</sup> Kapur (n 78) 748.

<sup>456</sup> Fredman, Difference with a Distinction (n 446) 108.

<sup>457</sup> Fredman, Reversing Roles (n 440) 444; Eansor (n 440); Kenney (n 442) 357.

<sup>458</sup> Fredman, *Discrimination Law* (n 431) 9.

identified as similar. Both these tenets are conceptually deficient in responding to discrimination claims involving pregnancy and reproduction. I will now show, through an exercise in constitutional interpretation, that the constitutional conception of equality in India moves away from both these tenets to focus, instead, on group-based disadvantage and differential treatment to redress such disadvantage.

### **III. The Contours of Constitutional Equality**

In this section, I rely on textualism, historicism and structuralism—methods of constitutional interpretation set out in Chapter 2—to draw out the conception of equality underlying Article 15. I show that Article 15 centres group-based disadvantage, avoiding the trap of formal equality's sameness-difference paradigm. An acknowledgment of historical disadvantage experienced by members of certain groups leads to an automatic rejection of identical treatment as the standard of equality: against the background of disadvantage, identical treatment, it is recognised, often furthers inequality rather than redressing it. Differential treatment is therefore built into the Constitution. At the same time, disadvantage (which necessitates differential treatment) is not essentialised as innate to the group, rendering the group inherently different, as under formal equality. Instead, group-based disadvantage is identified as a product of inequality, which ought to be—and can be—redressed. Moreover, disadvantage is understood multi-dimensionally to include socio-economic disadvantage, stigma experienced by members of certain groups and their inability to participate socially and politically.

It should be noted that the Constitution is silent on pregnancy and reproduction. So, the discussion below does not explicitly touch on these issues. However, it shows how the constitutional conception of equality in India clearly deviates from formal equality, which, as argued in Part II of the Chapter, is limited in responding to pregnancy. In Parts IV and V of the Chapter, I apply the constitutional conception developed below to pregnancy and reproduction.

*i. Textual Interpretation*

Article 15(1) prohibits the State from discriminating against citizens on the basis of certain listed grounds, such as caste, sex, and religion. These grounds speak to the experience of groups within the grounds—Scheduled Castes and Tribes, women, religious minorities—who occupied a position of disadvantage at the time of framing of the Constitution, due to discrimination against them:

Each of these indices marks persons/communities who inhabit disempowered life-worlds. Each index has served historically as a separator of citizen–subjects from citizens, the former trapped under the wheels of the development juggernaut set in motion by the latter, who monopolize not only resources but also the reins of government, holding the state captive. Violence and asymmetrical power relations, needless to say, are deeply entrenched in these worlds.<sup>459</sup>

The grounds are thus sites of historical group-based disadvantage,<sup>460</sup> representing ‘past ways in which people have been marginalized and oppressed’.<sup>461</sup>

Article 15(2) affirms the centrality of group-based disadvantage to the meaning of discrimination under Article 15. It makes explicit reference to certain specific forms of disadvantage—‘disability, liability or restriction’ in accessing the public sphere—experienced on account of group membership, and seeks to eradicate such disadvantage. Similarly, Articles 15(3) and (4) expressly identify historically disadvantaged groups—women, children, socially and educationally backward classes, the Scheduled Castes and Tribes—and permit the State to introduce special measures for these groups. These provisions thus deviate from identical treatment as the standard of equality. Article 15(4) further clarifies that such ‘special provisions’ ought to be for the ‘advancement’ of these groups, implying that these measures ought not

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<sup>459</sup> Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge, 2012) 456 (‘*Tools of Justice*’).

<sup>460</sup> Gautam Bhatia, ‘Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution’ (2017) 1(2) *Indian Law Review* 131 (‘*Equal Moral Membership*’).

<sup>461</sup> Jayna Kothari, *The Future of Disability Law in India* (OUP, 2012) 21 (‘*Disability Law*’).

perpetuate their disadvantage. A straight-forward textual reading of Article 15 thus reveals that the provision aims to redress group-based disadvantage, including through permitting differential treatment. A historical reading of the provision builds on these observations.

*ii. Historical Interpretation*

The Constituent Assembly Debates shine light on the constitutional role of Article 15: removing the ‘age-long disabilities and sufferings’<sup>462</sup> experienced by members of certain social groups falling within the listed grounds under Article 15(1). Article 15 recognises in ‘substantive terms’ that ‘groups are unequally placed and that this has physical and material consequences for the groups located at the bottom of the social order’.<sup>463</sup> This is evident in discussions around Article 15(2), which seeks to ensure equal access to the public sphere<sup>464</sup> to members of all groups. As KT Shah observed, the emphasis of Article 15(2) is on ‘places of public use or resort, or those dedicated to public service, from which *in the past discrimination has been made and individuals of particular communities or classes have been excluded for no other reason except their caste or birth*’.<sup>465</sup> ‘there are roads through which the *people of scheduled castes and other low castes* are not allowed to walk...if a *scheduled caste man* goes to draw water from the well, he immediately meets with his death.’<sup>466</sup> Similar examples were given of schools where Dalit students were not allowed to sit with others, temples where they were made to worship the deity at a distance, and hospitals where they were denied medical treatment.<sup>467</sup> Such exclusion, KT Shah pointed out, was ‘wholly out of place’

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<sup>462</sup> S Nagappa, CAD (Volume VII, 29 November 1948) [7.62.99], [7.62.101].

<sup>463</sup> Kannabiran, *Tools of Justice* (n 459) 458.

<sup>464</sup> The ‘public sphere’, under Article 15(2), includes shops, public restaurants, hotels, places of public entertainment, wells, tanks, bathing ghats, roads and places of public resort.

<sup>465</sup> KT Shah, CAD (Volume VII, 29 November 1948) [7.62.57] (emphasis added).

<sup>466</sup> Mohd Tahir, CAD (Volume VII, 29 November 1948) [7.62.84] (emphasis added).

<sup>467</sup> VC Keshava Rao, CAD (Volume III, 29 April 1947) [3.18.228]; M. Ananthasayanam Ayyangar, (Volume III, 29 April 1947) [3.18.247]; Bhopinder Singh Man, CAD (Volume VII, 29 November 1948) [7.62.109].

in a Constitution framed on ‘democratic equality’—on ‘*real* equality’—of citizens.<sup>468</sup> Through the inclusion of Article 15(2), the Drafters thus sought to remove the stigma associated with group membership, on account of which individuals from marginalised groups were prevented from entering public spaces.<sup>469</sup>

Article 15(3) allows the State to make ‘special provisions’ for women and children. In justifying its inclusion, BN Rau, in his ‘Notes on Fundamental Rights’, made reference to the Fourteenth Amendment of the United States Constitution, which requires that no State shall deny to any person the ‘equal protection of the laws’. BN Rau cautioned that the guarantee of equality should not be taken ‘too literally’ so as to render invalid special measures taken by the State for women and children, affecting prejudicially the ‘institution of separate schools, hospitals, etc. for women’. To avoid this result, the Draft Constitution of October 1947, for the first time, included Article 15(3).<sup>470</sup>

In introducing Article 15(3), the drafters were explicitly aware of women’s history of disadvantage, recognising that the ‘average woman in this country has suffered now for centuries from *inequalities heaped upon her by laws, customs and practices of people*’.<sup>471</sup> Vallabhai Patel observed that ‘even in a non-discriminatory clause it would be necessary *in the present condition of our country* to make special provision for women’.<sup>472</sup> Similarly, KT Shah pointed out that:

this is a provision for *discrimination in favour of women*... This discrimination is *in favour of particular classes of our society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps*. Those, I think, may require special

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<sup>468</sup> KT Shah, CAD (Volume VII, 29 November 1948) [7.62.57], [7.62.58] (emphasis added).

<sup>469</sup> Bhopinder Singh Man, CAD (Volume VII, 29 November 1948) [7.62.109].

<sup>470</sup> Juliette G. Duara, *Gender Justice and Proportionality in India: Comparative Perspectives* (Routledge, 2017) 74-75.

<sup>471</sup> Hansa Mehta, CAD (Volume I, 19 December 1946) [1.9.41] (emphasis added).

<sup>472</sup> Vallabhai Patel, CAD (Volume III, 29 April 1947) [3.18.202] (emphasis added).

treatment; and if they do require it, they should be permitted special facilities for some time so that *real equality* of citizens be established.<sup>473</sup>

By emphasising on the scope of Article 15(3)—discrimination *in favour* of women to achieve ‘real equality’—KT Shah actively ‘distinguished [it] from the preceding article’,<sup>474</sup> which prohibited discrimination *against* women.

The historical reading of Article 15 supports the conclusion arrived at textually. It confirms that Article 15 centres group-based disadvantage rather than difference, in turn also rejecting identical treatment as a measure of equality. At the same time, the historical reading goes further. It shows that Article 15 does not essentialise disadvantage necessitating differential treatment as innate to women, rendering them ‘different’ from men. Rather, it identifies women’s disadvantage as a product of discrimination against them, the ‘unfortunate legacy of the past’ reflected in the ‘laws, customs and practices of people’. Finally, Article 15 understands discrimination asymmetrically, meaning that it does not view as discrimination forms of differential treatment in favour of women.

### *iii. Structural Interpretation*

Structuralism, as Chapter 2 explains, requires a given provision to be located within the relevant constitutional ‘topological space’ to which it belongs,<sup>475</sup> to discern both its constitutional role and its interpretation. Like Article 21 belongs to the ‘liberty code’, Article 15 is a part of the ‘equality code’ of the Constitution, comprising of Articles 14-18:

Though the principal provision relating to equality before the law is embodied in **Article 14**, the four articles which follow it are a manifestation of its basic doctrines. **Article 15** in outlawing discrimination on grounds of religion, race, caste, sex and place of birth is but a manifestation of equality. Equality in matters of public employment under **Article 16** is a facet of the basic postulate of equality. **Article 17** gives expression to equality in abolishing untouchability: a practice fundamentally

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<sup>473</sup> KT Shah, CAD (Volume VII, 29 November 1948) [7.62.87] (emphasis added).

<sup>474</sup> *ibid.*

<sup>475</sup> *GVK Industries* (n 391).

at odds to the notion of an equal society. Titles which place some citizens above others are abolished by **Article 18** in manifesting yet another aspect of equality.<sup>476</sup>

To identify the conception of equality underlying Article 15, it is therefore useful to look at Articles 16, 17 and 18. The debates surrounding the provision of reservations (a form of affirmative action) under Article 16, for backward classes (who are underrepresented in public services), are especially instructive. Those members of the Constituent Assembly objecting to reservations spoke the language of formal equality. *First*, ‘equality of opportunity’ under Article 16 was seen as guaranteeing only identical treatment, such that any form of ‘special consideration’, including reservations, would violate the equality guarantee: ‘there can be only one of these two things—either there can be clear equal opportunity or special consideration’.<sup>477</sup> *Second*, the emphasis on identical treatment was furthered by arguing that merit—an identical selection standard—ought to be the only basis of recruitment. The absence of merit-based selection, it was stated, would place a ‘premium on inefficiency’.<sup>478</sup> *Third*, differential treatment through reservations was viewed as ‘casteism’,<sup>479</sup> and as against the principle of non-discrimination embodied in Articles 15 and 16.<sup>480</sup> This implied a symmetric understanding of non-discrimination wherein *any* differential treatment on the basis of protected grounds would be discriminatory, regardless of whether the effect of the provision was to perpetuate group-based disadvantage or redress it. *Fourth*, it was argued that differential treatment through reservation would stigmatise members of backward

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<sup>476</sup> *Indian Young Lawyers* (n 397) [14] (Chandrachud J.). Below, I do not focus on Article 14 because there was no significant discussion around the provision in the Constituent Assembly. I focus instead on Articles 16-18.

<sup>477</sup> Hukam Singh, CAD (Volume VII, 30 November 1948) [7.63.159].

<sup>478</sup> Loknath Misra, CAD (Volume VII, 30 November 1948) [7.63.23]; Raj Bahadur, CAD (Volume IX, 23 August 1949) [9.122.134], [9.122.135]; Damodar Seth, CAD (Volume VII, 30 November 1948) [7.63.80], [7.63.81].

<sup>479</sup> Seth (n 478).

<sup>480</sup> Raj Bahadur, (Volume IX, 22 August 1949) [9.121.66].

classes,<sup>481</sup> and entrench the psychology of separation.<sup>482</sup> Through this, disadvantage necessitating reservations for certain groups was essentialised—resulting in stigma—rather than being seen as a product of inequality which ought to be—and can be—redressed.

In contrast, both the responses to these objections and the eventual introduction of reservations within public service are indicative of an implicit rejection of formal equality. In opening the clause on reservation to general discussion, the Vice-President of the Constituent Assembly observed: ‘The clause...affects particularly *certain sections of our population—sections which have in the past been treated very cruelly*...today [we are] prepared to *make reparation*’.<sup>483</sup> Tackling head on the supposed conflict between equality of opportunity and reservations, BR Ambedkar stated that ‘although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration’ due to ‘historical reasons’.<sup>484</sup> Reservations were seen as playing this role, by ensuring that equality of opportunity existed not only in the statute book, but was ‘translated into action’.<sup>485</sup> Alladi Krishnaswamy Iyer added to this by noting that there was no similar provision in the equal protection clause of the United States Constitution. As a result, he argued, ‘the Fourteenth Amendment in the United States Constitution, which was intended to remove the disability of the Negroes, has not, as experience has shown, served the purpose in the United States’.<sup>486</sup> There was thus an explicit rejection of

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<sup>481</sup> HV Kamath, (Volume IX, 23 August 1949) [9.122.85]; RK Sidhva, CAD (Volume X, 14 October 1949) [10.151.128], [10.151.175].

<sup>482</sup> Das Bhargava, CAD (Volume VII, 6 November 1948) [7.50.98]; Raj Bahadur, CAD (Volume IX, 23 August 1949) [9.122.135]; Brajeshwar Prasad, (Volume X, 14 October 1949) [10.151.78], [10.151.79].

<sup>483</sup> Vice President, CAD (Volume VII, 30 November 1948) [7.63.115] (emphasis added).

<sup>484</sup> BR Ambedkar, CAD (Volume VII, 30 November 1948) [7.63.205].

<sup>485</sup> Shri S Nagappa, CAD (Volume II, 21 January 1947) [2.12.68], [2.12.7].

<sup>486</sup> Alladi Krishnaswami Iyer, CAD (Volume XI, 23 November 1949) [11.163.62].

identical treatment alone as the measure of equality, based on the fact that *only* identical treatment would not offer ‘real’ equality to members of disadvantaged groups.

This was accompanied by the recognition that backward classes may not be able to attain dominant standards of merit *because of* historical disadvantage. Requiring them to participate on identical terms was described as ‘having a one-mile race between two persons one of whom had already gone ahead half-a-mile, and another who had yet to start. That is quite unequal, unfair and unjust’.<sup>487</sup> Thus, instead of having the equality clause function ‘just like a machine’<sup>488</sup>—by mechanistically treating people identically—it was argued that reservations ought to be provided.<sup>489</sup>

Crucially, reservations were seen as ‘remov[ing] and eliminat[ing] those conditions which go to make backwardness’,<sup>490</sup> such as underrepresentation in public service, to enable ‘the development of the talent that is latent in each one of us’.<sup>491</sup> That is, backwardness, due to which members of certain groups fell short of the standard of merit, was not treated as inevitable, but rather ‘the result of conditions which have been persisting and in existence for several centuries’.<sup>492</sup> At the same time, existing standards of merit were identified as being built on the experiences of dominant groups: ‘This cry, this bogey of merit and fair-play is being raised by those who are in an advantageous position and who stand to suffer if others also come into the picture.’<sup>493</sup> It was

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<sup>487</sup> PS Deshmukh, CAD (Volume IX, 23 August 1949) [9.122.22]; Shri Phool Singh, CAD (Volume IX, 23 August 1949) [9.122.98] (comparing it to ‘asking a man on bicycle to compete with another on a motorcycle, which in itself is absurd’).

<sup>488</sup> Hukam Singh, CAD (Volume IX, 22 August 1949) [9.121.51].

<sup>489</sup> P Kakkan, CAD (Volume 30 November 1948) [7.63.133]; Shri Ajit Prasad Jain, CAD (Volume XI, 22 November 1949) [11.162.166]; HJ Khandekar, CAD (Volume VII, 30 November 1948) [7.63.151].

<sup>490</sup> Mohammad Ismail Khan, CAD (Volume VII, 30 November 1948) [7.63.154].

<sup>491</sup> MR Masani, CAD (Volume I, 17 December 1946) [1.7.8].

<sup>492</sup> Mohammad Ismail Khan, CAD (Volume VII, 30 November 1948) [7.63.154].

<sup>493</sup> Shri Phool Singh, CAD (Volume IX, 23 August 1949) [9.122.98], [9.122.99], [9.122.101]:

It is not a question of competition. If you want to run the country, properly, if the administration is to be efficient as my friends want it to be, then you must have people in the job who know something

pointed out that ‘people's capacities cannot be measured by mere passing of examinations or obtaining the highest possible marks’.<sup>494</sup> Instead, they ought to be assessed in reference to the task discharged, such that in certain services other attributes have to be valued over mere marks.<sup>495</sup> Moreover, it was observed that in provinces where reservations had been in practice, such as Madras and Bombay, there had been no significant drop in efficiency.<sup>496</sup> Finally, in response to the claim that such forms of special treatment were discriminatory, it was pointed that the existing status quo was in fact discriminatory, with certain social groups almost entirely capturing the public services.<sup>497</sup> As long as disadvantage occurred on group-based lines, redressing disadvantage—here, through reservations to individual members of groups—would also have to proceed on group-based lines.<sup>498</sup> Thus, formal equality evidently held limited purchase in the drafting of Article 16, which, instead, affirmed the ‘equality code’s’ commitment to redressing group-based disadvantage through differential treatment.

The debates on Article 17 prohibiting untouchability speak a similar language. Untouchability was seen as a symptom of the caste system,<sup>499</sup> premised on the ‘laws of Manu’. These laws created *varnas* (or castes), and ordered them hierarchically, such that the ‘untouchables’,

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about the job and who come from the masses. Otherwise the administration will lose touch with the masses.

See also Hukam Singh, CAD (Volume IX, 22 August 1949) [9.121.49].

<sup>494</sup> PS Deshmukh, CAD (Volume IX, 23 August 1949) [9.122.19]; Ananthasayanam Ayyangar, CAD (Volume IX, 23 August 1949) [9.122.149].

<sup>495</sup> P Kakkan, CAD (Volume VII, 30 November 1948) [7.63.133]; BN Munavalli, CAD (Volume IX, 22 August 1949) [9.121.58].

<sup>496</sup> PS Deshmukh, CAD (Volume IX, 23 August 1949) [9.122.31].

<sup>497</sup> *ibid* [9.122.19], [9.122.31].

<sup>498</sup> Muniswamy Pillai, CAD (Volume VII, 30 November 1948) [7.63.134]; Mohammad Ismail Khan, CAD (Volume VII, 30 November 1948) [7.63.155].

<sup>499</sup> Ranjan Thakur, CAD (Volume III, 29 April 1947) [3.18.30]; SC Banerjee, CAD (Volume III, 29 April 1947) [3.18.99]; DN Datta, CAD (Volume III, 29 April 1947) [3.18.103].

who were at the bottom of the hierarchy, were denied even the freedom to name their children.<sup>500</sup> As a result, this group lagged behind others in terms of their economic and educational status, and faced stigma.<sup>501</sup> The prohibition on untouchability was introduced to remedy the ‘subjugation and despair’, the ‘humiliation and disgrace’ experienced by members of this group.<sup>502</sup> It sought to abolish ‘social inequity, the social stigma and the social disabilities in our society’.<sup>503</sup>

Along the same lines, Article 18, which prohibits an Indian citizen from accepting titles, was introduced in the ‘interest of equality between human beings’,<sup>504</sup> by abolishing ‘vulgar distinctions’<sup>505</sup> which ‘give a different view to the man’.<sup>506</sup> The provision sought to dismantle hierarchy created by the granting of titles. Titles, it was argued, were ‘toys and baubles’<sup>507</sup> conferred by the ‘alien imperialist Government who have been...suppressing our freedom movement and who have been conferring titles on these people who have aided them’.<sup>508</sup> Titles were also described as a ‘corroding, corrupting practice [making] individuals go about currying favour with authority to get particular distinctions’.<sup>509</sup> By prohibiting the taking and granting of titles (except military and academic distinctions), Article 18 cemented the constitutional role of the ‘equality code’: the dismantling of social hierarchy, or the perceived superiority of some over the other.

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<sup>500</sup> HJ Khandhar, CAD (Volume XI, 21 November 1949) [11.161.65].

<sup>501</sup> S Nagappa, CAD (Volume XI, 21 November 1949) [11.161.154].

<sup>502</sup> Monomohan Das, CAD (Volume VII, 29 November 1948) [7.62.168]; Muniswamy Pillai, CAD (Volume VII, 29 November 1948) [7.62.167]; Kaka Bhagwant Roy, CAD (Volume XI, 24 November 1949) [11.164.115].

<sup>503</sup> Santanu Kumar Das, CAD (Volume XI, 24 November 1949) [7.62.172].

<sup>504</sup> MR Masani, CAD (Volume III, 30 April 1947) [3.19.56].

<sup>505</sup> HV Kamath, CAD (Volume XI, 19 November 1949) [11.160.14].

<sup>506</sup> Loknath Misra, CAD (Volume VII, 30 November 1948) [7.63.243].

<sup>507</sup> HV Kamath, CAD (Volume VII, 30 November 1948) [7.63.262].

<sup>508</sup> HV Kamath, CAD (Volume III, 30 April 1947) [3.19.73].

<sup>509</sup> Sri Prakasa, CAD (Volume III, 30 April 1947) [3.19.69].

When located within this ‘equality code’, the central tenets of Article 15 come to life. There is a clear absence of the sameness-difference paradigm riddling formal equality. Article 15 is not concerned with identifying similar groups and offering identical treatment to them. Rather, it recognises the history of disadvantage experienced by certain groups and the existing social hierarchy amongst groups. Disadvantage is viewed multi-dimensionally, extending to socio-economic disparities, stigma on account of group membership, and barriers to equal social and political participation. Against this, Article 15 aims to redress group-based disadvantage and eliminate social hierarchy. To do so, it recognises that identical treatment alone is insufficient. In fact, the very standard of identical treatment might be based on the experiences of members of advantaged groups, and thus function to exclude members of disadvantaged groups. As a result, Article 15 prescribes differential treatment to redress group-based disadvantage. Yet, it does not essentialise disadvantage as innate and cast the group as inherently different. Instead, it views disadvantage as a product of historic discrimination against these groups. The constitutional conception of equality underlying Article 15 therefore deviates significantly from formal equality. In the next section, I identify this conception as ‘substantive equality’ and develop an approach to pregnancy and reproduction reflecting this conception.

#### **IV. A Substantive Equality Approach to Pregnancy and Reproduction**

Kapur and Cossman identify the aim of substantive equality as ‘eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society’.<sup>510</sup> This view was endorsed by the Supreme Court of India in *Joseph Shine*.<sup>511</sup> Jaising similarly understands the goal of substantive equality as being the ‘eradication of historical disadvantage’.<sup>512</sup> MacKinnon calls this

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<sup>510</sup> Kapur and Cossman (n 429) 200.

<sup>511</sup> *Joseph Shine* (n 350) [38] (Chandrachud J.).

<sup>512</sup> Jaising (n 429) 293.

conception of equality ‘substantive equality’ because it takes ‘substantive inequality as its point of departure and produces equality in substance at its point of arrival’.<sup>513</sup> Substantive equality thus focuses not on sameness or difference, but group-based disadvantage.<sup>514</sup>

As the next step, substantive equality understands disadvantage multi-dimensionally. This is best illustrated by Fredman’s four-dimensional framing.<sup>515</sup> Women undoubtedly experience disadvantage in a socio-economic sense: for instance, underrepresentation in jobs, underpayment for work of equal value, the resulting lack of financial independence, and restrictions on access to credit, property, or similar resources. At the same time, even at its most expansive, socio-economic disadvantage does not cover all the wrongs associated with inequality. Stigma, stereotyping, humiliation, and violence are experienced by women regardless of their relative socio-economic standing. This form of disadvantage recognises the centrality of inter-personal affirmation to our sense of identity: ‘Identity is shaped through the ways in which others recognise us, and we recognise others.’<sup>516</sup> Stereotypes fail to value us as individuals, and thus contribute to perpetuating inequality by furthering unequal relations of power.<sup>517</sup> Disadvantage also has a structural dimension. It is perpetuated not just through individual acts of prejudice: ‘such prejudices are frequently embedded in the *structure* of society’.<sup>518</sup> In other words, ‘it’s causes are embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional rules and the collective consequences of following those rules’—the ‘everyday practices of a well-intentioned

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<sup>513</sup> MacKinnon, *Sex Equality* (n 431) 187.

<sup>514</sup> Kapur (n 78) 744; Catherine MacKinnon, ‘Substantive Equality Revisited: A Reply to Sandra Fredman’ (2016) 14(3) *International Journal of Constitutional Law* 739, 740.

<sup>515</sup> Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712-738 (‘Substantive Equality Revisited’).

<sup>516</sup> *ibid* 731.

<sup>517</sup> Sandra Fredman, ‘Substantive Equality Revisited: A Rejoinder to Catherine MacKinnon’ (2016) 14(3) *International Journal of Constitutional Law* 748 (‘Rejoinder’).

<sup>518</sup> Fredman, *Discrimination Law* (n 431) 14 (emphasis added); Kothari, *Disability Law* (n 461) 2.

society’—beyond the conscious coercive actions of a ‘tyrannical power’ alone.<sup>519</sup> The patriarchal institution of motherhood, set out in Chapter 1, demonstrates women’s structural disadvantage. The institution is undergirded by several unquestioned norms:<sup>520</sup> the expectation that women will reproduce, the imposition of unilateral responsibilities of care, the construction of the public sphere around an individual without caring responsibilities, and the devaluing of care work. The consequence of following these everyday norms is a perpetuation of women’s disadvantage, *even if* independent, intentional acts furthering their disadvantage cannot be identified. Finally, disadvantage is reflected in the lack of women’s participation in decisions concerning them. This is seen both at a micro-level in their every-day lives and at a macro-level, when female representation in selected and elected bodies is considered.<sup>521</sup> The four dimensions of disadvantage also interact with one another.<sup>522</sup> For instance, women’s socio-economic disadvantage could contribute to stereotypes about women as innately financially dependent (and vice-versa) which may then be used to deny them participation outside the home, in turn entrenching norms about their role within the home which forms the basis of their structural disadvantage. The Supreme Court, in *Nitisha*, explicitly endorsed Fredman’s four-dimensional framing on disadvantage as underlying India’s constitutional conception of equality.<sup>523</sup> I therefore use this framing in Chapters 4 and 5.

Substantive equality’s focus on redressing multi-dimensional disadvantage transforms the central enquiry under the equality guarantee. Unlike formal equality which asks whether two groups are similar before treating them identically, substantive equality enquires whether the rule

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<sup>519</sup> Young, *Justice* (n 102) 5, 6; See also Kapur and Cossman (n 429) 200.

<sup>520</sup> In Chapter 1, Part IV, I identify the following norms: ‘essentialisation’, ‘individualisation’, ‘naturalisation’, ‘biologicalisation’, ‘idealisation’, ‘privatisation’, and, ‘depoliticisation’.

<sup>521</sup> Fredman, *Discrimination Law* (n 431) 27-32.

<sup>522</sup> Fredman, *Rejoinder* (n 517) 747-749.

<sup>523</sup> *L.A. Col. Nitisha v Union of India* AIR 2021 SC 1797 [44] (*‘Nitisha’*).

or practice in question perpetuates group-based disadvantage, in which case it falls foul of the equality guarantee.<sup>524</sup> This has three crucial implications. *First*, substantive equality understands that identical treatment could, in effect, entrench group-based disadvantage. As a result, it explicitly deviates from identical treatment as a measure of equality: ‘if equal treatment of subjects...results in divergent impacts, the substantive equality model rings the alarm’.<sup>525</sup> *Second*, substantive equality is no longer concerned only with the form of the rule. Rather, it investigates the effect or impact of a rule, recognising that a facially neutral rule—a form of identical treatment which would be compliant with formal equality—could, in effect, perpetuate group-based disadvantage.<sup>526</sup> *Third*, substantive equality is expressly asymmetric. It focuses explicitly on the group which has suffered disadvantage: ‘women rather than men, black people rather than whites, people with disabilities rather than able-bodied, or gay people rather than heterosexuals’.<sup>527</sup> It therefore distinguishes between special provisions aiming to redress disadvantage experienced by these groups, and those creating or perpetuating inequality amongst these groups,<sup>528</sup> such that the former does not amount to discrimination while the latter does. In other words, substantive equality defines as discrimination not *any* differential treatment on prohibited grounds, but rather those forms of differential treatment that disadvantage, in form or effect, a group which has historically experienced disadvantage, understood multi-dimensionally.<sup>529</sup>

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<sup>524</sup> Kapur and Cossman (n 429) 200; Goonesekere (n 436) 10; Kauffman (n 436) 616.

<sup>525</sup> Jaising (n 429) 293, citing Catherine MacKinnon, ‘Difference and Dominance: On Sex Discrimination’ in Katherine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Routledge 1991) 81; Kapur and Cossman (n 429) 198.

<sup>526</sup> Kenney (n 442) 358.

<sup>527</sup> Fredman, *Substantive Equality Revisited* (n 515) 729.

<sup>528</sup> Fredman, *Rejoinder* (n 517) 747.

<sup>529</sup> Kapur (n 78) 744; Goonesekere (n 436) 10; Kauffman (n 436) 616.

The constitutional conception of equality in India, set out in Part III of the Chapter, maps closely onto substantive equality, so understood.<sup>530</sup> The constitutional role of the ‘equality code’ is to redress group-based disadvantage: the ‘age-long disabilities and sufferings’<sup>531</sup> experienced by members of certain social groups. The ‘equality code’ understands disadvantage multi-dimensionally, to include socio-economic disadvantage, stigma, and social and political exclusion. It rejects identical treatment as the standard for equality in light of its failure to achieve ‘real’ equality. And, it defines discrimination asymmetrically, bringing outside the meaning of discrimination forms of differential treatment which aim to redress group-based disadvantage.

Let us now apply the constitutional conception of substantive equality to claims of discrimination in the reproductive context. At the outset, substantive equality no longer enquires whether pregnant women are similar to or different from men. Rather, it simply asks whether the rule or practice perpetuates women’s disadvantage along one or several dimensions. Thus, the biological fact of pregnancy, the assumptions attached to it, and the material implications of reproduction within the patriarchal institution of motherhood no longer operate as headwinds to an equality claim.<sup>532</sup> This approach also eliminates the need for a similarly situated male comparator: the sick man or otherwise. This does not imply that substantive equality, on a conceptual level, is not concerned with relativity or comparison; it is, to the extent that it aims to redress women’s disadvantage relative to men’s, and dismantle the hierarchy which exists between

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<sup>530</sup> As also noted within existing literature, see, Paramanand Singh, ‘Equal Opportunity’ and ‘Compensatory Discrimination’: Constitutional Policy and Judicial Control’ (1976) 18(2) *Journal of the Indian Law Institute* 302-303; Kauffman (n 436) 585-588; Nair (n 429) 256-57; MacKinnon, *Sex Equality* (n 431) 189; Goonesekere (n 436) 23; Nussbaum (n 453) 39:

The understanding of equality in the Constitution is explicitly aimed at securing substantive equality for previously subordinated groups, and is designed to ward off merely formal understandings of equality...the framers understood the goal of equality in terms of an end to systematic hierarchy and discrimination, based on both caste and sex.

<sup>531</sup> Nagappa (n 462).

<sup>532</sup> MacKinnon, *Sex Equality* (n 431) 187.

men and women. However, the focus on group-based disadvantage rather than sameness-difference does away with the need for a suitable male comparator at the level of each individual case.

By implication, men are no longer held as the normative standard against which women's equality claims are assessed. Pregnancy is no longer seen as an obstacle to equality—setting women apart from men—which women have to surrender to be treated equally. Substantive equality thus does not devalue or denigrate differences between groups, here the fact of pregnancy. Instead, substantive equality respects difference, recognising that it can be a valuable aspect of one's identity as a member of a group. It identifies that '[a] person's particular sense of history, affinity, and separateness, even the person's mode of reasoning, evaluating, and expressing feeling, are constituted partly by her or his group affinities'.<sup>533</sup> At the same time, substantive equality aims to tackle, and redress, the detriment or disadvantage associated with difference:

*[s]ubstantive equality is about recreating society and societal structures to incorporate "differences", not to distort them, appropriate them, reject them through objectification or denial, merely "accommodate" them, or assess them against some presumably "undifferent" comparator group.*<sup>534</sup>

Thus, substantive equality allows, and arguably requires, measures which meet women's needs associated with pregnancy, removing forms of disadvantage they experience on account of this difference (for instance, threat to life and health during childbirth). Yet, in demanding these measures, substantive equality does not essentialise women as reproductive beings, reaffirming traditional gender norms.<sup>535</sup> Instead it 'opens the space within...these discourses [which] constitute

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<sup>533</sup> Young, *Justice* (n 102) 9, 12. Though Young also clarifies that this does not imply that 'persons have no individual styles, nor are unable to transcend or reject a group identity. Nor does it preclude persons from having many aspects that are independent of these group identities'.

<sup>534</sup> Diana Majury, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40(3/4) *Osgoode Hall Law Journal* 320 (emphasis added); Fredman, *Substantive Equality Revisited* (n 515) 733; See also Kauffman (n 436) 559

<sup>535</sup> Fredman expresses this fear in *Difference with a Distinction* (n 446) 112; See also Eansor (n 440) 425.

women as naturally different, [are] further scrutinised and deconstructed'.<sup>536</sup> Thus, difference itself becomes part of the substantive equality analysis, rather than a justification for not pursuing an equality claim, as under formal equality.

Substantive equality strikes this delicate (and difficult) balance between respecting difference, removing detriment associated with difference, and resisting essentialisation of the said difference by distinguishing between pregnancy and parenthood.<sup>537</sup> Pregnancy is recognised as a valuable form of difference between men and women, and is facilitated through special provisions for women, including but not limited to provisions for abortion and obstetric care.<sup>538</sup> Parenting, on the other hand, is not seen as the sole responsibility of women, therein resisting the essentialisation of women's difference. Instead, under substantive equality special provisions for parenting extend to all those who desire to parent. These include forms of social support—such as parental leave, flexible workplaces, possibilities for part time work, and quality child-care—enabling parents to discharge their responsibilities within and outside the home. Thus, unlike formal equality, which cements the patriarchal institution of motherhood by offering women a 'choice' between mothering within the institution or being childless, substantive equality potentially transforms the law's response to patriarchal motherhood. It preserves the joys of mothering (or, parenting) while redressing disadvantage associated with it, therefore constructing a legal environment conducive to forms of systemic or structural change.<sup>539</sup>

## V. Building the Doctrinal Model

The previous sections prove that conceptually, substantive equality offers a superior alternative to formal equality in grappling with discrimination claims involving pregnancy and reproduction. I

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<sup>536</sup> Kapur (n 78) 755; See also Eansor (n 440) 431.

<sup>537</sup> Fredman, *Reversing Roles* (n 440) 443.

<sup>538</sup> The specific examples of abortion and obstetric care are explored in Chapters 4 and 5.

<sup>539</sup> Fredman, *Substantive Equality Revisited* (n 515) 733; See also Kauffman (n 436) 559.

now build a doctrinal response to pregnancy and reproduction under Article 15, reflecting substantive equality. As reproductive claims have rarely been adjudicated under Article 15, to build the doctrinal model, I rely on two sources: *first*, the general gender discrimination jurisprudence under Article 15 and *second*, cases on pregnancy and employment, the only instance where reproductive issues have consistently been adjudicated under the non-discrimination provision.<sup>540</sup>

In the first two sections, I develop this approach under Article 15(1) and Article 15(3) independently. As I indicated earlier, courts have read Article 15 as reflecting both formal and substantive equality. I begin each section with a doctrinal reading of the provision which mirrors formal equality. I show how this reading would be detrimental to discrimination claims involving pregnancy, affirming the conclusions arrived in Part II of the Chapter. I then set out an alternate doctrinal reading of the provision which reflects substantive equality. I argue that this reading would benefit discrimination claims within the reproductive sphere, as observed in Part IV. To substantiate my claim, I rely on cases of pregnancy and employment which show hints of the alternate reading. In the third section, I read Articles 15(1) and 15(3)—in their alternate senses— together, to arrive at a substantive test for non-discrimination, which I then apply to cases of pregnancy and reproduction. This doctrinal model will form the basis for Chapters 4 and 5, where I apply the model to challenge India’s law on abortion and prevailing maternal mortality and morbidity. In the sections below, I once again read cases from the Supreme Court and State High Courts ‘horizontally’, as understood in the Introduction to the Thesis, clustering together cases which represent various trends in interpretation.

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<sup>540</sup> Courts typically do not use the language of ‘reproductive rights’ in responding to discrimination claims brought by pregnant women against their employers. It could potentially be argued that these claims falls within the ambit of reproductive rights, especially in light of the definition of reproductive rights set out in the Introduction to the Thesis. However, pursuing this argument is outside the scope of the Thesis. I rely on these cases simply as an example of a non-discrimination approach to reproductive claims more broadly, even if not specifically recognised as a ‘reproductive rights’ issue.

#### A. Article 15(1): The Prohibition on Sex Discrimination

Article 15(1) prohibits the State from discriminating against any citizen ‘on grounds **only** of religion, race, caste, **sex**, place of birth or any of them’. Courts have relied on the word ‘only’ to import formal equality into Article 15(1). This reading is epitomised in *Nergesh Meerza*,<sup>541</sup> where Regulations 46 and 47 of the Air India Employee Service Regulations were subject to constitutional challenge before the Supreme Court. Air India employed women as Air Hostesses and men as Air Flight Pursuers. The impugned regulations provided that Air Hostesses had to retire on attaining the age of 35 (extendable to 45 at the discretion of the Managing Director), on marriage if it was within four years of service, or on first pregnancy. Parallel conditions did not exist for Air Flight Pursuers. The petitioners argued that these differential terms constituted discrimination on ground of sex under Article 15(1). Rejecting this claim, the Supreme Court held:

what Article 15 (1) and 16 (2) prohibit is that discrimination should not be made **only and only on the ground of sex**. These Articles of the Constitution **do not prohibit the State from making discrimination on the ground of sex coupled with other considerations**.<sup>542</sup>

In *Nergesh Meerza*, the ‘other considerations’ included the differential terms of employment between Air Hostesses and Air Flight Pursuers, which the Court failed to see as themselves based on sex.

The *Nergesh Meerza* reading of Article 15(1) operates strictly within formal equality’s sameness-difference paradigm. Under this reading, while sex *alone* cannot be a reason to treat women differently from men, the presence of ‘other considerations’—let’s call them ‘plus factors’—would immediately serve to render women different. Once women are deemed different, then they need not be treated equally, since identical treatment extends only to equals.

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<sup>541</sup> *Air India v Nergesh Meerza* AIR 1981 SC 1829 (*Nergesh Meerza*).

<sup>542</sup> *ibid* [70] (emphasis added).

A survey of the gender discrimination jurisprudence shows that courts have brought a range of factors within ‘other considerations’, each of which has the potential to bar a claim of discrimination within the reproductive sphere. *First*, courts have held that physiological differences between men and women—‘patent physical disparities’ and the ‘structure of the body’<sup>543</sup>—are plus factors, rendering women different from men: ‘Differentiated by these matters from the other sex, she is properly placed in a class by herself.’<sup>544</sup> As Kannabiran notes, ‘biology, by this token, is destiny’.<sup>545</sup> Under this reading, women’s very ability to get pregnant would serve as a plus factor beyond sex, placing any form of differential treatment on ground of pregnancy outside the scope of Article 15(1).

*Second*, courts have held that gendered assumptions about women—women as financially incapable of paying security for costs for litigation<sup>546</sup> or women as ‘transplanting’ to the family of the husband after marriage<sup>547</sup>—are valid ‘other considerations’ beyond sex. Through this, a wedge is driven between sex and gender,<sup>548</sup> disaggregating<sup>549</sup> or drawing artificial distinctions between the two<sup>550</sup> to uphold blatantly discriminatory legislation as constitutional.<sup>551</sup> Under this approach, rules

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<sup>543</sup> *RS Singh v State of Punjab* AIR 1972 P H 117 [9] (‘*RS Singh*’).

<sup>544</sup> *ibid*; See also *Dwaraka Bai v Professor Nainan Mathews* AIR 1953 Mad 792 [30], where the plus factor was the different ‘abilities of man and woman’ (‘*Dwaraka Bai*’).

<sup>545</sup> Kannabiran, *Judicial Meanderings* (n 429) 91.

<sup>546</sup> *Sri Mahadeb Jiew v Dr. B.B. Sen* AIR 1951 Cal 563.

<sup>547</sup> *Rajkumar Rajindra Singh v Union of India* AIR 1976 HP 82; *Nalini Ranjan Singh v State of Bihar* AIR 1977 Pat 171; *Ambika Prasad Mishra v State of Uttar Pradesh* 1980 AIR 1762.

<sup>548</sup> Nussbaum (n 453); Avani Sood, ‘Gender Justice through Public Interest Litigation: Case Studies from India’ (2008) 41 *Vanderbilt Journal of Transnational Law* 853; Kauffman (n 436) 616.

<sup>549</sup> Kannabiran, *Judicial Meanderings* (n 429) 88. A similar trend also observed *M. Kannan v Government of Tamil Nadu* WA No. 685 and 694/1994 (Madras High Court, 29 April 1994); *K. Karupiah v Commissioner and Secretary, Government of Tamil Nadu, Social Welfare and Nutritious Meal Programme Department* W.P. No. 33771/2006 (Madras High Court, 5 October 2009).

<sup>550</sup> Kapur (n 78) 751.

<sup>551</sup> Jaising (n 429) 294.

reflecting gendered assumptions about women based on their reproductive ability would be consistent with Article 15(1).

*Third*, courts have treated the implications of sex inequality—women’s financial dependence on men<sup>552</sup> or their susceptibility to threats of sexual abuse<sup>553</sup>—as plus factors rendering women different, and thus defeating their claim to equality. As a result, a rule disadvantaging women—say, by excluding them from employment—on account of the ‘reality’ of their domestic responsibilities—an implication of sex inequality within the reproductive sphere—would not violate Article 15(1).

*Fourth*, courts have also deemed as ‘other considerations’ seemingly neutral criteria, often based on the experiences of men—such as the height requirement for employment<sup>554</sup>—and having an adverse effect on women—such as a facially neutral rule prohibiting dance performances in bars.<sup>555</sup> This operates to exclude claims of indirect discrimination,<sup>556</sup> placing beyond the reach of Article 15(1) facially neutral rules having a disproportionate adverse impact on pregnant women.

*Finally*, courts have held that discrimination based on ‘one or more of [the listed] grounds and also on other grounds is not hit by the Article’.<sup>557</sup> Through this reading, intersectional forms of discrimination are placed outside the scope of Article 15(1).<sup>558</sup> For instance, in *Nergesh Meerza*,

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<sup>552</sup> *Cyril Britto v Union of India* AIR 2003 Ker 259 [7], [8].

<sup>553</sup> *Shri Danyandeo Dattatraya Kale v State of Maharashtra* 1995 (3) BCR 86 [44], [47]; *Giridhar Gopal v State* 1953 CriLJ 964.

<sup>554</sup> *RS Kavitha v State of Tamil Nadu* W.P. No. 24856/2008 (Madras High Court, 5 January 2010).

<sup>555</sup> *Indian Hotel and Restaurants Association v State Of Maharashtra* 2006 (3) BomCR 705 [24] (*‘Indian Hotel’*).

<sup>556</sup> Gauri Pillai and Shreya Atrey, ‘A feminist rewriting of *Air India v Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)’ (2021) 5(3) Indian Law Review 341.

<sup>557</sup> *Sm. Anjali Roy v State of West Bengal* AIR 1952 Cal 825 [16] (*‘Anjali Roy’*).

<sup>558</sup> Shreya Atrey, ‘Through the Looking glass of intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15’ (2016) 16 Equal Rights Review 161, 171 (*‘Looking glass’*).

the petitioner's discrimination claim on ground of sex intersecting with marital status, pregnancy and age, was held to fall beyond Article 15(1).

Below, I explore an alternate reading of Article 15(1), in line with substantive equality, which interprets 'sex' expansively and prohibits indirect and intersectional discrimination.

*i. Expansiveness of 'Sex'*

The alternate reading of Article 15(1) emerges as early as 1954 in cases from State High Courts. This reading readily accepts gendered assumptions about women as falling within the ambit of 'sex'. In *Rajeshwari Devi*,<sup>559</sup> a stereotype about women—the 'well-known fact that women generally are not such competent managers of property as men and are much more liable to be led astray'<sup>560</sup>—was used to enact different rules for the attachment of women's property. The State argued this differential treatment was not on ground 'only' of sex. Dismissing this suggestion, the Allahabad High Court simply stated that the 'differentiation is based solely on the sex of the proprietor'.<sup>561</sup> The Court thus implicitly rejected gendered assumptions about women as factors apart from sex under Article 15(1).

This shift was made explicit in *Walter Alfred Baid*,<sup>562</sup> where a policy appointing only women as nurses was challenged under Article 15(1). The State cited as a 'plus factor' that women were more suited for the duties to be performed by nurses,<sup>563</sup> presumably on account of gendered notions about women as carers. The Delhi High Court rejected this factor as a consideration

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<sup>559</sup> *Rani Raj Rajeshwari Devi v State of Uttar Pradesh* AIR 1954 All 608.

<sup>560</sup> *ibid* [57].

<sup>561</sup> *ibid* [58], [67]; Similarly, see *Radha Charan Patnaik v State of Orissa* AIR 1969 Ori 237 [13], [14].

<sup>562</sup> *Walter Alfred Baid v Union of India* AIR 1976 Delhi 302.

<sup>563</sup> *ibid* [9].

beyond sex, and instead held that it had its ‘genesis in sex itself’, therefore refusing to draw a distinction between sex and ‘what sex implies’.<sup>564</sup> The Court thus concluded:

where it is stated that, having regard to ***the physical disparity between the two sexes or the inherent characteristics or susceptibilities of one or the other of the sexes***, all members of that or the other sex are ineligible for a particular position, on ***what else is such discrimination or disability based, if not sex alone?***<sup>565</sup>

Through this, the Court brought within the category of ‘sex’ gendered assumptions about women and the physiological implications of sex.

*Vasantha*<sup>566</sup> involved a constitutional challenge to Section 66(1)(b) of the Factories Act 1948, which prohibited women from working in factories between 7 pm and 6 am. The State argued that the distinction between male and female employees was based on considerations other than sex: the need to protect women—the ‘weaker’ section—from harassment, and the difficulty night shifts would create for female workers who would be ‘subjected to very strenuous work [because] in addition to their working in factories they have to attend to their household duties’.<sup>567</sup> Both these factors are incidents of sex inequality. Had the Court accepted these as plus factors beyond sex, the Court would have relied on existing sex inequality to uphold a rule furthering such inequality by excluding women from employment. However, the Madras High Court rejected the State’s claim, holding that: ‘Section 66 of the Factories Act, 1948 [which] prohibits women from

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<sup>564</sup> *ibid* [10].

<sup>565</sup> *ibid* [10] (emphasis added); Eventually however the Delhi High Court struck down the policy as unconstitutional. While the policy was identified as falling within Article 15(3), Article 15(3) was held to be restricted to Article 15(1) and incapable of being extended to Article 16(2) (see [12]); The contrary position has however been taken in *Shamsher Singh Hukam Singh v State of Punjab* AIR 1970 P H 372 and *Government Of Andhra Pradesh v P.B. Vijayakumar* 1995 AIR SC 1648 (*‘Vijayakumar’*), holding that Article 15(3) extends to Article 16(2).

<sup>566</sup> *Vasantha v Union of India* (2001) IILLJ 843 Mad (*‘Vasantha’*).

<sup>567</sup> *ibid* [22], [53].

being engaged during the night shifts...is *solely based on the ground of sex*,<sup>568</sup> thus bringing within 'sex' the implications of sex inequality.

In *Naz Foundation*,<sup>569</sup> the constitutionality of Section 377 of the Indian Penal Code 1860 criminalising 'carnal intercourse against the order of nature' was challenged for discriminating against same-sex individuals. The Delhi High Court held that 'the purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with... "normal" or "natural" gender roles'. Discrimination on ground of sexual orientation, being based on 'stereotypical judgments and generalization about the conduct of either sex' was therefore held to constitute discrimination on ground of sex.<sup>570</sup> Through this, the Delhi High Court dissolved the wedge between sex and gender introduced by the 'on grounds *only* of...sex' test.

Learning from State High Courts, the Supreme Court endorsed the expansive interpretation of 'sex' in *NALSA*,<sup>571</sup> in 2014. *NALSA* granted legal recognition to the 'third gender' in India. The Supreme Court held that since 'gender and biological attributes constitute distinct components of sex', failure to grant legal recognition to the 'third gender' was discrimination on ground of gender identity, which amounted to discrimination on ground of sex.<sup>572</sup> The shift away from the limiting *Nergesh Meerza* reading of Article 15(1) was completed by the Supreme Court in 2017 in *Naveej Jobar*,<sup>573</sup> once again involving a constitutional challenge to

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<sup>568</sup> *ibid* [64] (emphasis added); Similar holding in *Omana Oomen Additional operator v The FACT Ltd.* AIR 1991 Ker 129 (Factories Act 1948, s 66(1)(b) held to be unconstitutional) and *Sundra Sodha v State of Rajasthan* W.P.(C) No. 6050/2014 (Rajasthan High Court, 8 July 2015) (Mines Act, 1952, s 46 which prohibited the employment of women in mines, was held to be discriminatory on ground of sex).

<sup>569</sup> *Naz Foundation* (n 376).

<sup>570</sup> *ibid* [99].

<sup>571</sup> *NALSA* (n 33).

<sup>572</sup> *ibid* [59] (Radhakrishnan J.).

<sup>573</sup> *Naveej Jobar* (n 32).

Section 377. Chandrachud J, in his concurring opinion, dismissed the ‘on ground *only* of...sex’ test as a ‘formalistic interpretation’ of Article 15(1), because it allowed the State to claim that the discrimination was ‘based on sex and another ground (‘Sex plus’)’ and hence outside the ambit of Article 15.<sup>574</sup> Instead,

If [discrimination] is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex...That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be [the] position.<sup>575</sup>

In *Sabarimala*,<sup>576</sup> another 2017 decision from the Supreme Court, rules restricting women between the ages of 10 and 50—women within menstrual age—from entering the Sabarimala temple were challenged as violating Article 15(1). Nariman J, in his concurring opinion, held that the rule discriminated against women on ground of sex as it ‘completely barred [women]...based on the biological ground of menstruation’,<sup>577</sup> thus bringing within ‘sex’ physiological disparities between sexes.

As a final example consider *Babita Punya*<sup>578</sup> and *Annie Nagarja*,<sup>579</sup> decided by the Supreme Court in 2019. In these cases, rules denying women Permanent Commissions in the Army<sup>580</sup> and Navy were constitutionally challenged. The State paraded the usual host of reasons used to restrict women’s employment within certain sectors: pregnancy, motherhood and women’s ‘domestic obligations’; their ‘lower standards’ of physical capability; that the presence of women officers

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<sup>574</sup> *ibid* [36] (Chandrachud J.).

<sup>575</sup> *ibid* [41] (Chandrachud J.); See also *Sarojini Bhoi v State of Chhattisgarh* W.P.(S) No. 296/2014 (Chhattisgarh High Court, 30 November 2015) [27]; *Udham Singh Nagar District Cooperative Bank Ltd. v Anjula Singh* AIR 2019 Utr 69.

<sup>576</sup> *Indian Young Lawyers* (n 397).

<sup>577</sup> *ibid* [29] (Nariman J).

<sup>578</sup> *Ministry of Defense v Babita Punya* AIR 2020 SC 1000 (‘*Babita Punya*’).

<sup>579</sup> *Union of India v Annie Nagaraja* (2020) 13 SCC 1 (‘*Annie Nagaraja*’).

<sup>580</sup> Permanent Commissions for women were allowed in certain limited sectors within the army.

would require ‘moderated behaviour’ in otherwise all male units; infrastructural adjustments necessary for women officers such as separate bathrooms;<sup>581</sup> and that women are ill-suited for sailing duties.<sup>582</sup> In *Babita Punya*, the Court identified the true nature of these claims as ‘sex stereotypes premised on assumptions about socially ascribed roles of gender which discriminate against women’,<sup>583</sup> bringing within ‘sex’ stereotypes about the sexes. Similarly, in *Annie Nagaraja*, the Court termed the State’s reasons ‘specious’, ‘illusory’ and ‘without foundation’, denying women the opportunity to ‘overcome their histories of discrimination’.<sup>584</sup>

Underlying the statement that it is a “greater challenge” for women officers to meet the hazards of service “owing to their prolonged absence during pregnancy, motherhood and domestic obligations towards their children and families” is a ***strong stereotype which assumes that domestic obligations rest solely on women***. Reliance on the “inherent physiological differences between men and women” rests in a ***deeply entrenched stereotypical and constitutionally flawed notion that women are the “weaker” sex*** and may not undertake tasks that are “too arduous” for them. ***Arguments founded on the physical strengths and weaknesses of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers.***<sup>585</sup> To deny the grant of PCs to women officers on the ground that this would upset the “peculiar dynamics” in a unit casts an ***undue burden*** on women officers which has been claimed as a ground for excluding women.<sup>586</sup>

These decisions from State High Courts and the Supreme Court thus point to a strong alternative undercurrent to Article 15(1), which understands ‘sex’ expansively to include physiological differences between men and women, gendered assumptions about women, and the detrimental implications of sex inequality experienced by women. I showed earlier that the narrow reading of ‘sex’ would work to exclude women’s claims of discrimination involving pregnancy. At the end of

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<sup>581</sup> *Babita Punya* (n 578) [53].

<sup>582</sup> *ibid* [71].

<sup>583</sup> *ibid* [54].

<sup>584</sup> *Annie Nagaraja* (n 579) [68], [73].

<sup>585</sup> *ibid* [74]; *Babita Punya* (n 578) [54].

<sup>586</sup> *Babita Punya* (n 578) [54] (emphasis added).

the next section, I show how this alternate, expansive reading of ‘sex’ will, in contrast, aid women’s claims.

*ii. Inclusion of Indirect and Intersectional Discrimination*

Article 15(1)’s alternate reading brings within its scope indirect discrimination. *Naz Foundation*<sup>587</sup> heralded this shift. Though Section 377 was a facially neutral rule seemingly targeting any form of ‘carnal intercourse’ (that is, non-procreative sexual intercourse),<sup>588</sup> the Delhi High Court recognised how ‘in its operation it ended up unfairly targeting a particular community’. The provision had the ‘effect of viewing all gay men as criminals’, marking the members of this group with ‘deviance and perversity’.<sup>589</sup> As Section 377 ‘disproportionately impacted’ persons of a certain class ‘on the basis of their sexual orientation’, it was held unconstitutional under Article 15(1).<sup>590</sup> Note two things here: *first*, the Delhi High Court’s refusal to see a facially neutral rule as a plus factor beyond sex; and *second*, the Court’s focus on the impact or effect of a rule (rather than its form, or intention).

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<sup>587</sup> *Naz Foundation* (n 376).

<sup>588</sup> See *Khanu v Emperor* AIR 1925 Sind 286; *Lohana Vasantlal Devchand & Ors. v State* AIR 1968 Guj 252; *Fazal Rab v State of Bihar* AIR 1983 SC 323.

<sup>589</sup> *Naz Foundation* (n 376) [94], [97].

<sup>590</sup> *ibid* [113]. See also *Bahnishikha Chakma v State of Tripura* (Guwahati High Court, 24 March 2005) [9], where at issue were service rules for appointment to the post of Sub-Inspector (Unarmed), which imposed a minimum height requirement of 167.74 cm. The State claimed that there was no (formal) bar on women’s employment, and that women were at ‘liberty’ to apply to the post. Rejecting this contention, the Court termed the provision ‘undoubtedly discriminatory and unconstitutional’ under Article 15(1), implicitly recognising (and prohibiting) indirect discrimination:

the requirement of height for Sub-Inspectors (Unarmed) is **bound to exclude women** from entering into this realm and exactly it has happened. **It has been admitted at the bar that not a single woman Sub-Inspector has ever been appointed in the Unarmed wing.** This is enough to establish the fear that hostile discrimination in favour of men **on grounds of sex** has been created by the recruitment rules for the posts of Sub-Inspectors (Unarmed) by providing same height for both men and women (emphasis added).

*Naz Foundation* was followed by *Koushal*,<sup>591</sup> where a two-judge bench of the Supreme Court overruled the Delhi High Court and upheld Section 377 as constitutional by relying on its facial neutrality as an indicator of its constitutionality. In *Navej Johar*,<sup>592</sup> a five-judge bench of the Supreme Court sat in review over *Koushal*. Deviating from *Koushal*, Chandrachud J, in his concurring opinion, endorsed *Naz Foundation's* interpretation of Article 15(1). Chandrachud J rejected the 'on ground *only* of...sex' test set out in *Nergesh Meerza*, holding that this reading of Article 15(1) was a '**formalistic** view of the prohibition' of discrimination, because it failed to recognise the 'true operation' of sex discrimination.<sup>593</sup> Instead of focusing on the formal basis of classification—here, certain sexual acts—Chandrachud J declared that it is the effect of the facially neutral rule that is relevant under Article 15(1). To establish the effect, Chandrachud J drew on 'real life narrations of sufferings of discrimination, prejudice and hate' experienced by members of this community.<sup>594</sup> Malhotra J, in her concurring opinion, similarly observed that the '**import and effect**' of Section 377 was that 'voluntary consensual relationships between LGBT persons [were] criminalised in totality',<sup>595</sup> rendering Section 377 indirectly discriminatory on ground of sexual orientation under Article 15(1).

The Supreme Court, in *Nitisha*,<sup>596</sup> built on *Navej Johar* to develop the architecture of indirect discrimination. The Court defined indirect discrimination as 'caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a

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<sup>591</sup> *Suresh Kumar Koushal v Naz Foundation* AIR 2014 SC 563.

<sup>592</sup> *Navej Johar* (n 32).

<sup>593</sup> *ibid* [36] (Chandrachud J.) (emphasis added).

<sup>594</sup> *ibid* [49], [51], [80] (Chandrachud J.).

<sup>595</sup> *ibid* [14.3] (Malhotra J.) (emphasis added).

<sup>596</sup> *Nitisha* (n 523).

criterion'.<sup>597</sup> Indirect discrimination is thus concerned not with the form of the impugned rule (whether facially neutral or not) but its consequences.<sup>598</sup> As a result, intention is irrelevant to an assessment of indirect discrimination. Indirect discrimination is instead based on:

[t]he compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognize how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust status quo.<sup>599</sup>

Through this, indirect discrimination equips discrimination law 'to remedy patterns of discrimination that are not as easily discernible'.<sup>600</sup> Against these doctrinal advances, *Nitisha* drew on the Canadian Supreme Court in *Fraser v Canada*<sup>601</sup> to lay out a two-stage test to prove indirect discrimination:

First, the Court has to enquire whether the impugned Rule ***disproportionately affects a particular group***. Second, the Court has to look at ***whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage***. Such disadvantage could be in the shape of: "[e]conomic exclusion or disadvantage, [s]ocial exclusion...[p]sychological harms...[p]hysical harms...[or] [p]olitical exclusion", ***and must be viewed in light of any systemic or historical disadvantages faced by the claimant group***.<sup>602</sup>

*Navej Johar* also brought within Article 15(1) intersectional discrimination, otherwise barred by the *Nergesh Meerza* reading of the provision. Chandrachud J, in his concurring opinion, held that the *Nergesh Meerza*'s 'on ground *only* of...sex' test was 'incorrect' because it failed to take into account 'the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities', thus stripping the prohibition on discrimination of its 'essential content'.<sup>603</sup> In

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<sup>597</sup> *ibid* [48].

<sup>598</sup> *ibid* [53].

<sup>599</sup> *ibid* [66].

<sup>600</sup> *ibid* [53].

<sup>601</sup> *Fraser v Canada* 2020 SCC 28.

<sup>602</sup> *Nitisha* (n 523) [65] (emphasis added).

<sup>603</sup> *Navej Johar* (n 32) [36] (Chandrachud J.).

*Patan Jamal*,<sup>604</sup> the Supreme Court affirmed that ‘the fundamental guarantees under the Constitution provide for such a holistic analysis of discrimination faced by individuals’.<sup>605</sup> The Court defined intersectionality as ‘a form of oppression [that] arises out of the combination of various oppressions which, together, produce something *unique and distinct from any one form of discrimination* standing alone’.<sup>606</sup> The Court clarified that intersectionality does not simply see ‘caste, religion, class, disability and sexual orientation as merely “add ons” to the oppression that women may face’. This would assume gender is similarly oppressive for all women, only more so for women belonging to marginalised groups. Instead, ‘an intersectional analysis requires us to consider the *distinct experience* of a sub-set of women who exist at an intersection of varied identities’.<sup>607</sup> It thus ‘requires an exposition of reality that corresponds more accurately with how social inequalities are experienced’.<sup>608</sup>

*Patan Jamal* then translated intersectionality into the language of discrimination law. The Court identified that ‘when the identity of a woman intersects with, inter alia, her caste, class, religion, disability and sexual orientation, she may face...*discrimination due to two or more grounds*’. This is due to the ‘interlocking of different relationships of power at play’.<sup>609</sup> In such a situation, the single-axis approach to discrimination makes ‘invisible such minority experiences within a broader group since it formulates identity as “totemic” and “homogenous”’.<sup>610</sup> Further, when discrimination is intersectional, the ‘evidence of discrete discrimination on a specific ground

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<sup>604</sup> *Patan Jamal Vali v State of Andhra Pradesh* AIR 2021 SC 2190 (*Patan Jamal*). The case did not directly involve Article 15; it was a case of gender-based violence against a disabled, Dalit woman. However, the Court’s observations on intersectional discrimination are instructive in its conceptual development within Indian jurisprudence.

<sup>605</sup> *ibid* [20].

<sup>606</sup> *ibid* [14] (emphasis added).

<sup>607</sup> *ibid* [15] (emphasis added).

<sup>608</sup> *ibid* [18].

<sup>609</sup> *ibid* [12].

<sup>610</sup> *ibid* [14].

may be absent or difficult to prove'. The petitioner's claim will then fail because 'they are not able to simplify their story to accord with the dominant understanding of how discrimination or violence on the basis of a given characteristic occurs'.<sup>611</sup> It therefore becomes 'imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination'.<sup>612</sup>

Extending the scope of Article 15(1) to intersectional discrimination moreover bears fidelity to its text. As Atrey points out, the word 'only' within Article 15(1) indicates the 'inadequacy or inappropriateness' of certain grounds becoming the basis of discrimination. Had the intention been to restrict the number of grounds on which a claim of discrimination could be brought—as Court held in *Nergesh Meerza*—then 'only' would have been placed before 'grounds', rather than after it, with the provision reading '*only* on grounds of' rather than 'on grounds *only* of'.<sup>613</sup> Moreover, the text of Article 15(1) prohibits discrimination not just on the basis of a single listed ground but also on ground of 'any of them', suggesting that its scope is not restricted to single-axis discrimination.<sup>614</sup>

The alternate reading of Article 15(1) thus interprets 'sex' expansively and extends the reach of the provision to indirect and intersectional discrimination. In doing so, this reading resists the pull of formal equality. It abandons the search for sameness-difference and instead centres group-based disadvantage, in line with substantive equality. From this centring of group-based disadvantage emerges the wider understanding of 'sex' as including gender stereotypes which perpetuate women's disadvantage, and incidents of sex inequality which are symptoms of such disadvantage. The focus on group-based disadvantage also facilitates a shift away from the form

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<sup>611</sup> *ibid* [14].

<sup>612</sup> *ibid* [12].

<sup>613</sup> Atrey, *Looking glass* (n 558) 182, 183.

<sup>614</sup> *ibid* 180; Kannabiran, *Tools of Justice* (n 459) 461.

of a rule to its effect in entrenching such disadvantage, allowing the non-discrimination guarantee to confront indirect forms of discrimination. And finally, highlighting group-based disadvantage results in an automatic recognition that the most intense forms of disadvantage occur through an intersection of identities, moving beyond the prohibition on single-axis discrimination alone. In other words, the alternate reading of Article 15(1) is rooted firmly within the substantive conception of equality, set out in Part III of the Chapter.

Crucially, this alternate reading transforms Article 15(1), vesting it with doctrinal tools capable of responding to claims of discrimination involving pregnancy and reproduction. *First*, Article 15(1) no longer rejects claims of discrimination by arguing that pregnancy-related regulation does not raise concerns of equality as only women become pregnant and men do not. Nor does it search for an appropriate comparator at the level of each individual case. Instead, it simply asks whether the pregnancy-related regulation perpetuates women's group-based disadvantage directly or indirectly; if yes, the rule falls within the scope of Article 15(1). *Second*, Article 15(1) does not ignore stereotypes about women built into rules disadvantaging women through differential treatment based on pregnancy. Instead, it shines light on these assumptions, confirming their constitutional illegitimacy. *Third*, Article 15(1) does not rely on implications of sex inequality, such as women's unilateral responsibilities of care within patriarchal motherhood, to perpetuate their disadvantage. Instead, it identifies that rules drawing on the implications of sex inequality to treat women adversely place constitutionally suspect 'undue burdens' on women. *Fourth*, Article 15 does not focus myopically on only the form of a rule or its intent. Instead, it demands a thorough investigation of the impact of facially neutral rules, including those having adverse effects on pregnant women, or women with caring responsibilities. Crucially, in assessing impact, it draws on 'real life narrations' by members of affected groups. *Fifth*, Article 15(1) no longer restricts the reach of the provision to single-axis discrimination. Instead, it allows for the recognition of heightened (intersectional) disadvantage amongst pregnant women from marginalised groups.

Hints of this approach can be seen within cases of pregnancy and employment. In *Neetu Bala*,<sup>615</sup> a claim of sex discrimination was brought by a woman who was not hired as she was deemed ‘unfit for service’ on account of pregnancy. The P&H High Court held that ‘pregnancy disability exclusion amounted to downgrading women’s role in labour force’,<sup>616</sup> and thus was ‘per se discriminatory’:<sup>617</sup> ‘as only women can become pregnant and as such only women can be refused employment on the ground of pregnancy, hence a refusal for employment on the ground of pregnancy constitutes direct discrimination on the ground of sex’.<sup>618</sup> Through this, the Court turned the logic of formal equality on its head. Women’s difference was not used to preclude their claim for equality; rather, it was understood as the basis on which women are often discriminated against. The Court also emphasised that employment decisions cannot be predicated on mere ‘stereotyped impressions...myths or purely habitual assumptions’ about a woman’s inability to perform certain kinds of work.<sup>619</sup> ‘It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and resuming employment shortly after childbirth’.<sup>620</sup> In essence, the Court refused to view both the biological fact of pregnancy and gendered assumptions about women’s capacities during pregnancy as plus factors beyond sex under Article 15(1). Instead, the Court identified that distinctions disadvantaging women on account of these factors is exactly what sex discrimination looks like in the context of pregnancy and reproduction.

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<sup>615</sup> *Neetu Bala v Union of India* CWP No. 6414/2014 (P&H High Court, 1 February 2016) (*‘Neetu Bala’*).

<sup>616</sup> *ibid* [22] citing *General Electric Company v Martha V. Gilbert* 429 US 125 (1976) (dissent).

<sup>617</sup> *ibid* [23].

<sup>618</sup> *ibid* [57]; *Sharmila Yadav v Union of India* WP(C) No. 4651/2017 (Delhi High Court, 19 December 2017) [10]; *Savita Abuja v State of Haryana* W.P.(C) 2674/1987 (P&H High Court, 14 January 1988) [5].

<sup>619</sup> *Neetu Bala* (n 615) [23] citing *Los Angeles, Department of Water & Power v Marie Manhart* 435 U.S. 702.

<sup>620</sup> *ibid* [23] citing *Mary Ann Turner v Department of Employment Security* 423 U.S. 44.

## B. Article 15(3): ‘Special Provisions’ for Women

While Article 15(1) prohibits the State from discriminating on, amongst other grounds, sex, Article 15(3) states that ‘*nothing in this article* shall prevent the State from making any *special provision for women* and children’. It is however unclear from the text of Article 15(3) alone what measures constitute special provisions, why such measures have been permitted,<sup>621</sup> and how they interact with the prohibition on non-discrimination in Article 15(1). Due to this textual ambiguity, Article 15(3) lends itself to both a formal and substantive equality reading and has been called a ‘double-edged sword’.<sup>622</sup>

One reading of Article 15(3) sees special provisions for women as compatible with the constitutional guarantee of non-discrimination on ground of sex because women are different from men and therefore the two groups need not be treated similarly. This reading typically locates women’s difference within their perceived weakness, or victimhood. Some examples include restrictions on women’s employment within certain industries deemed unsafe,<sup>623</sup> measures offering women additional grounds for divorce,<sup>624</sup> exempting women from prosecution for adultery,<sup>625</sup> allowing women bail for crimes otherwise refused bail,<sup>626</sup> and provisions for maintenance of women on divorce.<sup>627</sup> These measures have been upheld under Article 15(3) relying on the

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<sup>621</sup> Cf, for instance, Canadian Charter of Rights and Freedoms 1982, s 15(2), which clarifies the aim of the provision:

Subsection (1) does not preclude any law, program or activity *that has as its object the amelioration of conditions of disadvantaged individuals or groups* including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (emphasis added).

<sup>622</sup> Duara (n 470) 73.

<sup>623</sup> *AM Shaila v Chairman, Kochin Port Trust* (1995) IILLJ 1193 Ker; *RS Singh* (n 543); *Leela v State of Kerala* 2004 (102) FLR 207 (‘*Leela*’); *Mahendran v Secretary, Travancore Deraswom Board* AIR 1993 Ker 42.

<sup>624</sup> *Dwaraka Bai* (n 544).

<sup>625</sup> *Smt. Sowmitri Vishnu v Union of India* 1985 AIR 1618 (‘*Sowmitri Vishnu*’).

<sup>626</sup> *Nirmal Kumar Banerjee v The State* 1972 CriLJ 1582 (‘*Nirmal Kumar*’).

<sup>627</sup> *Thamsi Goundan v Kanni Ammal* AIR 1952 Mad 529 (‘*Thamsi Goundan*’).

‘muscularly weaker physique of the woman, her general vulnerable physical...condition and her defensive and non-aggressive nature’;<sup>628</sup> because ‘it is the man who is the seducer and not the woman’<sup>629</sup>... the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime’;<sup>630</sup> because ‘females...because of their physical handicaps and/or immaturity [are] not likely to interfere with the investigation or to delay the trial by abscondence or interference’;<sup>631</sup> and because ‘[women] as a class...are weaker than men...the very provision in Clause 3 of Article 15, that special provision may be made for women, suggests the existence of disparity’.<sup>632</sup>

This reading of Article 15(3) reflects formal equality. It operates within the sameness-difference paradigm, asking whether women are different from men. Holding that they are, on account of their victimhood and need for protection, this reading rejects claims of discrimination, typically brought by men who argue that preferential treatment for women discriminates against them on ground sex. On the one hand, this reading appears to accommodate the reality of gender inequality: that, for instance, women experience forms of sexual harassment at the workplace. However, on the other hand, this reading endorses special provisions which entrench these forms of gender difference by seeking to protect and shield women. That is, this reading simply accepts

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<sup>628</sup> *Anil Kumar Mahsi v Union Of India* 1994 SCC (5) 704 [8]; *Pragati Varghese v Cyril George Varghese* AIR 1997 Bom 349.

<sup>629</sup> *Somnithri Vishnu* (n 625) [7].

<sup>630</sup> *ibid* [8]; This holding was upheld in *V Revathi v Union of India* 1988 AIR 835; The exemption for women from prosecution for adultery was also endorsed by the Supreme Court in *Yusuf Abdul Aziz v State of Bombay* 1954 AIR 321.

<sup>631</sup> *Nirmal Kumar* (n 626).

<sup>632</sup> *Thamsi Goundan* (n 627) [3]; See also *Gupteshwar Pandey v Smt. Ram Peari Devi* AIR 1971 Pat 181; *T. Pavani v The Vice Chancellor, Osmania University* W.P. No. 17703/1990 (Andhra Pradesh High Court, 27 March 1991) [7]; *M.I. Shabdad v Mohd. Abdullah Mir*. AIR 1967 J and K 120. Another rationale for differential treatment of women under this reading could be women’s perceived role as mothers or carers. For this, see *G. Parimelazhagan v State of Tamil Nadu* W.P. No. 28813/2007 (Madras High Court, 11 August 2008); *Shaukeen Ahmad v State of Uttar Pradesh* Misc. Bench No. 7026/2018 (Allahabad High Court, 13 March 2018); *G.K. Pushpa v State of Karnataka* W.P. No. 16285-16287/2012 (Karnataka High Court, 12 September 2012); *B.R. Acharya v State of Gujarat* (Gujarat High Court, 30 September 1987) [5]; *State of Orissa v Sankar Jena* 2006 LabIC 2048 [21], [37]; *Shelly Jaffri Latif v State of West Bengal* W.P. No. 7506/2003 (Calcutta High Court, 4 December 2003); *Leela* (n 623) [19].

these differences between men and women as a given, without interrogating their basis.<sup>633</sup> It thus essentialises gender difference—often a product of inequality—as innate to women as a group, doing great disservice to women, especially pregnant women. Under this reading, adverse treatment of pregnant women could easily be justified on the basis that they are especially vulnerable and in need of protection, cementing this stereotype as a basis for future discrimination against women outside the reproductive sphere.

However, as with Article 15(1), there exists an alternate reading of Article 15(3), which (i) rejects protectionism in light of its impact in perpetuating women’s disadvantage (ii) recognises gender difference and permits differential treatment to redress disadvantage associated with such difference, and (iii) resists the tendency to essentialise both difference and disadvantage as innate to women. I now discuss this reading.

*i. Rejecting Protectionism*

Some members of the Constituent Assembly, admittedly, endorsed protectionism under Article 15(3). For instance, BN Rau saw a New York law which prohibited the employment of women in certain establishments between 10 pm and 6 am as a valid special provision under Article 15(3).<sup>634</sup> Similarly, KT Shah observed that ‘special provisions which exclude women from certain dangerous occupations’ are not ‘intended in any way to diminish their civic equality or status as citizens. It is only intended to *safeguard, protect* or lead to their betterment in general.’<sup>635</sup>

However, KT Shah also suggested that ‘special provisions’ under Article 15(3) be extended to Scheduled Castes and Scheduled Tribes, who have been ‘neglected in the past’, so that ‘any special discrimination in favour of them may not be regarded as violating the basic principles of

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<sup>633</sup> Kapur (n 78) 748; Sood (n 548) 854; Kauffman (n 436) 597, 616; Jaising (n 429) 297.

<sup>634</sup> Duara (n 470) 74.

<sup>635</sup> KT Shah, CAD (Volume VII, 29 November 1948) [7.62.90] (emphasis added).

equality for all classes of citizens in the country'. KT Shah argued that these groups 'need and must be given' special treatment: 'there are classes of our citizens who may need through no fault of theirs, some special treatment if equality is not to be equality of name only or on paper only, but equality of fact'.<sup>636</sup> Eventually, KT Shah's amendment was not accepted because it was pointed out that allowing such 'special provisions' for Scheduled Castes and Scheduled Tribes could have the 'opposite effect' of further segregating these groups from the general public.<sup>637</sup> But KT Shah's suggested inclusion indicates that the intention behind introducing Article 15(3) was not protectionism *alone*; rather, Article 15(3) also sought to clarify both that the 'equality code' aimed to achieve equality of fact and that it understood discrimination asymmetrically.

This aligns with the rejection of protectionism in the context of other constitutional provisions. Article 39(e) of the Constitution—part of the Directive Principles of State Policy—commands the State to ensure that 'the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their *age* or *strength*'. While debating this provision, HV Kamath argued that along with age and strength, sex also be included: 'it is conceivable that women might be forced by sheer necessity to take to occupations which [may not] be suitable to the conditions imposed on them by nature'.<sup>638</sup> Lakshminarayan Sahu supported this amendment: 'There are many factories and mines which are not fit for women to work in...I do not like that they should work day and night in the mines and be obliged to adopt some such profession which may spoil their home life'.<sup>639</sup> However, while HV Kamath himself withdrew the amendment because women

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<sup>636</sup> *ibid* [7.62.91], [7.62.93].

<sup>637</sup> BR Ambedkar, CAD (Volume VII, 29 November 1948) [7.62.126].

<sup>638</sup> HV Kamath, CAD (Volume VII, 22 November 1948) [7.57.85].

<sup>639</sup> Lakshminarayan Sahu, CAD (Volume VII, 22 November 1948) [7.57.92], [7.57.93].

members of the Constituent Assembly were opposed to its inclusion,<sup>640</sup> the amendment proposed by Lakshminarayan Sahu was not accepted, pointing to a constitutional rejection of protectionism.

Such rejection has a doctrinal counterpart within the alternate reading of Article 15(3). In *Vasantha*,<sup>641</sup> discussed above, Section 66(1)(b) of the Factories Act, 1948 which barred women from being employed on night shifts in factories, was challenged under Article 15(1). The State argued that the provision intended to protect women from sexual harassment, and therefore constituted a ‘special provision’ within Article 15(3). Rejecting this claim, the Madras High Court instead looked at the effect of the provision, identifying that it ‘results in denial of livelihood, improvement in status to women as well as economic freedom’.<sup>642</sup> In light of its effect in perpetuating women’s disadvantage socio-economically, the Court held that the provision did not fall within the scope of Article 15(3).

This reading was further developed by the Supreme Court in *Anuj Garg*.<sup>643</sup> Section 30 of the Punjab Excise Act, 1914 prohibiting the employment of women within establishments serving alcohol, was under constitutional challenge. The State, once again, argued that the provision intended to further the security of women. The Supreme Court, at the outset, clarified that the constitutionality of a rule would be assessed not based on its intention, but rather its effects: ‘Legislation should not be only assessed on its proposed aims but rather on the implications and the effects...*No law in its ultimate effect should end up perpetuating the oppression of women*’.<sup>644</sup> The Court then observed that the effect of the impugned provision was the perpetuation of

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<sup>640</sup> HV Kamath, CAD (Volume VII, 22 November 1948) [7.57.86].

<sup>641</sup> *Vasantha* (n 566).

<sup>642</sup> *ibid* [55].

<sup>643</sup> *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 (*‘Anuj Garg’*).

<sup>644</sup> *ibid* [44], [45] (emphasis added).

women's oppression, through entrenching sexual differences.<sup>645</sup> The provision 'suffered from incurable fixations of stereotype morality and conception of sexual role'<sup>646</sup> and ended up 'victimizing its subject in the name of protection'.<sup>647</sup> In other words, the 'practical effect' of the provision's 'romantic paternalism' was to put women not on a pedestal, but in a cage.<sup>648</sup> As a result, the provision did not fall within Article 15(3).

The protectionist reading of Article 15(3) was similarly rejected in *Joseph Shine*,<sup>649</sup> involving a seemingly beneficial rule exempting women from criminal prosecution for adultery.<sup>650</sup> Yet, the Supreme Court held that the rule was premised on stereotypes about women, viewing them as 'chattel', passive, sexual properties of the husband, and otherwise devoid of sexual agency.<sup>651</sup> In promoting such stereotypes, Section 497, in effect, 'gives legal recognition to socially discriminatory and gender-based norms',<sup>652</sup> having 'a deep social effect on how society perceives the sexual agency of women'.<sup>653</sup> That is, while the form of the rule facially appeared to benefit women by exempting them from criminal sanction, its effect, 'when viewed in the context of a social structure which considers the husband as the owner of the wife's sexuality', was to 'perpetuate a deeply entrenched patriarchal order'.<sup>654</sup> Section 497, a form of 'benevolent

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<sup>645</sup> *ibid* [53].

<sup>646</sup> *ibid* [44].

<sup>647</sup> *ibid* [35]; See also *C. Ramesh v State of Karnataka* W.P. Nos. 3743 and 9345/2008 (Karnataka High Court, 24 September 2008) [24], [27], [31] (*Ramesh*) holding unconstitutional a provision prohibiting the employment of women and children—note here the infantilisation of women—in establishments serving alcohol in light of the 'effect and impact of such a provision' on women: it 'deprives the female section of society' of 'an adequate means to livelihood'.

<sup>648</sup> *Anuj Garg* (n 643) [42] citing *Frontiero v Richardson* 411 U.S. 677.

<sup>649</sup> *Joseph Shine* (n 350).

<sup>650</sup> Indian Penal Code 1890, s 497.

<sup>651</sup> *Joseph Shine* (n 350) [2], [24], [65] (Chandrachud J.) and [23] (Nariman J.).

<sup>652</sup> *ibid* [45] (Chandrachud J.).

<sup>653</sup> *ibid*.

<sup>654</sup> *ibid* [38], [39] (Chandrachud J.).

patriarchy',<sup>655</sup> was thus held to fall outside Article 15(3): 'The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of "protection"'.<sup>656</sup>

In rejecting protectionism, courts also require the State to submit evidence in support of its assumptions about women. For instance, in *Sakamma*,<sup>657</sup> a provision restricting the employment of women as Assistant Lineman with the Electricity Board was challenged. The Karnataka High Court rejected arguments that women could not work as an Assistant Lineman, tracing such arguments back to existing 'social prejudices'.<sup>658</sup> Instead, the Court cited several examples where women do perform, and have been performing, such work.<sup>659</sup> The Court also emphasised that the State had not placed on record any evidence—'an iota of empirical or statistical data or any scientific study or analysis'<sup>660</sup>—indicating that women could not do such work.<sup>661</sup> Similarly, in *Dimple Singla*,<sup>662</sup> a woman officer was not appointed to a post due to apprehensions that the duties associated with the post would be difficult for a lady officer with a small child. This was despite the petitioner herself never raising any objections. Rejecting the stance of the State, the Delhi High Court held: 'In the absence of any empirical evidence, we fail to understand how such a prognosis

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<sup>655</sup> *ibid* [24] (Chandrachud J.).

<sup>656</sup> *ibid* [47], [56] (Chandrachud J.).

<sup>657</sup> *Sakamma H.M. v Karnataka Power Transmission Corporation Limited* WP No. 1249/2012 (Karnataka High Court, 29 February 2012) ('*Sakamma*').

<sup>658</sup> *ibid* [10].

<sup>659</sup> *ibid* [11], [12].

<sup>660</sup> *Kush Kalra v Union of India* W.P.(C) No. 10498/2015 (Delhi High Court, 5 January 2018) [59] ('*Kush Kalra*').

<sup>661</sup> *ibid* [16], [17]; See also *Sinya Mol v KSEB* W.P. (C) No. 18140/2006 (Kerala High Court, 22 January 2007) [22] ('*Sinya Mol*').

<sup>662</sup> *Dimple Singla v Union of India* Letters Patent Appeal No. 449/2001 (Delhi High Court, 25 September 2001) ('*Dimple Singla*').

could be made by the third respondent. It appears that there is still a lurking doubt about capabilities of lady officers. The letter smacks of discrimination and unequal treatment'.<sup>663</sup>

Protectionism also often leads to the State replacing the woman as the decision-maker, deciding for the woman that a certain act is too dangerous. In rejecting protectionism, the alternate reading of Article 15(3) re-centres women within decisions concerning them. For instance, in *Rajamma*,<sup>664</sup> the Kerala High Court dealt with a policy of the Kerala government which excluded women from the post of Last Grade civil servants because the nature of responsibilities was arduous. In describing the policy as a form of 'romantic paternalism', the Court refused to uphold it under Article 15(3) since the mandate of the equality provisions was to 'obliterate' discrimination, not 'perpetuate' it.<sup>665</sup> In arriving at this decision, the Court highlighted the importance of women's participation:

The right of women should not be denied on fanciful assumptions of what work the woman could do and could not do. Whether the work is of an arduous nature and therefore unsuitable for women *must be decided from the point of view of how women feel about it and how they would assess it...it is for her to decide whether she should apply for the concerned job and not for the male dominated legislature or the male dominated bureaucratic machinery...*It is regrettable that decisions of material consequence said to be in the so called interests of women...are generally taken not after any consultation with representative bodies of women, but unilaterally by the administrators, most of whom carry with them the hang-over of the past, the past of male domination in our social set up.<sup>666</sup>

The final nail in protectionism's coffin comes from the recognition that accepting the State's protectionist impulse would be to constitutionally legitimise placing on women the costs of sex inequality. As the Supreme Court remarked in *Anuj Garg*, protectionist measures 'punish' women because their very presence might provoke sexual assaults: 'It is women who are made to pay the

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<sup>663</sup> *ibid* [8].

<sup>664</sup> *AN Rajamma v State of Kerala* W.A. No. 682/1982 (Kerala High Court, 29 March 1983) ('*Rajamma*').

<sup>665</sup> *ibid* [1], [35].

<sup>666</sup> *ibid* [34] (emphasis added); See also *Sinya Mol* (n 661) [23].

price in lost job opportunities'.<sup>667</sup> Similarly, in *Sabarimala*, Chandrachud J, in his concurring opinion, rejected the argument of the State that the restriction on the entry of women is justified because celibacy was the foremost requirement for all believers of the temple deity, and women would distract men from being celibate:

Such a claim cannot be sustained as a constitutionally sustainable argument. ***Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy.*** This is then employed to deny access to spaces to which women are equally entitled.<sup>668</sup>

To sum up, the alternate reading of Article 15(3) rejects protectionist measures due to their impact in perpetuating women's disadvantage. It also challenges the gendered assumptions on which protectionism is built, demands that women participate in decisions concerning them, and refuses to place the burden of sex inequality on women.

#### ***ii. Recognising Gender Difference***

In rejecting protectionism, the alternate reading of Article 15(3) however does not treat gender difference as irrelevant, and guarantee women only identical treatment with men as under formal equality. Instead gender differences are recognised and differential treatment is sanctioned to the extent necessary to redress the disadvantage women experience due to these differences. This reading thus sees Article 15(3) as a tool to compensate women for historic discrimination against them, and correct group-based disadvantage which is a product of such discrimination.<sup>669</sup> As the Supreme Court observed in *PB Vijayakumar*<sup>670</sup> upholding reservations for women within public employment:

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<sup>667</sup> *Anuj Garg* (n 643) 43 citing *Dothard v Rawlinson* 433 US 321 (dissent); See also *Saniya B v Kerala State Beverages Corporation Ltd.* W.P.(C) Nos. 12956/2014 and 8958/2015 (Kerala High Court, 13 December 2016).

<sup>668</sup> *Indian Young Lawyers* (n 397) [55] (Chandrachud J.) (emphasis added).

<sup>669</sup> Kapur (n 78) 748; Kauffman (n 436) 616; Sagade and Forester (n 429).

<sup>670</sup> *Vijayakumar* (n 565).

The insertion of clause (3) of Article 15 in relation to women is a *recognition of the fact that for centuries, women of this country have been socially and economically handicapped*. As a result, they are *unable to participate* in the socio-economic activities of the nation on a footing of equality. It is *in order to eliminate* this socio-economic backwardness of women and *to empower* them in a manner that would bring about *effective equality* between men and women that Article 15(3) is placed in Article 15. Its object is to *strengthen and improve the status of women*.<sup>671</sup>

In other words, the insertion of Article 15(3) was thought necessary because ‘history reveals that in our country, women were not treated with equality with men’.<sup>672</sup> Article 15(3) thus permits the State to adopt measures in favour of women for ‘*neutralizing the effect of the discrimination and hostility* practised against them in the past’,<sup>673</sup> ‘uplifting women’ as they ‘did not get their due under the *social conditions* then prevailing’,<sup>674</sup> and ‘bring[ing] about *gender parity* by *power balancing*’ between men and women.<sup>675</sup>

*Vasantha*<sup>676</sup> is helpful (as a starting point) to observe Article 15(3) in operation in this alternate sense. In *Vasantha*, the All India Democratic Women’s Association supported the ban on night shifts for women in factories, acknowledging the reality that women experience a greater risk of harassment, especially in the absence of safeguards.<sup>677</sup> Taking this into consideration, while striking down Section 66(1)(b) as unconstitutional under Article 15(1), the Madras High Court demanded that safeguards—a form of differential treatment under Article 15(3)—be put in place

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<sup>671</sup> *ibid* [7] (emphasis added); See also *Sukanta Mukherjee v Union of India* W.P.(W) No. 791/1998 (Calcutta High Court, 1 March 2000); *G. Vijayaraghavan v State of Tamil Nadu* WP No. 18399/2008 (Madras High Court, 23 July 2009); *Union of India v K.P. Prabhakaran* (1997) 11 SCC 638.

<sup>672</sup> *Satish Menon v State of Madhya Pradesh* (Madhya Pradesh High Court, 3 July 2009).

<sup>673</sup> *Sundra Sodha v State of Rajasthan* W.P.(C) No. 6050/2014 (Rajasthan High Court, 8 July 2015) [13] (emphasis added).

<sup>674</sup> *Shamsher Singh* (n 565) [14] (emphasis added).

<sup>675</sup> *Mamta Dinesh Vakil v Bansi Wadhwa* TS No. 86/2000 (Bombay High Court, 6 November 2012) [95] (emphasis added).

<sup>676</sup> *Vasantha* (n 566).

<sup>677</sup> *ibid* [29].

for female employees who opted to work night shifts.<sup>678</sup> These safeguards attempted to redress women's disadvantage—the risk of sexual harassment—without denying them decision-making regarding employment.

Similarly, in *Anuj Garg*,<sup>679</sup> the Supreme Court refused to promote a 'rhetoric of empty rights' as 'women would be as vulnerable without state protection as by the loss of freedom'.<sup>680</sup>

The Court then set out the approach the State ought to adopt in such circumstances:

***Instead of prohibiting women's employment in bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated.*** It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. ***Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive on the women.***<sup>681</sup>

Echoing *Anuj Garg*, the Supreme Court in *Hotel Priya*<sup>682</sup> declared unconstitutional rules restricting women's employment with the intention of protecting them, instead highlighting duties on the State:

In case there were any real concern for the safety of women, ***the state is under a duty*** - as highlighted by *Anuj Garg*, ***to create situations conducive to their working, to run that extra mile to facilitate their employment, rather than to thwart it, and stifle their choice.*** Such measures – which claim protection, in reality are destructive of

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<sup>678</sup> *ibid* [105].

<sup>679</sup> *Anuj Garg* (n 643).

<sup>680</sup> *ibid* [35].

<sup>681</sup> *ibid* [41] (emphasis supplied); *Mabila Utkarsh Trust v Union of India* SCA No. 2984/2012 and 11532 and 11533/2013 (Gujarat High Court, 13 December 2013) ('*Mabila*') [24.1]. The Court specifically referred to transport facilities between the residence of women and the factory, adequate medical units and creches. See also *Noorjehan Safia Niaz v State of Maharashtra* PIL No. 104/2014 (Maharashtra High Court, 26 August 2016) [37]:

The respondent No. 2 Trust is always at liberty to take steps to prevent sexual harassment of women, not by banning their entry in the sanctum sanctorum, but by taking effective steps and making provisions for their safety and security e.g. by having separate queues for men and women.

<sup>682</sup> *Hotel Priya v State of Maharashtra* W.P. (CA) No. \_\_\_\_/2022 (Supreme Court, 18 February 2022).

Article 15 (3) as they masquerade as special provisions and operate to limit or exclude altogether women’s choice of their avocation.<sup>683</sup>

The alternate reading of Article 15(3) thus attempts to transform the public sphere which is typically built around the male norm. Women are no longer required to choose between unemployment and unsafe employment, and compelled to bear the cost of sex inequality. Instead, the responsibility is shifted onto the State to bring meaningful changes to the public sphere, enabling women to effectively participate equally.

This process of transformation is aided by the recognition that while women are more at risk of certain threats (such as harassment) due to sex inequality, other forms of risk affect men and women equally. While formal equality would be consistent with ‘equal misery’ for men and women, a ‘*richer concept of equality* [would instead] argue that protection for women...be extended to men, rather than that all be stripped away in blind adherence to the myth of freedom of choice’.<sup>684</sup> In *Dhanyamo*<sup>685</sup> the Kerala High Court adopted this approach. At issue was a provision prohibiting employment of women within establishments serving alcohol, with a view to ‘protecting women from being exposed to dangers in workplaces’.<sup>686</sup> By examining the *effect* of the provision—depriving women of livelihood<sup>687</sup>—and by identifying that perceptions of women as ‘weak’ are based on ‘social conditioning’,<sup>688</sup> the Court struck down the provision as unconstitutional. At the same time, the Court also cited the work of the International Labour Organisation, noting that ‘there has been a gradual shift in emphasis from protecting women to

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<sup>683</sup> *ibid* [46] (emphasis added).

<sup>684</sup> Sandra Fredman, *Women and the Law* (OUP 1998) 64-67 (emphasis added).

<sup>685</sup> *Dhanyamo v State of Kerala* W.P.(C) No. 3450/2014 (Kerala High Court, 17 August 2015) (*‘Dhanyamo’*).

<sup>686</sup> *ibid* [10].

<sup>687</sup> *ibid* [27].

<sup>688</sup> *ibid* [38]; *Brj Bala v State of Himachal Pradesh* W.P.(C) No. 211/1983 (Himachal Pradesh High Court, 22 August 1983).

promoting equality and improving the living and working conditions of workers of either sex on an equal basis'.<sup>689</sup> This was based on the recognition that various forms of workplace hazards—for instance, unsafe equipment or absence of adequate periods of rest—affect both men and women equally. The Court therefore suggested—reflecting a 'richer concept of equality'—that workplace protections be levelled up, by extending them to *all* employees, thus making the public sphere safer not just for women but for all participants.

### *iii. Resisting Essentialism*

In permitting differential treatment redressing women's disadvantage, the alternate reading of Article 15(3) does not essentialise such disadvantage as innate or inevitable to women as a class. Instead, 'differences [are] recognised and taken into account, not as a form of protectionism, but with the goal of *eliminating the unequal consequences of sex differences*, whether biologically or culturally determined'.<sup>690</sup>

In *Madan Mohan Sharma*<sup>691</sup> at issue was a provision which extended the Central Government Health Scheme to all female dependents of a government employee, irrespective of the age of the female dependent, while capping the age of male dependents at 25. This policy was upheld by the Delhi High Court as a measure to 'ameliorate the unequal socio-economic status' of women.<sup>692</sup>

This Court believes that the impugned office order acknowledges a socio-economic reality, namely that women must overcome far greater barriers towards joining the formal work-force than men. *These barriers could be created by custom, social mores, cultural expectations, familial compulsions, or a combination of all of these.* This

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<sup>689</sup> *Dhanyamo* (n 685) [22].

<sup>690</sup> Kauffman (n 436) 616 (emphasis added); Fredman, *Substantive Equality Revisited* (n 515) 729, 733.

<sup>691</sup> *Madan Mohan Sharma v Minister of Health and Family Welfare* W.P.(C) No. 6908/2014 ('*Madan Mohan*').

<sup>692</sup> *ibid* [12].

reality forms the basis of a number of female-oriented, beneficial provisions, such as those of maintenance law.<sup>693</sup>

Thus, women's disadvantage—here, the barriers to women's participation within the formal labour force—was recognised as relevant, and special treatment was legitimised. At the same time, such disadvantage was not seen as innate or inevitable, treating women as *inherently* unable to participate within the labour force, which is the approach protectionism takes. Instead, disadvantage was identified as a product of 'custom, social mores, cultural expectations or familial compulsions', forms of historic discrimination against women which the non-discrimination guarantee seeks to redress through special measures in favour of women.

Summing up, the alternate reading of Article 15(3) no longer asks whether women are different from men—with difference being located in women's victimhood—to justify special measures. Instead it enquires whether a rule, in form or effect, perpetuates women's disadvantage or redresses it through compensation and correction. If the former, the rule falls outside Article 15(3); if the latter, the rule is constitutionally permitted by the provision. The alternate reading thus moves away from sameness-difference to centre group-based disadvantage and redress it, a shift in line with substantive equality.<sup>694</sup>

As with Article 15(1), the alternate reading of Article 15(3) benefits claims of discrimination involving pregnancy and reproduction. It does not require women to mimic the 'wombless male body' to claim equality, abandoning their reproductive desires. Instead, it

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<sup>693</sup> *ibid* [10]. See also *K R Gopinath Nair v The Senior Inspector cum Special Sales Officer of Cooperative Societies* AIR 1987 Ker 167, where disadvantage was seen as a product of historical inequality, 'strong prejudices'—beliefs such as men are women's protectors because women are timid and delicate—and the legal system itself—'Indian women in particular had suffered under the legal system as available under the Hindu law'; *Thota Sesbarathamma v Thota Manikyamma* 1991 SCC (4) 312, where women's historical disadvantage was traced back to 'selfishness and male chauvinism' within the Hindu scriptures which 'degraded women' by denying them education, preventing them from holding property, binding them forever to men (whether it be their father, husband or son)—women were not allowed to divorce their husbands, who were however permitted to 'discard an unwanted wife'—permitting corporeal punishment for women who 'commit faults' and seeing the murder of women as a minor offense.

<sup>694</sup> *Joseph Shine* (n 350) [56] (Chandrachud J.) ('Article 15(3)... serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. **Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense**') (emphasis added).

accommodates these desires while removing the disadvantage associated with them. In turn, it transforms the public sphere, otherwise built on the male norm. At the same time, it ensures that the differential treatment *itself* does not disadvantage women, by perpetuating assumptions about them or denying them participation in the public or private sphere. And, crucially, it guarantees that neither difference nor disadvantage is essentialised to women as a group. That is, it refuses to treat women either as reproductive beings or as passive disadvantaged victims of unfortunate circumstances. Instead, it maintains a distinction between pregnancy and parenting and understands disadvantage as a product of historic discrimination against women.

Hints of this alternative approach can, once again, be seen within cases on pregnancy and employment. In *Municipal Corporation of Delhi*,<sup>695</sup> female employees on the muster roll claimed maternity benefit which was denied to them because they were not regularised employees. In requiring the Corporation to extend maternity benefit under the Maternity Benefit Act 1961 to these women, the Supreme Court began by referring to women's history of disadvantage, highlighting both gender norms affecting women as a group, and prevalent intersectional forms of disadvantage experienced by women from marginalised groups:

Not long ago, the place of a woman in rural areas has been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour... Since they are engaged on daily wages, they, in order to earn their daily bread, work even in advance stage of pregnancy and also soon after delivery, unmindful of [the] detriment to their health or to the health of the new-born.<sup>696</sup>

Against this background, the Supreme Court set out the constitutional conception of substantive equality: 'its *aim is to assist the removal of socio-economic disparities and inequalities*...it *does not adopt a doctrinaire approach and refuses to yield blindly to abstract notions*, but adopts a

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<sup>695</sup> *Municipal Corporation of Delhi v Female Workers (Muster Roll)* AIR 2000 SC 1274 ('*Municipal Corporation*').

<sup>696</sup> *ibid* [6]; See also *Geeta Sharma v Union of India* W.P.(C) No. 4954/2000 [15], where the failure to provide maternity to benefit to temporary employees was held to amount to discrimination.

realistic and pragmatic approach...A just social order can be achieved only when *inequalities are obliterated*.<sup>697</sup> The Court saw maternity benefit for women—a form of differential treatment under Article 15(3)—as necessary so that women may ‘overcome the state of motherhood *honourably, peaceably, undeterred by the fear of being victimised*’ for forced absence during the pre or post-natal period.<sup>698</sup> Thus, women’s difference was respected and accommodated while the disadvantage associated with difference—the impact of pregnancy on workforce participation—was sought to be redressed.

Similarly, in *Neetu Bala*,<sup>699</sup> the P&H High Court held that employers have to take ‘alternative’ steps to accommodate women’s difference by providing them maternity leave and hiring ad hoc employees for that time period.<sup>700</sup> In the absence of such measures, the Court emphasised, female employees would be ‘unduly penalised’ for their reproductive decisions:<sup>701</sup> ‘by forcing a choice between bearing a child and employment, it interferes both with her reproductive

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<sup>697</sup> *Municipal Corporation* (n 695) [29], [30] (emphasis added). Endorsed in *State of Himachal Pradesh v Sudesh Kumari* LPA No. 194 and 195/2014 (Himachal Pradesh High Court, 18 November 2014) [10]; *Devshree Bandhe v Chhattisgarh State Power Holding Company Limited* W.P.(S) No. 101/2017 (Chhattisgarh High Court, 20 February 2017) [12]; *Hemalaba Saraswathi v State of Rajasthan* (Rajasthan High Court, 29 January 2008) [30]; *Deepa Sharma v State of Uttarakhand* W.P. No. 54/2018 (Uttarakhand High Court, 15 December 2016) [9] (*‘Deepa Sharma’*); *L Kannaki v Secretary to Government Animal Husbandry and Fisheries Department* W.P. No. 3603/2007 (Madras High Court, 20 December 2011) [25]; *Simi Dutta v State* SWP No. 2614/1999 (Jammu and Kashmir High Court, 12 February 2001) [11]; *Vandana Kumari v University of Delhi* W.P.(C) No. 8302/2009 (Delhi High Court, 12 July 2010) [51] (*‘Vandana Kumari’*); *Sadbna Agrawal v State of Chhattisgarh* W.P.(S) No. 4927/2016 (Chhattisgarh High Court, 3 January 2017) [12] (extended maternity benefit to surrogate parents).

<sup>698</sup> *Municipal Corporation* (n 695) [30] (emphasis added). Endorsed in *Aaliya Tabasum v State of Jammu and Kashmir* SWP No. 1743/2012 (Jammu and Kashmir High Court, 5 November 2013) [6]; *Archana v State of Maharashtra* W.P. No. 3491/2018 (Bombay High Court, 19 October 2018) [17].

<sup>699</sup> *Neetu Bala* (n 615).

<sup>700</sup> *ibid* [24]; Other cases requiring alternative measures to be taken to cater to the needs of pregnant persons: *Bilju AT v Union of India* WP(C) No. 8744/2011 (Delhi High Court, 24 May 2013) [48]; *Suchitra v Tamil Nadu Medical Council* WP Nos. 25727 and 25401/2018 (Madras High Court, 5 October 2018) [24]; *Arulini Ajitha Rani v State* WP No. 440/2011 (Madras High Court, 9 July 2012) [27]; *Nithya v University Of Madras* AIR 1995 Mad 164; *Jennifer A. v ESIC College of Nursing* WP No. 39211/2015 (Karnataka High Court, 15 June 2016) [40]; *Vandana Kumari* (n 697) [52].

<sup>701</sup> *Neetu Bala* (n 615) [23] citing *Cleveland Board of Education v Jo Carol La Fleur* 414 US 632; *Inspector (Mahila) Ravina v Union of India* W.P.(C) 4525/2014 (Delhi High Court, 6 August 2015) [10].

rights and her right to employment'.<sup>702</sup> The Court also clarified that mere 'administrative convenience'<sup>703</sup> or financial benefits<sup>704</sup> should not be cited by employers to refuse to hire pregnant women.

These cases also resist essentialism of women as mothers by distinguishing between pregnancy and parenthood. For instance, some courts have responded to discrimination claims by levelling up parental benefits and extending them to men as well. In *Shanti Mehra*,<sup>705</sup> while granting the petitioner's claim for maternity benefit, the Uttarakhand High Court also directed that the State provide '15 days paternity leave to a male employee...to enable the father to look after the mother and child'.<sup>706</sup> Similarly in *Deepa Sharma*,<sup>707</sup> the Uttarakhand High Court once again held: 'Every *female employee and male employee*, whether appointed on regular basis, contractual basis, ad hoc/tenure or temporary basis, have a fundamental right to reasonable duration *of maternity leave as well as paternity leave*'. In requiring the State to provide paternity leave, however short-termed, courts are taking a step towards recognising that unlike the biological process of pregnancy, parenting can be and ought to be a form of shared responsibility. This contests harmful essentialisation of women, and is a key indicator of a substantive equality approach to pregnancy and reproduction, developed in Part IV of the Chapter. Nevertheless, there is still a way to go. In

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<sup>702</sup> *Neetu Bala* (n 615) [67]; See also *Laxmi Devi v State of Rajasthan* W.P.(C) Nos. 18808, 11990 and 18802/2015 (Rajasthan High Court, 30 May 2017) [24]; *Sushila Khichar v State of Rajasthan* W.P.(C) No. 1354/2019 (Rajasthan High Court, 5 September 2019) [12].

<sup>703</sup> *Neetu Bala* (n 615) [23] citing *Cleveland Board of Education v Jo Carol La Fleur* 414 US 632.

<sup>704</sup> *ibid* [55] citing *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1992] I.C.R. 325 [12]:

A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

<sup>705</sup> *Shanti Mehra v State of Uttarakhand* W.P. No. 99/2015 (Uttarakhand High Court, 15 December 2016).

<sup>706</sup> *ibid* [20]; See also *N Siva Krishna v National Board of Examination* W.P.(C) 4111/2015 (Delhi High Court, 24 April 2015) [13].

<sup>707</sup> *Deepa Sharma* (n 697) [18] (emphasis added).

both cases, the period of maternity leave was significantly more than the period of paternity leave. Thus, in one sense, courts continue to place the responsibility of childcare predominantly on women, which will remain until a full levelling up option is followed.

### C. Defining Discrimination

In the previous two sections I arrived at an alternate reading of Articles 15(1) and 15(3), in line with substantive equality, which I then applied to pregnancy and reproduction. Drawing the alternate approaches to the two provisions together, I now propose an expressly asymmetric, substantive test for non-discrimination under Article 15,<sup>708</sup> reflecting the constitutional conception of substantive equality, developed in Part III of the Chapter. This test does not see as constitutionally wrongful all forms of differential treatment on the basis of sex. Differential treatment which falls within the scope of Article 15(3)—that is, special provisions to compensate and correct women’s group-based disadvantage—would not amount to constitutionally prohibited sex discrimination. On the other hand, differential treatment which perpetuates women’s disadvantage—such as protectionist legislation—which falls outside the scope of Article 15(3), would violate Article 15(1).

*Charan Singh*<sup>709</sup> provides a good example of how this test operates in practice. A policy reserving for women the post of Enquiry and Reservation clerks in the Railways at Delhi, Bombay, Calcutta and Madras was challenged in this case. The Delhi High Court began by observing that equality, within the ‘equality code’, is not only ‘proclaimed as an ideal but is sought to be achieved in actuality’. As a result, the Constitution enables the State—through provisions like Article

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<sup>708</sup> Briefly developed in Pillai and Atrey (n 565) 345; See also Kannabiran, *Judicial Meanderings* (n 429) 90:

When evaluating whether or not a particular method of differentiation is discriminatory, it is therefore, important to ascertain whether that method will either lead to or reinforce existing hierarchies and concentrations of power. To the extent that they reflect and correspond with systems of social inequality, differentiation and classification maybe the source of discrimination.

<sup>709</sup> *Charan Singh v Union of India* CA No. 785/1978 (Delhi High Court, 28 November 1978) (*‘Charan Singh’*).

15(3)—to introduce appropriate measures to make the ideal of equality ‘effective and real’.<sup>710</sup> The Court then referred to the 1974 Report of the Committee on the Status of women in India, which recognised that ‘though women do not numerically constitute a minority, they are beginning to acquire the features of a minority community by the three recognised dimensions of inequality: Inequality of class (economic situation), status (social condition) and political power’.<sup>711</sup> The Court especially noted that women were under-represented in the Railway service, occupying less than 5 percent of posts in the Railways. Thus, the impugned provision was introduced by the State as a measure of ‘compensation’ to remedy the exclusion of women from the Railways.<sup>712</sup>

Without doubt, the measure engaged Article 15(1) because it drew a distinction on the basis of sex. Yet, the Court held that the measure did not *violate* Article 15(1) because it was introduced to ‘reduce the inequality between women and men’,<sup>713</sup> and thus fell within the scope of Article 15(3). The Court then made a crucial observation about how Articles 15(1) and 15(3) are to be read together: ‘what is prohibited by Article 15(1)...[is] ***adverse discrimination***. What is allowed by Article 15(3) ...is benign [discrimination] ***by which women and backward classes are helped towards equality***’.<sup>714</sup> This reflects clearly the substantive, asymmetric test for non-discrimination under Article 15, drawing a distinction between measures perpetuating inequality (‘adverse discrimination’) and those redressing it (‘benign discrimination’); the Constitution prohibits only the former and not the latter.

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<sup>710</sup> *ibid* [1].

<sup>711</sup> *ibid* [7].

<sup>712</sup> *ibid* [5].

<sup>713</sup> *ibid* [12].

<sup>714</sup> *ibid* [18] (emphasis added).

The Court also clarified that Article 15(3) should not be treated as an exception to Article 15(1), but rather a part and parcel of it.<sup>715</sup> Had Article 15(3) been recognised as an exception, the implication would be that though ‘special provisions’ for women are forms of constitutionally prohibited sex discrimination, they are permitted due to their compensatory and corrective role. In contrast, recognising them as part of equality implies that they do not, even at the threshold, constitute forms of prohibited discrimination. This, once again, confirms the asymmetry of non-discrimination under Article 15.

When undergirded by substantive equality, Article 15 also understands discrimination as occurring not simply through individual acts of independent actors but through the very operation of social systems, often built into the ‘everyday practices of a well-intentioned society’.<sup>716</sup> Chandrachud J, in his concurring opinion in *Joseph Shine and Sabarimala*, identified the non-discrimination guarantee as being directed at eliminating not just individual but also ‘institutional and systemic discrimination against disadvantaged groups’,<sup>717</sup> thus focusing on redressing ‘structures of oppression and domination which exclude [certain groups] from participation in an equal life’.<sup>718</sup> The Supreme Court, in *Nitisha*,<sup>719</sup> built on this,<sup>720</sup> to scrutinise the disproportionate exclusionary impact of the Indian Army’s hiring procedures on female applicants.

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<sup>715</sup> *ibid* [12]-[14], citing *State of Kerala v NM Thomas* AIR 1976 SC 490 (‘*NM Thomas*’). The Court also went one step beyond *NM Thomas* to hold that if Article 15(3) is a part of equality and not an exception to it, then no limitation could be placed on the number of posts reserved under Article 15(3) ([13], [15]). Other cases holding that Article 15(3) is not an exception to Article 15(1) but part and parcel of it: *Vasant Ambadas Hanchate v State of Maharashtra* W.P. Nos. 167 of 1982, 4023, 4337 and 4462/1984 and 507/1985 (Bombay High Court, 28 June 1985) [8]; *Vinayak v State of Maharashtra* SCA No. 1490/1977 (Bombay High Court, 12 February 1985) [3]; *Madan Mohan* (n 691) [12]; *P. Katama Reddy v Revenue Divisional Officer, Anantpur* W.P. No. 6729/1993 (Andhra Pradesh High Court, 28 November 1997) [18]. Cf see *Anjali Roy* (n 557) [20]; *Dhanyamo* (n 685) [28].

<sup>716</sup> *Young, Justice* (n 102) 5, 6.

<sup>717</sup> *Joseph Shine* (n 350) [38] (Chandrachud J.).

<sup>718</sup> *Indian Young Lawyers* (n 379) [117] (Chandrachud J.).

<sup>719</sup> *Nitisha* (n 523).

<sup>720</sup> On how *Nitisha* developed a systemic approach to discrimination, see Gauri Pillai, ‘A continuing constitutional conversation: Locating Nitisha’ (2022) 22(1) *International Journal of Discrimination and the Law* 90-2.

The Court began by drawing out ‘patterns’ of discrimination, marginalisation and disadvantage that women are subject to.<sup>721</sup> Crucially, the Court observed that these seemingly ‘harmless structures’, which assume norm status, are in fact reflections of the ‘insidious patriarchal system’, and have been made by men for men.<sup>722</sup> Speaking in an employment context, the Court understood systemic discrimination as being built into ‘workplace dynamics’: it emerges from the ‘simple operation of established procedures of recruitment, hiring, promotion, none of which [are] necessarily designed to promote discrimination’,<sup>723</sup> thereby going beyond an ‘identifiable actor’s isolated state of mind’.<sup>724</sup> Gender-based systemic discrimination, the Court held, thus ‘encapsulates the patriarchal disadvantage that permeates all aspects of [a woman’s] being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure’.<sup>725</sup>

How does this asymmetric and systemic conception of non-discrimination apply to pregnancy and reproduction? Consider a rule which either facially or in effect draws a distinction on the basis of pregnancy. This rule, like the rule in *Charan Singh*, would engage Article 15(1), as it would constitute differential treatment on ground of sex. However, it would violate Article 15(1) *only* if it falls outside the scope of Article 15(3). If the rule treats women differently to redress disadvantage associated with their difference—whether pregnancy or parenting—then such differential treatment would constitute a ‘special provision’ under Article 15(3). As a result, it would be ‘part and parcel’ of the principle of equality under Article 15(1) and would not violate it. However, if the provision perpetuates women’s group-based disadvantage along one or several dimensions, including by failing to distinguish between pregnancy and parenting, then it would be

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<sup>721</sup> *Nitisha* (n 523) [44]-[45].

<sup>722</sup> *ibid* [100].

<sup>723</sup> *ibid* [74] citing *Action Travail des Femmes v Canadian National Railway Company* (1987) 1 SCR 1114 and Marie Mercat-Burns, ‘Systemic discrimination: rethinking the tools of gender equality’ (2018) 2 *European Equality Law Review* 5-6.

<sup>724</sup> *ibid* [72].

<sup>725</sup> *ibid* [77].

outside the scope of Article 15(3), and be presumptively unconstitutional under Article 15(1), unless justified. Crucially, under a systemic understanding of discrimination, such perpetuation of disadvantage need not reflect invidious intent to so disadvantage. Rather, it could be the result of an interaction between a facially neutral rule and the insidious patriarchal institution of motherhood. How, if at all, rules perpetuating women's disadvantage can be justified, including the applicable standard of review, is explored further in Chapters 4 and 5.

## VI. Locating the Social Dimension

I began this Chapter with the observation that whether Article 15 protects, or has the potential to protect, the interests represented by the social dimension depends on the conception of equality underlying the provision. The previous sections performed the mammoth task of developing this conception. I began by teasing out the constitutional conception of equality at the root of Article 15, which I identified as substantive equality. I then built a conceptual approach to pregnancy and reproduction reflecting substantive equality. Finally, I translated substantive equality from a conceptual paradigm to a doctrinal one. Having, in essence, defined the contours of substantive equality conceptually, constitutionally *and* doctrinally, I am now in a position to comment on Article 15's potential to capture the social dimension. For this, I go back to the method I used in Chapter 2 to identify whether Article 21 captures the individual dimension. I look first at the interests protected by Article 15 in its substantive avatar, and then at how they correlate with the interests represented by the social dimension.

In constitutionally prohibiting discrimination on certain listed grounds, Article 15's substantive avatar protects an individual's interest in redressing forms of group-based disadvantage. This is evident at each stage discussed above. Let us start with the constitutional role of Article 15. Constitutionally, Article 15 aims to 'guarantee protection to *those citizens who had*

*suffered historical disadvantage*, whether it be of a political, social, or economic nature'.<sup>726</sup> In line with this role, its 'primary enquiry', within the 'equality code', is 'whether the provision contributes to the subordination of a *disadvantaged group of individuals*'.<sup>727</sup> As a result, Article 15 focuses on the effects of a rule in perpetuating disadvantage, rather than its form, therein rejecting identical treatment as the measure of equality. In turn, it prohibits both direct and indirect discrimination, based on a single ground or an intersection of grounds, recognising the heightened disadvantage caused by the latter. Moreover, deviating from identical treatment alone, Article 15 permits differential treatment to redress group-based disadvantage but prohibits differential treatment perpetuating such disadvantage. Discrimination is thus understood asymmetrically, meaning Article 15 focuses on groups which have suffered disadvantage, and views as discrimination only those forms of differential treatment which perpetuate their disadvantage. Finally, Article 15 sees discrimination as built into the very structure of social systems—that is, as a structural form of disadvantage—rather than manifesting simply through individual acts by independent actors, whether direct or indirect.

Building these nuances into the initial interest identified above, in constitutionally prohibiting discrimination, Article 15's substantive avatar protects an individual's interest in redressing forms of group-based disadvantage by preventing direct or indirect forms of treatment, at an individual or systemic level, which perpetuate the individual's disadvantage as a member of a historically disadvantaged group(s). Crucially, and this deserves emphasis, in protecting this interest, Article 15 actively centres an individual as a *member of a group*, as opposed to Article 21 which centres as individual *as an individual*. That is, while Article 15 retains an individual as the unit

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<sup>726</sup> *Navej Johar* (n 32) [15] (Malhotra J.) (emphasis added).

<sup>727</sup> *Joseph Shine* (n 350) [38] (Chandrachud J.) (emphasis added).

of its protection,<sup>728</sup> it identifies that the individual has been discriminated against *because* of her membership of particular groups (e.g., *as* a woman, or *as* a Dalit woman). In other words, ‘it is the individual’s group membership that is the terrain upon which social disabilities operate’,<sup>729</sup> and the elimination of these social disabilities is Article 15’s constitutional mandate.

How does this interest correlate with the interests represented by the social dimension? The social dimension, through its historical component, represents a woman’s interest in reproductive decision-making because women, as a group, have been denied such decision-making within the patriarchal institution of motherhood, perpetuating their historical disadvantage. Such denial takes different forms depending on women’s membership of other social groups, as recognised by the intersectional component of the social dimension. When placed side by side, the close correlation between the interests represented by the social dimension and those protected by Article 15 is readily evident, at three separate stages.

*First*, both centre women as members of a historically disadvantaged group, while also highlighting the unique and intersectional forms of disadvantage experienced by women within the larger group. That is, both narrow in on the role of group membership, as responsible for forms of disadvantage experienced by individuals (though, of course, not its only cause). Through this, both also present group membership as a site for State action, through the redressal of group-based disadvantage. *Second*, the social dimension and Article 15 target a similar form of harm. Both identify the harm that occurs when the disadvantage of a historically disadvantaged group is furthered, whether through the denial of reproductive decision-making or otherwise. This is in

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<sup>728</sup> *NM Thomas* (n 715) [77] (Mathew J.) (‘Article 16(1) provides for equality of opportunity for all citizens in the matter of employment and there can be no doubt that the equality guaranteed is an individual right’).

<sup>729</sup> Bhatia, *Transformative Constitution* (n 78) 91; See Tarunabh Khaitan, ‘The Point of Discrimination Law’ in Martha Nussbaum et al (eds), *The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US* (OUP 2018) (arguing that the salience of groups in discrimination law is consistent with individuals, and not groups, remaining the primary objects of moral concern under discrimination law: ‘one can be concerned about group disadvantage mainly (or even solely) because of the impact it has on individuals’).

contrast to the individual dimension and Article 21, which target the harm from being denied decision-making that is central to one's sense of self, a function of the interaction between one's body and mind. In aligning on the type of harm seen as wrongful, the social dimension and Article 15 are bound by a common normative core. *Third*, the social dimension and Article 15 do not see action or inaction perpetuating group-based disadvantage, including through the denial of reproductive decision-making, as isolated events occurring to individuals at random. Rather, they both pinpoint the place of these events within a larger history of group-based subordination: that is, these events impact, directly or indirectly, individuals from certain groups *because* of their group membership. This understanding attributes certain meaning and significance to the events, as elements of a historical pattern, which then shapes how the events are understood normatively and doctrinally. The three stages, in turn, suggest that Article 15 possesses the potential to protect the interests represented by the social dimension, if it were to be introduced within the constitutional home for reproductive rights in India.

Consider an example on this point, drawing from the cases on pregnancy and employment, which offer a rare glimpse into a non-discrimination approach to reproductive issues. In *Municipal Corporation of Delhi*,<sup>730</sup> the Supreme Court invoked Article 15(3) to grant maternity benefit to muster roll employees. In its reasoning, the Court identified that 'poor illiterate' women are forced by 'sheer poverty' to work even during advanced stages of pregnancy and soon after delivery, unmindful of the detriment to their health. Note here a clear expression of the Court's starting point: the group to which the claimants belonged and the history of disadvantage of the said group. The Court then assessed the impact of the denial of maternity benefit on these women, identifying such denial as perpetuating their group-based disadvantage by affecting their health adversely and compelling them to decide between having a child and earning their daily sustenance. Alternatively,

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<sup>730</sup> *Municipal Corporation* (n 695).

in *Neetu Bala*,<sup>731</sup> the dismissal of a female employee on account of her pregnancy was held to be discriminatory on ground of sex under Article 15(1). Here, the P&H High Court correlated the individual woman's experience with that of women as a class about whose capabilities (or the lack of it) several myths exist within patriarchy. By terming the dismissal sex-based discrimination, the Court recognised that the individual act of dismissal existed within a wider structure of exclusion premised on 'downgrading' or devaluing women's labour.<sup>732</sup> In other words, the act of dismissal was not an isolated act but a symptom of women's group-based disadvantage, an element within a pre-existing pattern.

To further carve out the role of Article 15 within the constitutional home for reproductive rights, compare Article 15, in its substantive avatar, to Article 21, as understood in Chapter 2. What immediately stands out is that Articles 15 and 21 protect two distinct interests in constitutionally grounding reproductive rights. Article 15 reflects the social dimension and protects women's interest in reproductive decision-making because its denial perpetuates women's disadvantage, and has perpetuated it historically (within patriarchal motherhood). Article 21, in contrast, reflects the individual dimension and protects an individual's (including a woman's) interest in reproductive decision-making because it is central to the individual's identity, with denial of such decision-making affecting the individual's life and health. At their core, Articles 15 and 21 thus embody two distinct normative rationales, each of which offers a separate justification—through the interests protected—for constitutionally guaranteeing reproductive rights.

Making this contrast sharper, in protecting the relevant interests, Article 15 expressly centres an individual as a member of a group while Article 21 centres an individual as an individual. In Chapter 2, I caveat this conclusion by showing that Article 21 understands an individual

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<sup>731</sup> *Neetu Bala* (n 615).

<sup>732</sup> *ibid* [22].

‘concretely’, that is, in social context and amongst her web of relationships, with the State bearing positive duties. This is certainly significant, as this conception of Article 21 preserves the ‘positive potential of individual conduct and eccentricity’<sup>733</sup> without collapsing into notions traditional liberal reproductive choice. However, Article 21, even when so understood, stops here. As Law pithily captures in the context of abortion: ‘The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied’.<sup>734</sup> Article 15, in contrast, goes one step further. It narrows in on, and carefully draws out from the broader social context, the role of group membership in denying women reproductive decision-making, and the impact of such denial in perpetuating group-based disadvantage.

This step is intrinsically important because it (finally) provides a constitutional platform for women’s distinctive reproductive experiences. It identifies that women are denied reproductive decision-making *because* they are women (and women from certain groups), and stamps such denial as constitutionally wrongful for *this* reason. The step is also instrumentally important because it assists the State (and other institutional players) in determining *how* to guarantee women ‘real and effective’ reproductive decision-making. It indicates that redressing group-based disadvantage is a crucial step (though not the only step) in this process, especially because group membership, and attendant advantage or disadvantage, often lie at the root of the broader contextual factors shaping one’s reproductive environment, as Chapter 1 suggests. Redressing group-based disadvantage (in its various manifestations) thus possesses the potential to eliminate broader contextual barriers to reproductive decision-making, enabling such decision-making in a ‘real and effective’ sense.

To underscore the distinctiveness of the interests protected by Articles 21 and 15 in constitutionally grounding reproductive rights, consider a case relying on both provisions to grant

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<sup>733</sup> Denbow (n 174) 9.

<sup>734</sup> Law (n 65) 1020 (emphasis added).

a woman's reproductive claim. In *Mini KT*,<sup>735</sup> a female employee was dismissed from service due to her continuous absence from work on account of her responsibilities of care towards her disabled child. The Kerala High Court held that the dismissal violated her constitutional rights, as it compelled her to choose between her 'motherhood' and employment. In coming to this conclusion, the Court relied on both the right to life and personal liberty *and* the right to non-discrimination. With respect to Article 21, the Court held: 'motherhood is an integral part of [the] dignity of a woman...*Personhood of a woman as mother is her acclaim of individuality essentially valued as liberty of her life*'.<sup>736</sup> Note here a clear reflection of the individual dimension of reproduction, focusing centrally on its identity component: parenthood as crucial to Mini's personhood. The dismissal was thus held to violate Article 21 *because* it failed to respect her personhood and thus affected adversely her personal liberty and life (with dignity).

The Court however observed that the issue had 'another dimension' in the context of Articles 14, 15 and 16 of the Constitution:<sup>737</sup>

The Constitution makers foresaw [that a] woman can be deprived from opportunity in public employment *on account of her position in the traditional society. Constitutional provisions, therefore, want to ensure that woman shall not be discriminated on account of her sex.* Right to equal opportunity for a woman, for office or position is not possible, if her *shackles of chain to confine her to household*, is not removed....Our constitutional scheme under Articles 14 to 16 is well designed to insulate any discrimination against woman likely to be suffered by her on account of her *familial obligations*... Thus, any action of the employer denying an opportunity to woman to compete with men in public employment on account of her obligation as a woman, as a mother, would amount to discrimination....Incapacity of the organisation to deal with woes of a woman employee cannot be capitalised to penalise her.<sup>738</sup>

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<sup>735</sup> *Mini KT v Senior Divisional Manager (Disciplinary Authority), Life Insurance Corporation of India* W.P.(C) No. 22007/2012 (Kerala High Court, 21 December 2017).

<sup>736</sup> *ibid* [22], [23] (emphasis added).

<sup>737</sup> *ibid* [27].

<sup>738</sup> *ibid* [27], [29], [36] (emphasis added).

In drawing attention to this second ‘dimension’, the Court recognised that Mini is a *woman*, a member of a historically disadvantaged group which has been denied equal opportunity in public employment due to entrenched gender roles—‘position in traditional society’ and ‘familial obligations’—emerging from the gendered assumptions attached to their reproductive ability. The act of dismissing Mini was constitutionally wrongful, the Court held, not only because it failed to respect her personhood, but also because it perpetuated Mini’s disadvantage by maintaining the ‘shackles’ confining her to the household. And, the Court implied, Mini’s dismissal also disadvantaged women as a class by retaining the ‘architecture’ of the public sphere which has been designed ‘without adhering to rules of gender equality, often overwhelmingly to suit men’.<sup>739</sup> The strong influence of the social dimension, especially its historical component, is evident within the Court’s reasoning under Article 15. And, when compared to the Court’s assessment under Article 21, the differing normative baseline set by Article 15 in constitutionally grounding a reproductive claim stands out clearly. Article 15 thus performs a distinctive role within the constitutional home for reproductive rights, and is indisputably irreplaceable. Yet it has so far been ignored in India; this Thesis makes an argument for its recentring.

This leaves one last question to be answered. Should Article 15 entirely replace Article 21 as the constitutional home for reproductive rights? Or, is there still value in retaining Article 21? The answer depends on whether Article 15 has the potential to capture the individual dimension, which is Article 21’s key contribution within the constitutional home. As Chapter 1 argues, reproductive decision-making is undergirded not just by the interests represented by the social dimension but also by the interests represented by the individual dimension. And therefore, the appropriate constitutional home for reproductive rights must be capable of protecting both sets of interests and capturing their relationship.

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<sup>739</sup> *ibid* [1].

Article 15, even in its substantive avatar, does not appear to protect the interests represented by the individual dimension. Unlike Article 21, Article 15 does not value reproductive decision-making because it is central to an individual's sense of self. Instead, it values reproductive decision-making because certain groups of individuals—women, and especially women from disadvantaged groups—have been denied such decision-making, perpetuating their historical disadvantage. The closest Article 15 comes to the interests represented by the individual dimension is when, in its substantive sense, it demands that the differences between individuals—for instance, their reproductive ability—be respected, because they are valuable aspects of individuals' identity as members of groups, or their 'group affinities'.<sup>740</sup> However, this affirmation of difference, while important, sits at a distance from the individual dimension, which values reproductive decisions because they are central to an individual's own personality rather than a determinant of group membership.

As the next step, can Article 15 be interpreted expansively to extend its protection to the interests represented by the individual dimension? As I argued with respect to Article 21 and the social dimension, Article 15 cannot be so interpreted because such interpretation would be at odds with its constitutional role, discerned through textual, historical and structural interpretation in Part III of the Chapter. Article 15's constitutional role points to its potential to capture the social rather than the individual dimension. Its constitutional role, then, sets the outer boundaries for its role within the reproductive context; Article 15 cannot be interpreted so expansively that these boundaries are rendered irrelevant. Moreover, Article 15 need not be so interpreted because Article 21 already exists to perform this role, which it executes well through its 'personal liberty' clause, reinforced by its 'right to life' clause.

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<sup>740</sup> Young, *Justice* (n 102) 9, 12.

At this stage, one might point out that the Thesis interprets Articles 21 and 15 too rigidly, setting in stone their constitutional roles to heighten the contrast between them, and further the overall argument being made. This claim is exaggerated; the reading of Articles 21 and 15 retains flexibility of interpretation, drawing only the absolute outer boundaries of the provisions. At the same time, I do draw these boundaries, which I locate after a careful and rigorous exercise in constitutional interpretation. And to the extent the boundaries are drawn, they are justified by the fact that Article 21 and Article 15 are, ultimately, two distinct constitutional rights: if one were to perform the role of the other, the very purpose of providing two separate rights would be defeated.

In conclusion, Article 15 ought not completely displace Article 21 from the constitutional home for reproductive rights in India. The eschewing of Article 21 would be a significant loss, in light of its ability to robustly protect the interests represented by the individual dimension. Rather, the two provisions ought to work together, *in synthesis*, as the ‘new’ constitutional home for reproductive rights in India.

## **VII. Conclusion**

Chapter 3 conducted a conceptual, constitutional and doctrinal exposition of Article 15, at the end of which I concluded that Article 15, in its substantive avatar, possesses the potential to protect the interests presented by the social dimension. Reading Chapters 2 and 3 together, it emerges that in constitutionally grounding reproductive rights, Articles 21 and 15 independently protect the interests represented by the individual and social dimensions respectively. However, Chapter 1 requires that the appropriate constitutional home for reproductive rights not just protect the independent interests but also capture their interrelationship. Now, I move to Part III, where, through the examples of abortion and preventable maternal mortality and morbidity, I ask (and answer) two central questions: What does the synthesis between Articles 21 and 15 achieve constitutionally for reproductive rights? Does the synthesis capture the interrelationship between the individual and social dimensions?



**PART III**  
**THE SYNTHESIS**

## CHAPTER 4

### Law on Abortion: Constitutionality and Interpretation

#### I. Introduction

BR Ambedkar remarked in the Constituent Assembly: ‘Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative’.<sup>741</sup> In essence, Chapters 4 and 5 compellingly illustrate Ambedkar’s claim. They test the power of the synthesis between liberty and equality, Articles 21 and 15, as the ‘new’ constitutional home for reproductive rights in India. Chapter 4 explores this question through the first concrete example: India’s law on abortion. The aim of the Chapter is not to craft the ideal regulatory framework for abortion in India. Rather, it is to understand what changes when the synthesis assumes its place as the ‘new’ constitutional home.

To answer these questions, I begin by breaking down the law on abortion in India. I show how restrictions on reproductive decision-making are built into the law at three levels: the very architecture of the law—conditional abortion within gestational limits sanctioned by third-party decision-makers—the assumptions underlying the law—women as mothers and untrustworthy decision-makers—and the structure of the law—as an exception to criminal law (**Part II**). I then test the law on abortion, so understood, against the synthesis. I trace the rights violations caused by the law (**Part III**); the proportionality of common justifications offered by the State for restrictions within the law (**Part IV**); and, the possibility of using the synthesis, as a tool of statutory interpretation, to expansively interpret the law (**Part V**).

At each stage, I focus especially on *first*, the independent contributions of Articles 21 and 15, in their roles within the ‘new’ constitutional home for reproductive rights; and *second*, the implications of the interaction between Articles 21 and 15 within the home. I conclude by showing

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<sup>741</sup> BR Ambedkar, CAD (Volume XI, 25 November 1949) [11.165.325].

how the interaction between the provisions reaffirms the constitutional weight granted to reproductive decision-making by women. It thus captures the interrelationship between the individual and social dimension in the first sense, as understood in Chapter 1 (**Part VI**).

## II. Breaking Down the Law on Abortion

The legal regulation of abortion in India began with criminalisation. The Indian Penal Code 1860 ('IPC') declared criminal voluntarily causing a woman with child to miscarry, unless done in good faith for saving the life of the woman. It brought within the scope of the law both the person causing the miscarriage, and the woman herself.<sup>742</sup> Predictably, criminalisation did not eliminate the need for abortions and only compelled women to seek abortions in unsafe settings from unskilled practitioners, causing death.<sup>743</sup> To quell the rising mortality rate, the State introduced the Medical Termination of Pregnancy Act 1971 ('MTPA'), conditionally legalising certain categories of abortions, and exempting them from criminal sanction. While the MTPA is special law on abortions, rendering the provisions of the IPC 'subserving',<sup>744</sup> the legalisation of abortion under the MTPA continues to exist as an exception to an otherwise criminal act.

The MTPA allows termination up to an outer limit of 20 weeks. Termination is permitted only when continuation of pregnancy would cause grave injury to the physical or mental health of the pregnant woman,<sup>745</sup> or where there is substantial risk that the foetus, if born, would suffer from such physical or mental abnormalities so as to be seriously handicapped.<sup>746</sup> If the pregnancy is

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<sup>742</sup> Indian Penal Code 1890, ss 312-316 ('IPC').

<sup>743</sup> Siddivinayak Hirve, 'Abortion Law, Policy and Services in India: A Critical Review' (2004) 12 *Reproductive Health Matters* 114; Tulsi Patel, 'Experiencing Abortion Rights in India through Issues of Autonomy and Legality: A Few Controversies' (2018) 13 *Global Public Health* 705.

<sup>744</sup> *Poornima Devu* (n 302) [19]; *Jacob George v State of Kerala* 1994 3 SCC 430 [7] ('*Jacob*').

<sup>745</sup> Medical Termination of Pregnancy Act 1971, s 3(2)(b)(i) ('MTPA').

<sup>746</sup> *ibid* s 3(2)(b)(ii).

caused due to rape<sup>747</sup> or failure of contraception,<sup>748</sup> it is presumed that there is grave injury to the mental health of the woman. In assessing injury to health, the pregnant woman's 'actual or reasonable foreseeable environment' can be taken into account.<sup>749</sup> Such assessment is carried out by one medical professional for termination prior to 12 weeks, and two medical professionals for termination between 12 and 20 weeks.<sup>750</sup> Beyond 20 weeks, the MTPA permits termination only if the medical professional, in good faith, is of the opinion that termination is 'immediately necessary to save the life' of the pregnant woman.<sup>751</sup> In 2002, an amendment to the MTPA was passed, decentralising the certification procedure for facilities providing abortion services and legalising medical abortion for the first seven weeks of gestation.<sup>752</sup> In March 2021, another amendment was passed which mandates the approval of only one medical professional for abortions under 20 weeks; allows abortions between 20 and 24 weeks for 'certain categories of women' with the permission of two medical professionals; and, removes any outer limit for abortion for 'substantial foetal abnormalities'. Though who these 'categories of women' are has not been officially notified, it appears to apply to 'vulnerable women': 'survivors of rape, and victims of incest', especially minors.<sup>753</sup>

This is the architecture of the law on abortion in India. Restrictions built into the law are evident even at this stage. At the outset, the law requires medical professionals to authorise women's requests for abortion, substituting women with doctors as decision-makers. Further, the

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<sup>747</sup> *ibid* s 3(2)(b) Explanation I.

<sup>748</sup> *ibid* s 3(2)(b) Explanation II.

<sup>749</sup> *ibid* s 3(3).

<sup>750</sup> *ibid* s 3(2)(a) and (b).

<sup>751</sup> *ibid* s 5.

<sup>752</sup> The Medical Termination of Pregnancy (Amendment) Act 2002.

<sup>753</sup> Vrinda Grover, 'The Amendments in the MTP Act Bill Are Flawed | Analysis' *Hindustan Times* (28 February 2020) <<https://www.hindustantimes.com/analysis/the-amendments-in-the-mtp-act-bill-are-flawed-analysis/story-H0DZJUAWWopQZKPzbLXyJL.html>> accessed 5 May 2021.

law allows abortion only when specific conditions are met; abortion is also conditional throughout the gestation period. Finally, the law operates within gestational limits: 20 weeks unless the termination is ‘immediately necessary to save the life of the pregnant woman’ and 24 weeks for ‘vulnerable women’. The advancing gestational period also brings with it stricter conditions for termination and involves more third-party decision-makers. It is then no surprise that the Madras High Court, in *V Krishnan*,<sup>754</sup> described the MTPA as primarily an ‘enabling provision to save the registered medical practitioner from the purview of the Indian Penal Code’ rather than a recognition of the right to an abortion.<sup>755</sup>

Below, I further break down the law on abortion, going beyond its architecture alone. I draw on a wide range of sources: parliamentary debates, judicial decisions from the Supreme Court and State High Courts (read ‘horizontally’), empirical data on the interpretation of the law, and existing literature analysing the law. Bringing these together, I exhume the ideological assumptions underlying the MTPA: women as mothers and untrustworthy decision-makers. I set out how these assumptions influence the architecture of the law and limit its interpretation by courts and medical professionals, who are authorised by the law to interpret it (**Parts A and B**). I then show how structure of the law—the MTPA as an exception to the criminal offense under the IPC—further restricts its interpretation through placing a chilling effect on third-party decision-makers under the law (**Part C**).

#### A. Women as Mothers: Women’s Roles

Underlying the MTPA is a strong motherhood narrative, essentialising women’s role as mothers. As evidence, consider the drafting history of the MTPA and its amendments. Endorsing the

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<sup>754</sup> *V Krishnan v G Rajan* (1994) 2 MWN (Cri) 333 (*V Krishnan*).

<sup>755</sup> *ibid* [42].

MTPA for allowing termination in case of pregnancy on account of rape, a Parliamentary member in 1971 remarked:

*Every young girl cherishes the hope of having a home of her own, and to be a mother...She falls prey [to] exploitation. It is due to those reasons that she becomes pregnant, not due to her fault.*<sup>756</sup>

Note here both the reference to the desire of every woman to become a mother, and the underlying assumption that women would choose to deviate from this role only when faced with extenuating circumstances, especially in cases like rape where pregnancy was not their ‘fault’. A corollary to this ideology of motherhood is that reproductive decision-making by women poses a fundamental threat to the traditional patriarchal family,<sup>757</sup> with one Parliamentary member opposing abortion stating: ‘women who undergo this process deteriorate mentally and an inferiority complex forms in their minds. *Peace and happiness disappear from their family life.*’<sup>758</sup>

While these statements could be seen as reflecting the specific social context of the 1970s, similar references can be found in the debates on the 2020 amendments as well, which extend the gestational limit for pregnancies on account of rape or involving a foetal anomaly. Speaking in support of the amendment, the Minister of Health and Family Welfare clarified that:

[the] provision is not for extending the term of abortions in *normal* circumstances. The women who have become pregnant *due to certain unfortunate circumstances or their child is likely to remain handicapped* for the life, *only* for such cases the term has been extended from 20 weeks to 24 weeks.<sup>759</sup>

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<sup>756</sup> Statements by Mukul Bannerjee, Statements regarding Medical Termination of Pregnancy Bill, Lok Sabha (2 August 1971) (‘1971 Debates’) (emphasis added).

<sup>757</sup> LB Pizzarossa, “‘Women Are Not in the Best Position to Make These Decisions by Themselves’: Gender Stereotypes in the Uruguayan Abortion Law” (2019) 1 University of Oxford Human Rights Hub Journal 30, 38.

<sup>758</sup> 1971 Debates (n 756) (MM Joseph) (emphasis added).

<sup>759</sup> Statement by Dr. Harsh Vardhan, Statements regarding Medical Termination of Pregnancy (Amendment) Bill 2020, Lok Sabha (17 March 2020) (‘2020 Debates’) (emphasis added).

Abortions are thus seen as the last resort in ‘unfortunate circumstances’; in ‘normal circumstances’, women would, by implication, necessarily continue their pregnancy.

Judicial decisions embody an identical narrative. In the landmark decision of *Suchitra Srivastava*,<sup>760</sup> the first case to explicitly house reproductive rights within the Constitution, the Supreme Court held that the MTPA provides only a ‘qualified right’ to an abortion, because the ‘termination of pregnancy has never been recognised as the *normal recourse* for expecting mothers’.<sup>761</sup> Termination is once again seen as the ‘exception’<sup>762</sup>—applicable to circumstances like rape where the woman is not at ‘fault’—while ‘the normal rule [is] that pregnancy should continue till term’.<sup>763</sup> On similar lines, in *D Rajeswari*<sup>764</sup> the Madras High Court remarked that the ‘[t]he kicking with the legs of a child in the womb of the pregnant woman would be a delightful feeling to her’, except in cases of rape, where the pregnancy causes ‘mental anguish and agony’.<sup>765</sup> Yet, in other cases, courts have denied termination even to rape victims, reasoning that they might regret their abortion as it requires them to deviate from their maternal role. For instance, in *Ashaben*,<sup>766</sup> the Gujarat High Court rejected the request for abortion by a survivor of rape by quoting another survivor: ‘After the abortion, I wanted to die. **How could I live when I had just ended the life of my child?**’<sup>767</sup>

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<sup>760</sup> *Suchitra Srivastava* (n 34).

<sup>761</sup> *ibid* [11] (emphasis added); *Bhatou Boro v State of Assam* (2018) 2 GauLR 577 [6] (*‘Bhatuo’*).

<sup>762</sup> *Marimuthu* (n 323) [15].

<sup>763</sup> *V Krishnan* (n 754) [42].

<sup>764</sup> *D Rajeswari v State of Tamil Nadu* 1996 CriLJ 3795 (*‘Rajeswari’*).

<sup>765</sup> *ibid* [13].

<sup>766</sup> *Ashaben v State of Gujarat* (2015) AIR CC 3387 (*‘Ashaben’*).

<sup>767</sup> *ibid* [12] (emphasis added).

The motherhood narrative is further entrenched within the MTPA through the difference in value accorded to consent for termination and consent for continuation of pregnancy. Both forms of consent are not treated as equally significant, as they ought to be. Instead, as the Supreme Court affirmed in *Suchitra Srivastava*:

while the explicit consent of the woman in question *is not a necessary condition for continuing the pregnancy*, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is *indeed an essential condition for proceeding with the termination of a pregnancy*...We cannot permit a *dilution of this requirement of consent* since the same *would amount to an arbitrary and unreasonable restriction on the reproductive rights* of the victim.<sup>768</sup>

Simply put, while women cannot be compelled to end their motherhood, they can be compelled, in certain circumstances, to become mothers. Both forms of compulsion *equally* ignore women's reproductive decision-making, and ought to be *equally* condemned; yet the former is seen as more egregious than the latter, therefore requiring explicit consent from the woman. It could be argued that women's consent is especially important for the former because unwanted termination causes bodily incursion. However, this ignores that an unwanted pregnancy is also a form of bodily incursion. It could also be argued that termination of pregnancy is treated differently from continuation because medical professionals cannot be compelled to perform medical procedures (here, termination). To hold true, this concern requires a focus on consent of the medical professional, with consent of the woman being treated as equally important in both cases. Here, instead, differing value is accorded to consent of the woman in both instances, with no mention of the medical professional. If so, the only factor explaining the emphasis on consent in one case and its dilution in the other is the outcome of the two cases: one aligns with motherhood while the other deviates from it.

The motherhood narrative is most obvious in cases of termination on ground of foetal anomaly, authorised under Section 3(2)(ii) of the MTPA. In judicial decision-making under this

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<sup>768</sup> *Suchitra Srivastava* (n 34) [15]; See also *Marimuthu* (n 323) [39]; *V Krishnan* (n 754) [47].

provision, sole emphasis is placed on medical prognosis on foetal survival. For instance, in *Kulwinder Kaur*,<sup>769</sup> the P&H High Court permitted termination because of medical opinion that ‘the foetus if allowed to be born would have grim chances of survival and a limited life span’. Similarly in *Pallavi Bhoi*<sup>770</sup> the Chhattisgarh High Court allowed termination holding:

the medical board has opined that in case the child is born, he/she would be completely mentally [retarded]...having regard to the ***future of the child, inability of the foetus to be developed as full grown, if the child is born, it is obvious that it would be dependent on mercy of others and healthy future is unforeseeable.***<sup>771</sup>

The woman seeking the abortion is referred to, at best, only as an allied factor: ‘***Considering the poor prognosis of baby***, continuation of pregnancy will not bring any benefit to either ***mother*** or fetus’;<sup>772</sup> ‘[i]n the present case also, in the best interest of the petitioner ***and the prospective child foreseen the future of both***, this Court inclined to permit for the termination of pregnancy at this stage’;<sup>773</sup> ‘unless the pregnancy is allowed to be terminated, the life of the ***mother as well as that of the baby to be born*** will be in great danger’.<sup>774</sup>

As a result, when there is no substantial risk of the child being born with serious physical and mental abnormalities—that is, when the ‘prospective child’ has some ‘future’—then termination is denied, irrespective of the woman’s decision to terminate, and the factors driving that decision. In fact, the woman’s decision was, in one such case, termed ‘reproductive

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<sup>769</sup> *Kulwinder Kaur v Chandigarh* W.P.(C) 1088/2019 (P&H High Court, 31 January 2019); See also *Manga Singh v Chandigarh Administration* W.P.(C) 23222/2019 (P&H High Court, 2 September 2019).

<sup>770</sup> *Pallavi Bhoi v State of Chhattisgarh* W.P.(C) 2261/2019 (Chhattisgarh High Court, 9 July 2019) (*‘Pallavi’*).

<sup>771</sup> *ibid* [8]-[9] (emphasis added).

<sup>772</sup> *Suchita Swapnil Latkar v Union of India* W.P.(C) 855/2017 (Supreme Court, 8 September 2017) (*‘Suchita’*) (emphasis added).

<sup>773</sup> *Miss Ab v State of Bihar* W.P.(C) 590/2018 (Patna High Court, 31 January 2018) (emphasis added).

<sup>774</sup> *Sarmishta* (n 317) [11] (emphasis added).

materialism!’<sup>775</sup> This trend is best illustrated by *X v Uttarakhand*,<sup>776</sup> where the 16 year old petitioner was kidnapped and raped, and became pregnant as a result. The Uttarakhand High Court denied termination at 21 weeks holding that, ‘under the facts and circumstances of the case where the medical opinion of five registered medical practitioners is that there is no substantial risk of the child being born with serious physical and mental abnormalities’, termination cannot be granted. Thus, the very possibility of foetal survival inevitably translated into an obligation to carry the pregnancy to term, automatically disregarding the petitioner’s age, the circumstances of her pregnancy, and the (often unilateral) responsibilities of childcare borne by women. She was treated as a mother first, and subject to gender norms that ‘invisibilise[d]’ her needs ‘in favour of the needs of the foetus’.<sup>777</sup> Note also a continuous reference within these decisions to women as ‘mothers’ and the foetuses as ‘babies’,<sup>778</sup> unveiling the ideological pre-commitment to the motherhood narrative.

This motherhood narrative drives the MTPA’s architecture, specifically the conditional nature of abortion and the nature of conditions permitted. Abortion on demand vests women with control over whether and when to give birth, ‘break[ing] with the customary assumption that women exist to care for others...[and] allowing them to determine when and how they will devote themselves to caring for others’.<sup>779</sup> In contrast, conditional abortion, as in the MTPA, falls in line

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<sup>775</sup> *Nandini Tushar Ravool v State* W.P.(C) No 8313/2018 (Bombay High Court, 14 August 2018) (‘*Nandini?*’).

<sup>776</sup> *X v Uttarakhand* W.P.(M/S) 1909/2018 (Uttaranchal High Court, 17 July 2018) [13]; See also *Nikhil Datar v Union of India* 2008 (110)BOMLR 3293 (‘*Nikhil?*’); *Suparna Debnath v State of West Bengal* AST No. 3/2019 (Calcutta High Court, 29 January 2019) (‘*Suparna?*’); *Nandini* (n 775).

<sup>777</sup> Jain (n 79); Aparna Chandra et al., ‘Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study’ (2021) 62 <<https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf>> accessed 23 April 2022 (‘Legal Barriers’).

<sup>778</sup> *Suchita* (n 772); *Sarmishta* (n 317) [11]; *Suparna* (n 776).

<sup>779</sup> Siegel, *Sex Equality* (n 64) 815, 819.

with women's maternal role by suggesting that in the absence of these conditions, women would *normally* want to, and should be expected to, continue their pregnancies.

Similarly, the conditions listed within the MTPA denote circumstances—such as threat to life, grave injury to physical or mental health, rape, foetal anomaly—where women are seen as morally blameless in seeking an abortion: '[w]hatever has happened to the [rape] victim and whatever its consequences, are not her *fault* at all. She cannot, and should not, be blamed for it'<sup>780</sup> as the pregnancy was '*beyond the control* of such *victim* women'.<sup>781</sup> In other situations, it is assumed that women would not want to—and more importantly, should not be permitted to—deviate from their maternal role. Thus, the MTPA permits abortion only in circumstances that prevent women from caring adequately for their children. Women are allowed abortions not in order to 'avoid becoming mothers, but in order to be better mothers'. In other words, abortion serves not as a means for women to exit the patriarchal institution of motherhood, but as means to tighten the link between womanhood and motherhood.<sup>782</sup>

The MTPA is thus dominated by perceptions of women as 'essentially reproductive machines',<sup>783</sup> driven by 'the imagination of mothers as primary care givers'.<sup>784</sup>

The current legal framework on abortion relies on patriarchal notions of motherhood and women's role as caregivers to restrict access to abortion...to married women (whose contraceptive method has failed), rape survivors, and women whose foetuses have serious abnormalities. In doing so, the law effectively posits pregnancy as a

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<sup>780</sup> *Chandrakant Jayantilal Suthat v State of Gujarat* (2016) 2 GLH 662 [40] ('*Chandrakant*') (emphasis added).

<sup>781</sup> *Neelam* (n 317) [21] (emphasis added).

<sup>782</sup> Radka Dudová, 'The Framing of Abortion in the Czech Republic: How the Continuity of Discourse Prevents Institutional Change' (2010) 46 *Czech Sociological Review* 945, 959; Fran Amery, 'Solving the "Woman Problem" in British Abortion Politics: A Contextualised Account' (2015) 17 *The British Journal of Politics and International Relations* 551, 555; See also Chandra et al, *Legal Barriers* (n 777) (noting that the foetal anomaly condition in India relies on the 'proper' role of women in society as nurturing, caring mothers).

<sup>783</sup> Shruthi Pandey, 'Women's Health and Law in India: Trends of Hope and Despair' in Kalpana Kannabiran (ed), *Women and Law: Critical Feminist Perspectives* (Sage 2014) 206.

<sup>784</sup> Arathi Madhavan, 'Aborting Reproductive Justice: An Analysis of the Legislative Process Concerning Reproduction in India' (2016) 3 *Indian History* 141 ('Aborting Reproductive Justice').

natural state for women, carving out abortion as an exception only in extraordinary circumstances.<sup>785</sup>

The motherhood narrative also extends beyond the architecture of the MTPA to seep into its interpretation by courts and medical professionals. Courts do not see the termination of pregnancy as the ‘normal recourse’ for pregnant women, as discussed above.<sup>786</sup> Courts also permit termination only when women report certain kinds of harm, meeting specific extreme thresholds. For instance, courts do not permit termination on account of anxiety about continuation of an unwanted pregnancy<sup>787</sup> or matrimonial discord and a desire to pursue education and employment,<sup>788</sup> despite the MTPA allowing abortions on ground of injury to mental health.

Similarly, influenced by the motherhood narrative, medical professionals can be disapproving of ‘elective abortions’, where the abortion is sought for reasons beyond harm to health, rape, or foetal anomaly. They may dismiss reasons women present for abortion as ‘superficial’ or not ‘good enough’;<sup>789</sup> ‘scold’ women while providing abortion;<sup>790</sup> or discourage them from opting for abortion and encourage them to continue the pregnancy,<sup>791</sup> especially if they do not have children.<sup>792</sup>

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<sup>785</sup> Jain (n 79) 33–34: See also N Menon, ‘The Impossibility of `Justice’: Female Foeticide and Feminist Discourse on Abortion’ (1995) 29 Contributions to Indian Sociology 385; A Randhawa, ‘Foucault’s Futures: A Critical Re-Reading of India’s Abortion Laws’ (2020) UNSW Law Journal Student Series No 20-29.

<sup>786</sup> See (n 760)-(n 767).

<sup>787</sup> *Sheetal Shankar Salvi v Union of India* (2018) 11 SCC 606 (*Sheetal*).

<sup>788</sup> *Neelam* (n 317).

<sup>789</sup> Chandra et al, Legal Barriers (n 777).

<sup>790</sup> Heidi Johnston, ‘Abortion Practice in India: A Review of Literature’ (CEHAT 2002) 16.

<sup>791</sup> P Varkey et al, ‘The Reality of Unsafe Abortion in a Rural Community in South India’ (2000) 8 Reproductive Health Matters 89.

<sup>792</sup> R Hussain, ‘Abortion and Unintended Pregnancy in Six Indian States’ (Guttmacher Institute) 12 <[https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-unintended-pregnancy-six-states-india.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-unintended-pregnancy-six-states-india.pdf)> accessed 5 May 2021.

In response, it could be argued that the MTPA permits only conditional abortions not because women are seen as mothers, but because the State interest in protecting potential foetal life demands that unless the harm from continuation of pregnancy is of a specific threshold, foetal potentiality ought to prevail. This, in essence, is the foetal potentiality justification for conditional abortion, which posits foetal potentiality as a strong driver behind the MTPA. However, as Part IV(C) of the Chapter will show through a reading of the MTPA's drafting debates, foetal potentiality has historically not played a role in determining the architecture of the MTPA. Instead, these debates point to the prominence of motherhood narratives, as set out above. In any case, Part IV(C) will also show that the use of restrictive abortion laws as the means to protect foetal potentiality is itself premised on normalising women's role as mothers. Restricting abortion is neither suitable nor necessary for preserving foetal potentiality. More effective alternate measures exist for this purpose. Despite this, restrictive abortion laws are chosen, and retained, *because of* deeply ingrained stereotypes about women as mothers. Thus, foetal potentiality does not offer an alternative to the motherhood narrative as the driver behind the MTPA; instead, it is merely an instance of the narrative.

#### B. Women as Untrustworthy Decision-Makers: Women's Capacities

In allowing conditional abortion, the MTPA sees women not only as mothers but also as untrustworthy decision-makers requiring State protection: desperate and passive victims of rape and exploitation, unfortunate mothers of crippled children, and uninformed patients mistreated by unscrupulous medical providers. Once this imagery is in place, identifying women as 'objects of intervention',<sup>793</sup> the State easily steps into the role of the benevolent protector.

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<sup>793</sup> Madhavan, *Aborting Reproductive Justice* (n 784) 145.

This imagery is evident in the repeated references, within the 1971 debates, to the MTPA's desire to 'save'<sup>794</sup> pregnant women from backstreet medical providers:

Either you legalise abortion or leave the fate of a woman in the hands of quacks<sup>795</sup>...Either they stake their lives in the hands of these quacks, or they take some medicine and die or they commit suicide by throwing themselves onto the railway track.<sup>796</sup>

Other members expressed concerns about foetuses conceived through rape and foetuses having a disability, endorsing the MTPA as a method of providing 'victims' of undesirable pregnancies a way out:

we cannot overlook the situation created by unwanted pregnancy, pregnancy created by pressure of circumstances, where *women have fallen a victim to it* circumstantially<sup>797</sup>...So far as the humanitarian aspect is concerned, during partition, for example, many women were *victims* of forcible sexual acts, resulting in unwanted pregnancy<sup>798</sup>...there is [also] the eugenic consideration. Because in some cases, women run the risk of having *crippled children*. A mother who has reasonable grounds to believe that she will bear crippled children should have the benefit of termination of pregnancy.<sup>799</sup>

This imagery carried through from 1971 to 2002 and then to 2020, when, in liberalising provisions of the MTPA, some members of the Parliament (once again) fell back on the State's responsibility to save pregnant women from 'quacks' through improving access to abortions.<sup>800</sup> Others, as in 1971, highlighted the role of the amendments in protecting pregnant women from undesirable

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<sup>794</sup> *Marimuthu* (n 323) [16]; *Poornima Devu* (n 302) [12].

<sup>795</sup> 1971 Debates (n 756) (KN Tiwar; Mukul Bannerjee).

<sup>796</sup> *ibid* (SM Bannerjee).

<sup>797</sup> *ibid* (DP Chattopadhyay).

<sup>798</sup> *ibid*.

<sup>799</sup> *ibid* (emphasis added).

<sup>800</sup> Statements by Shri A Raja and Shri EM Sudarsana Natchiappan, Discussion On The Medical Termination Of Pregnancy (Amendment) Bill 2002, Lok Sabha (5 December 2002) ('2002 Debates'); 2020 Debates (n 759) (Dr. Harsh Vardhan; Sangeeta Kumari Singh Deo; Dr. Kakoli Ghosh Dastidar; Varun Gandhi; P Raveendranath Kumar; Jaksur Meena; Dr. Thol Thirumaavalavan).

foetuses: ‘cases of congenital anomaly, lunatic pregnancy, cases of rape, unwed, widow pregnancies’.<sup>801</sup>

This does not imply that providing women safe abortions and ensuring access to termination for unwanted pregnancies—whether due to rape, or foetal anomaly—are undesirable. However, what is of concern is the image of the woman underlying these conditionally authorised abortions—as weak and vulnerable victims of desperate social circumstances<sup>802</sup>—and the State’s resultant desire to protect. Legalising abortions, even if conditionally, was not seen as a measure of respect for women’s reproductive decision-making, guaranteeing them an option for safe abortion in the absence of which they would have to rely on backstreet providers. Instead, it was viewed as a way to save them from harms the State deems sufficient: bad abortions and bad babies. Thus, as Menon tellingly notes, ‘access to abortion [in India was] upheld through a sanctifying of social norms which are antithetical to feminism’.<sup>803</sup>

That this imagery was explicitly chosen is evident from the fact that dissenters in Parliament, both in 1971 and 2020, demanded that women’s reproductive decision-making be respected through allowing abortion on request:

I must say that the present Bill is a half-way house... ***You should have put in only one sentence saying that if a woman wants to terminate pregnancy, it should be allowed. There should have been only the one line and it would have been complete.***<sup>804</sup>

Our abortion laws are doctor-centric and do not consider abortion as a fundamental right... I urge upon the Government to redraft India’s abortion

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<sup>801</sup> 2020 Debates (n 759) (Gautam Singmani and Ravi Kishan).

<sup>802</sup> Ellie Lee, ‘Tensions in the Regulation of Abortion in Britain’ (2003) 30 *Journal of Law and Society* 532, 535.

<sup>803</sup> Menon (n 785) 375.

<sup>804</sup> 1971 Debates (n 756) (Vikram Chand Mahajan) (emphasis added); S Chattopadhyay, ‘Medical Termination of Pregnancy Act 1971: A Study of the Legislative Process’ (1974) 16 *Journal of the Indian Law Institute* 588 (A member of the Rajya Sabha similarly opposed the Bill, terming it ‘compromising’. He instead argued in favour of women deciding the question of termination of pregnancy without consent from third parties, and without having to meet conditions related to their physical and mental health. He termed the Bill a ‘half-hearted measure’).

law<sup>805</sup> ...*It should allow abortion on request of the woman rather than approval of the medical practitioner or board.*<sup>806</sup>

Yet, the dissenting voices were ignored at both stages to reinstate women's victimhood. Emphasising victimhood allows the reconciliation of 'the deeply embedded stereotype of women as natural mothers with the liberalisation of abortion'.<sup>807</sup> It also ties the legalisation of abortion to avoiding harm from unsafe abortions, thereby improving public health. The harm reduction approach to abortion renders abortion more palatable, reducing public opposition, a strategy successfully used elsewhere to decriminalise or liberalise abortion.<sup>808</sup>

However, women's victimhood also legitimises the protectionist impulse of the State: "The assumption [is] that women seeking abortions are emotionally fraught and in need of support...[she] is unable to make this decision alone and "need[s] to be accompanied".<sup>809</sup> This cements stereotypical assumptions about women's decision-making capacity, with women being seen as 'unreliable narrators even of their own bodies and lives'.<sup>810</sup> This, in turn, translates into a paternalistic replacement of the woman with the doctor as a decision-maker:

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<sup>805</sup> 2020 Debates (n 759) (Ritesh Pandey) (emphasis added).

<sup>806</sup> *ibid* (Sushri S Jothimani).

<sup>807</sup> Pizzarossa (n 757) 46.

<sup>808</sup> Dudová (n 782) 975; Bianca Stifani et al, 'From Harm Reduction to Legalization: The Uruguayan Model for Safe Abortion' (2018) 143 *International Journal of Gynecology & Obstetrics* 45; Pauline Cullen and Elzbieta Korolczuk, 'Challenging Abortion Stigma: Framing Abortion in Ireland and Poland' (2019) 27 *Sexual and Reproductive Health Matters* 6; Cynthia Beavin et al, 'Activist Framing of Abortion and Use for Policy Change in Peru' (2019) 27 *Sexual and Reproductive Health Matters* 160; Richard Sambaiga, 'Health, Life and Rights: A Discourse Analysis of a Hybrid Abortion Regime in Tanzania' (2019) 18 *International Journal for Equity in Health* 135.

<sup>809</sup> Pizzarossa (n 757) 50; Amery (n 782) 555. The other critique of harm reduction is that it does not bring structural or transformative change, and thus benefits some women more than others, noted in Gordon Roe, 'Harm Reduction as Paradigm: Is Better than Bad Good Enough? The Origins of Harm Reduction' (2005) 15 *Critical Public Health* 243.

<sup>810</sup> Joanna Erdman, 'Harm Production: An Argument for Decriminalisation' in AM Miller and MJ Roseman (eds), *Beyond Vice and Virtue: Rethinking Human Rights and Criminal Law* (University of Pennsylvania Press 2019) 252 ('Decriminalisation'); Randhawa (n 785) ('Women seeking an abortion are socially constructed as irresponsible decision makers by the State [within the MTPA]').

Third-party authorization in abortion law...is premised on this very mistrust<sup>811</sup>...If women [are] weak and vulnerable, the doctor [is] a “calm, responsible, rational and reassuring figure”, “highly skilled and dedicated”, “sensitive, sympathetic”, a member of a “high and proud profession”, and he [sic] displays “skill, judgement and knowledge”.<sup>812</sup>

It is no surprise then that the MTPA, within its architecture, allows abortions *only* on the approval of either one or two medical professionals, depending on the gestational limit. Of late, Medical Boards have also played a central role in judicial determination of claims under the MTPA. Though Medical Boards are typically set up in cases involving termination beyond 20 weeks under Section 5 to ‘save the life’ of the pregnant woman,<sup>813</sup> in some cases courts have insisted on constituting Medical Boards even prior to 20 weeks—as early as 9<sup>814</sup> and 11 weeks<sup>815</sup>—though the MTPA itself does not have such a requirement. Once these Boards are set up, their opinion lies at the crux of the judicial analysis, and becomes the sole determinant of whether the termination is granted or not. For instance, in *R v Haryana*,<sup>816</sup> the P&H High Court noted that ‘victims of rape impregnated due to the act experience both short and long term psychological effects’, and ‘deep mental anguish’.<sup>817</sup> Yet the Court disallowed termination holding that:

[T]his Court had given liberty to the doctors...to go ahead with termination of pregnancy if it is not harmful to the victim...But the board decided *according to*

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<sup>811</sup> Erdman, Decriminalisation (n 810) 252.

<sup>812</sup> Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto 1997) 40; Mary Boyle, ‘The Experience of Abortion: A Contextualist View’ in JM Ussher (ed), *Women’s Health: Contemporary International Perspectives* (British Psychological Society 2000) 45.

<sup>813</sup> *Chandrakant* (n 780); *Snehal Pravin Desai v Union Of India* W.P.(C) 5070/2019 (Bombay High Court, 23 April 2019) (*Snehal*); *Poornima Devu* (n 302); *X v State Rep* CrI.O.P.No 14506/2019 and CrI.M.P.No 7043/2019 (Madras High Court, 19 June 2019) (*X v State*).

<sup>814</sup> *Anita v State of Madhya Pradesh* W.P. No. 10072/2019 (Madhya Pradesh High Court, 27 May 2019).

<sup>815</sup> *Sushma v State Of Gujarat* SCr.A No. 1693/2016 (Gujarat High Court, 14 March 2016); However in *X v State* (n 813) [12]-[19], the Madras High Court held that Medical Boards are only to be set up for terminations beyond 20 weeks, and required medical professionals to be sensitised about this.

<sup>816</sup> *R v Haryana* (n 325).

<sup>817</sup> *ibid* [34], [37].

*their wisdom* not to go ahead with the same...This court has to base its judgment *completely* upon the opinion of the experts in the field.<sup>818</sup>

Similarly in *Sikander*,<sup>819</sup> the P&H High Court denied a minor victim of rape permission to terminate, noting that ‘[i]n this regard, [the] *only guiding feature* for the purpose of determination of the Court *is the opinion of the experts*’.<sup>820</sup> To clarify, I do not claim that medical opinion has no role to play in this context. It remains important to seek medical opinion on whether the abortion, especially at a later stage of pregnancy, is medically safe. I do however contest the weight attributed to the medical decision. In the cases discussed above, it is the *only* deciding factor, once again rendering the woman invisible.

This medical focus, built into the architecture of the MTPA, also influences its interpretation, with harm from continuation of an unwanted pregnancy being understood in a medicalised fashion.<sup>821</sup> For instance, in *Sheetal Salvi*,<sup>822</sup> Sheetal wished to terminate her pregnancy at 27 weeks, on ground of foetal anomaly. The Supreme Court however rejected her request due to the absence of ‘medical grounds’: ‘The only other ground...apart from the medical grounds, is that [the] petitioner...is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason’.<sup>823</sup> Sheetal’s assessment of harm from the unwanted pregnancy was thus assessed against a sanitised medical standard, and held to fall short.

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<sup>818</sup> *ibid* [37]-[38] (emphasis added).

<sup>819</sup> *Sikander v State of Haryana* CWP No. 21291/2018 (P& H High Court, 29 August 2018) (*‘Sikander’*).

<sup>820</sup> Trend also noted in Chandra et al, *Legal Barriers* (n 777) 54.

<sup>821</sup> In fact, courts have explicitly recognised that Medical Boards often do not take into account non-medical factors. For instance, in *Surjibhai Kalasva v State of Gujarat* SCr.A No. 585/2018 (Gujarat High Court, 30 January 2018) [24]:

The opinion of the Doctors may be based exclusively keeping in mind the age of the foetus and the other complications which are likely to crop up. I have observed over a period of time that the Doctors, while expressing their opinion in such type of matters, do not consider the trauma and the agony, which the victim undergoes.

<sup>822</sup> *Sheetal* (n 787).

<sup>823</sup> *ibid* [4]; See also *Neelam* (n 317) [11]-[17].

In this decision, Sheetal failed to appear even in the ‘one-dimensional role of the patient’. She was instead ‘a phantom without substance, lurking voicelessly in the shadows, unable to assert her own interests’,<sup>824</sup> and ‘at the mercy of a chance encounter with a willing service provider’.<sup>825</sup> Sheetal’s case also aligns with the larger trend of interpretation, where anxiety about an unwanted pregnancy is not seen as causing ‘grave injury to mental health’ under Section 3(2). The ground is instead interpreted by medical professionals to apply either to situations where the woman suffers from a ‘psychological issue’ (a ‘mental disease’ or ‘hallucination’) or where she does not possess the capacity to make the decision.<sup>826</sup>

The excessive regulation of medical abortion (‘MA’) in India further confirms the strength of the stereotype about women as untrustworthy decision-makers. Despite clear guidance by the World Health Organisation (‘WHO’) that MA can be administered throughout pregnancy, subject to certain conditions,<sup>827</sup> India allows MA only up to 9 weeks.<sup>828</sup> The WHO guidelines also recommend self-administration of MA drugs, without the intervention of healthcare providers, up to 12 weeks of gestation.<sup>829</sup> Indian law, however, does not permit self-administration of MA drugs at any stage. At best, clinical prescription of MA drugs by a registered medical practitioner is

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<sup>824</sup> Daly (n 82) 77, 95.

<sup>825</sup> Chandra et al, Legal Barriers (n 777) 43.

<sup>826</sup> *ibid* 64.

<sup>827</sup> World Health Organisation, ‘Medical Management of Abortion’ (2018) 27-29 <<https://apps.who.int/iris/bitstream/handle/10665/278968/9789241550406-eng.pdf>> accessed 23 April 2022 (‘WHO Medical Management’); These recommendations are supported by the Royal College of Obstetricians and Gynaecologists (UK) and the International Federation of Gynaecology and Obstetrics: ‘NICE Guidelines’ (2019) <<https://www.nice.org.uk/guidance/ng140>> accessed 23 April 2022.

<sup>828</sup> Minister of Health and Family Welfare (India), ‘Comprehensive Abortion Care: Training and Service Delivery Guidelines’ (2018) 48 <[https://nhm.gov.in/New\\_Updates\\_2018/NHM\\_Components/RMNCHA/MH/Guidelines/CAC\\_Training\\_and\\_Service\\_Delivery\\_Guideline.pdf](https://nhm.gov.in/New_Updates_2018/NHM_Components/RMNCHA/MH/Guidelines/CAC_Training_and_Service_Delivery_Guideline.pdf)> accessed 23 April 2022.

<sup>829</sup> WHO Medical Management (n 827) 29, 40.

allowed up to 7 weeks,<sup>830</sup> to be administered at home. Beyond 7 weeks, even this option is unavailable. Women can access MA only at an approved facility,<sup>831</sup> defeating the very reasons why women typically prefer MA: less disruption to housework and child-care; avoiding travel to far off hospitals; and greater confidentiality, privacy and control over the procedure.<sup>832</sup> Similarly, despite MA drugs being classified under Schedule H of the Drugs and Cosmetics Rules, 1945,<sup>833</sup> they are overregulated compared to other Schedule H drugs. Dispensing MA drugs requires enhanced regulatory compliance (through the collection of prescriptions, maintenance of separate registers, and collation of personal information from users), with pharmacists selling these drugs being subject to frequent inspections.<sup>834</sup> This invokes fear of legal liability amongst MA providers, restricting the supply of MA drugs, sometimes even prompting their disappearance from the market.<sup>835</sup> The overregulation of MA drugs thus compellingly illustrates how a health care service that only women need is constructed as an exceptional procedure that requires a high degree of State surveillance and intervention,<sup>836</sup> motivated by assumptions about women as untrustworthy decision-makers who require protection from harmful abortion practices.<sup>837</sup>

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<sup>830</sup> Medical Termination of Pregnancy Rules 2003, r 5 ('MTP Rules').

<sup>831</sup> *ibid*; MTPA (n 745) s 4.

<sup>832</sup> Chandra et al, *Legal Barriers* (n 777) 121.

<sup>833</sup> Drugs and Cosmetics Rules 1945, r 65(9)(a).

<sup>834</sup> Pratigya Campaign for Gender Equality and Safe Abortion, *Availability of Medical Abortion Drugs in the Markets of Four Indian States, 2018* (2019) 31 <<https://pratigyacampaign.org/wp-content/uploads/2019/09/availability-of-medical-abortion-drugs-in-the-markets-of-four-indian-states-2018.pdf>> accessed 23 April 2022.

<sup>835</sup> *ibid* 27-28; Chandra et al, *Legal Barriers* (n 777) 125-29.

<sup>836</sup> Pizzarossa (n 757) 51.

<sup>837</sup> Alesha Doan and Corrine Schwarz, 'Father Knows Best: "Protecting" Women through State Surveillance and Social Control in Anti-Abortion Policy' (2020) 48(1) *Politics & Policy* 6-37; Reva Siegel, 'The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions' (2007) 3 *University of Illinois Law Review* 1306 ('Women-Protective Abortion Restrictions').

As with the foetal potentiality alternative to the motherhood narrative, it could be argued that the prominence of the medical professional within the MTPA reflects efforts to guarantee women's health rather than stereotypes about women's decision-making capacity. However, as Part IV(B) will show, restricting access to abortion is neither suitable nor necessary to promote safe abortions and preserve women's health. Restricting abortion only pushes women outside the healthcare system towards unsafe, backstreet abortions, adversely affecting their health. Despite this, the MTPA takes reproductive decision-making away from women in the name of their health only because it acts under the influence of assumptions about women.

### C. Interaction between the MTPA and the IPC

While the previous two sections looked at the MTPA in isolation, here I locate the MTPA within the IPC's criminal prohibition on abortion. Criminal laws represent 'the strongest expression of the State's power to punish and are among its most intentional acts'.<sup>838</sup> A State, in criminalising abortion, punishes women as a potential source of harm to the foetus,<sup>839</sup> and for 'transgressing stereotype-driven norms' about their role as mothers,<sup>840</sup> thus constructing its social meaning as inherently wrong. Through the use of criminal law, women seeking an abortion are labelled 'deviants', 'social pariahs', 'discredited persons', 'an underclass of potential or actual criminals', and 'reduced from a whole and usual person to a tainted, discounted one' who is then 'disqualified from full social acceptance'.<sup>841</sup> Criminalisation thus reinforces the existing motherhood narrative within the MTPA: 'Pregnant women are expected to be completely self-sacrificing, to the extent

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<sup>838</sup> UNGA 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report of Special Rapporteur Anand Grover' (3 August 2011) UN Doc A/66/254 [11] ('Grover Report').

<sup>839</sup> Randhawa (n 785).

<sup>840</sup> Grover Report (n 838) [16]-[17]; Rebecca Cook, 'Stigmatised Meanings of Abortion Law' in Joanna Erdman et al (ed), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2019) 351 ('Stigmatised Meanings'); Anuradha Kumar et al, 'Conceptualising Abortion Stigma' (2009) 11 *Culture, Health & Sexuality* 625, 628.

<sup>841</sup> Cook, *Stigmatised Meanings* (n 840) 347-352; Kumar et al (n 840) 626.

of giving up their lives for their foetuses; those who engage in any behaviour that harms their foetuses are, thus, deemed “bad mothers” who must be punished’.<sup>842</sup>

The stigma caused by criminalisation, in turn, results in secrecy around abortion,<sup>843</sup> creating a form of ‘enforced silence’ which allows for the perpetuation of hostility against those associated with abortion.<sup>844</sup> It also reduces awareness amongst abortion-seekers, and increases reluctance amongst abortion-providers,<sup>845</sup> compelling women to seek clandestine, and likely unsafe, abortions, harming their physical health. The stigma, evidence suggests, further results in negative mental health outcomes for women even if the abortion is otherwise safe.<sup>846</sup> These forms of harm to physical and mental health, in turn, contribute to the perception that abortions are, *in general*, unsafe for women, adding to existing stigma and seemingly justifying criminalisation; the vicious cycle thus continues.<sup>847</sup> Conditional abortion legislation, like the MTPA, brings another layer to the stigma by creating a ‘hierarchy of deservedness’ within which some abortions are seen as more acceptable and less susceptible to judgement than others.<sup>848</sup> Courts and abortion clinics thus become ‘gendered spaces’ in which women are forced to present their circumstances in the worst light possible, or in some cases, lie<sup>849</sup>, to gain access to a ‘privilege’ (abortion).<sup>850</sup> Finally, stigma

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<sup>842</sup> Jain (n 79) citing April Cherry, ‘Shifting our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses’ (2015) 28 *Journal of Law and Health* 641.

<sup>843</sup> Kathryn LaRoche et al, “‘We Have to Make Sure You Meet Certain Criteria’”: Exploring Patient Experiences of the Criminalisation of Abortion in Australia’ [2020] *Public Health Research & Practice*; Katherine Kerr, ‘Queensland Abortion Laws: Criminalising One in Three Women’ (2014) 14 *QUT Law Review* 24; Grover Report (n 838) [31].

<sup>844</sup> Cook, *Stigmatised Meanings* (n 840) 369; Kumar et al (n 840) 629.

<sup>845</sup> Grover Report (n 838) [34].

<sup>846</sup> Sally Sheldon, ‘The Decriminalisation of Abortion: An Argument for Modernisation’ (2016) 36 *Oxford Journal of Legal Studies* 334, 348 (‘Modernisation’); Kerr (n 843) 25; Grover Report (n 838) [36].

<sup>847</sup> Grover Report (n 838) [35].

<sup>848</sup> LaRoche (n 843); Cook, *Stigmatised Meanings* (n 840) 354, 357; Chandra et al, *Legal Barriers* (n 777) 36.

<sup>849</sup> LaRoche (n 843).

<sup>850</sup> Randhawa (n 785).

results in the proliferation of informal rules which evolve under the shadow of the formal criminal law:<sup>851</sup> for instance, the insistence on spousal consent for abortion,<sup>852</sup> or the refusal to abort if the woman does not agree to accept a more permanent form of post-abortion contraception.<sup>853</sup> While neither of these requirements are officially part of the MTPA, the stigma surrounding abortion creates an environment where these rules develop (and flourish) unchallenged.

Crucially, the interaction between the MTPA and the IPC limits the interpretation of the MTPA. As observed in *Nand Kishore Sharma*,<sup>854</sup> '[r]ead in the context of Sections 312 and 315, IPC, it would appear that the object of the [MTPA] was to make the provisions relating to termination of pregnancy *stringent and effective rather than to permit blatant termination of pregnancy*.'<sup>855</sup> As a result, while grounds such as 'grave injury to mental health' taking into account the woman's 'actual or reasonable foreseeable environment' can, in theory, be interpreted broadly to allow termination in a wide range of circumstances, medical professionals often adopt a cautious interpretation fearing criminal sanction.<sup>856</sup> This creates an 'atmosphere of panic',<sup>857</sup> a 'chilling effect',<sup>858</sup> sometimes leading to a refusal to terminate even when the request for abortion falls squarely within the MTPA.<sup>859</sup>

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<sup>851</sup> Cook, *Stigmatised Meanings* (n 840) 356; Chandra et al, *Legal Barriers* (n 777) 76-92.

<sup>852</sup> Hussain (n 792) 162; Shireen Jejeebhoy et al, 'Increasing Access to Safe Abortion in Rural Maharashtra: Outcomes of a Comprehensive Abortion Care Model' (Population Council 2011) 22.

<sup>853</sup> Hussain (n 792) 12; Johnston (n 790) 23.

<sup>854</sup> *Nand Kishore* (n 298).

<sup>855</sup> *ibid* [11] (emphasis added).

<sup>856</sup> Joanna Erdman and Rebecca Cook, 'Decriminalization of Abortion – A Human Rights Imperative' (2020) 62 *Best Practice & Research Clinical Obstetrics & Gynaecology* 11, 15; Jain (n 79) 30; Grover Report (n 838) [32]; Cook, *Stigmatised Meanings* (n 840) 365.

<sup>857</sup> Chandra et al, *Legal Barriers* (n 777) 32.

<sup>858</sup> *R v Haryana* (n 325) [37].

<sup>859</sup> See *Bashir Khan v State of Punjab* AIR 2014 P&H 150; *Vijendar v State of Haryana* W.P.(C) 20783/2014 (P&H High Court, 7 October 2014); *Hallo Bi @ Halima v State of Madhya Pradesh* 2013 CriLJ 2868; Padma Bhate-Deosthali and

Criminalisation also contributes to the MTPA's propensity to replace the woman with third-party decision-makers. When doctors refuse termination due to fear of criminal prosecution, women are compelled to approach courts to seek permission to terminate, passing onto them the power to decide whether the conditions under the MTPA have been met.<sup>860</sup> In some cases, in denying termination, courts have interrogated whether the rape has even occurred. In others, they have questioned, 'extremely invasively',<sup>861</sup> whether the rape has caused grave enough injury to mental health, suggesting that 'heightened scrutiny is required to safeguard against women's deceptive resort to abortion exceptions'.<sup>862</sup>

Considering the background facts and the pendency of the investigation, I am not in a position to directly come to the conclusion that it had been a matter of rape.<sup>863</sup>

In the present case, the victim has alleged that she had been ravished, but her conduct of not disclosing the incident of rape for more than 13 weeks and deciding not to get the pregnancy terminated for more than 20 weeks, as the writ application has been filed after 20 weeks of pregnancy, prima facie, ***does not suggest that such alleged [conception] has really caused grave injury to the mental health of the victim.***<sup>864</sup>

Thus courts, like medical professionals, replace the pregnant woman's assessment of harm with their own. Courts also pass the power of decision-making back to the doctors by authorising the setting up of Medical Boards. As seen earlier, once Medical Boards are set up, the decision to terminate often proceeds entirely in line with their determination. Further, the shuttling between medical professionals, the court (sometimes the lower court and an appellate court) and the

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Sangeeta Rege, 'Denial of Safe Abortion to Survivors of Rape in India' (2019) 21 Health and Human Rights Journal 189.

<sup>860</sup> Anubha Rastogi and Raunaq Chandrashekhar, 'Assessing the Judiciary's Role in Access to Safe Abortion' (Pratigya Campaign for Gender Equality & Safe Abortion 2019).

<sup>861</sup> Chandra et al, Legal Barriers (n 777) 55.

<sup>862</sup> Cook, Stigmatised Meanings (n 840) 359.

<sup>863</sup> *Ashaben* (n 766) [32]; *Jamana Suthar v State of Rajasthan* 2009 SCC OnLine Raj 3468 [13].

<sup>864</sup> *Indu Devi v State of Bihar* W.P.(C) 5286/2017 (Patna High Court, 26 April 2017) (emphasis added). This was overruled by the Supreme Court in *Z v Bihar* (n 37) but the point remains that the law gives the court the power to make determinations of this kind.

Medical Board cause significant delays, on average up to four weeks,<sup>865</sup> pushing the pregnancy into later term, when the conditions for abortion are more stringent. In *Z v Bihar*,<sup>866</sup> a destitute woman abandoned by her husband and living in a shelter home was raped. She approached the hospital for termination at 14 weeks. Between the medical professionals at the hospital, the Patna High Court, and the Supreme Court, the woman was examined by three separate medical panels. She was denied termination at each stage, despite it being a case of rape where termination should have been permitted at 14 weeks.<sup>867</sup> Predictably, this entire process pushed the pregnancy beyond the gestation limit of 20 weeks, and she was compelled to carry the pregnancy to term. Delays can also arise from the practical difficulty involved in setting up a Medical Board, especially in public sector hospitals in rural areas which are chronically understaffed.<sup>868</sup>

In conclusion, comparing the law on abortion in India to other jurisdictions might, on the face of it, suggest that the position in India is relatively liberal. India joins 14 other countries in allowing abortions on 'broad social or economic grounds' during the first 20 weeks of gestation. India is ahead of the 26 countries which prohibit abortion entirely, the 39 countries which allow abortion only to save the life of the woman, and the 56 countries which permit abortion to preserve the woman's physical, and in certain cases mental, health.<sup>869</sup>

Yet, India lags behind the 66 countries which allow abortion on demand, at the minimum up to 8-12 weeks, in certain cases up to viability, or in others throughout the gestation period.<sup>870</sup>

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<sup>865</sup> Bhate-Deosthali and Rege (n 859); Chandra et al, *Legal Barriers* (n 777) 58-9

<sup>866</sup> *Z v Bihar* (n 37).

<sup>867</sup> Similarly, in *R v Haryana* (n 325) three consecutive medical boards were constituted, pushing the pregnancy from 22 to 28 weeks.

<sup>868</sup> Barua et al, 'The MTP 2020 Amendment Bill: Anti-Rights Subjectivity' (2020) 28 *Sexual and Reproductive Health Matters* 2; Chandra et al, *Legal Barriers* (n 777) 49.

<sup>869</sup> Centre for Reproductive Rights, 'The World's Abortion Laws' <<https://maps.reproductiverights.org/worldabortionlaws>> accessed 5 May 2021.

<sup>870</sup> *ibid.*

Further, India's law operates within gestational limits, and replaces women with doctors as decision-makers. Thus, the very architecture of the law on abortion in India restricts reproductive decision-making. In addition, the law is undergirded by pernicious assumptions about women, essentialising their roles as mothers and untrustworthy decision-makers. These assumptions not only drive the architecture of the law, but also limits its interpretation by courts and medical professionals, who are authorised by the law to interpret it. Finally, the structure of India's law on abortion treats abortion as criminal, except under conditions set out by the MTPA. The brooding presence of criminal law creates stigma around abortion and introduces additional third-party decision-makers. Most importantly, it further limits the interpretation of the law's provisions without 'a single word of the text being altered'.<sup>871</sup> Restrictions on reproductive decision-making are thus built into India's law on abortion at three levels: its architecture, its assumptions and its structure. This, then, sets the stage for the constitutional analysis to follow.

### III. Tracing the Rights Violation

Here, I assess India's law on abortion against Article 21 (**Part A**) and Article 15 (**Part B**) independently, as doctrinally developed in Chapters 2 and 3. I especially draw out, *first*, the distinct contributions of each provision in challenging the law; and *second*, the interaction of the provisions within the synthesis, to assess the role of the synthesis as the 'new' constitutional home for reproductive rights.

#### A. Article 21

The restrictions on reproductive decision-making built into India's law on abortion (at the three levels) imply that several cases of termination fall beyond the reach of the law. These women are offered two alternatives by the law: either seek termination outside the healthcare system from unsafe, backstreet providers of abortion or carry the unwanted pregnancy to term. Many women

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<sup>871</sup> Amar Jesani and Aditi Iyer, 'Women and Abortion' (1993) 28 Economic and Political Weekly 2591, 2592.

avail the first option. Tellingly, two-third of abortions in India remain unsafe,<sup>872</sup> with unsafe abortion being the third highest contributor to maternal mortality in India.<sup>873</sup> This violates women's 'right to life' under Article 21, which guarantees their right to survival, including the right to 'survive pregnancy and childbirth'.<sup>874</sup>

Alternatively, women carry the unwanted pregnancy to term. This adversely affects their physical and mental health, once again violating their 'right to life'.<sup>875</sup> As Chapter 1 notes, even a medically normal pregnancy affects a woman's cardiovascular, respiratory, gastrointestinal, metabolic, renal and endocrine systems,<sup>876</sup> posing greater risks to her health than when her body is in a non-pregnant condition. When the pregnancy is desired, women willingly assume this demanding physical responsibility. However, when the pregnancy is unwanted, these significant biological changes are externally imposed, impacting women's physical health.<sup>877</sup> Empirical studies also note that women with unwanted pregnancies have increased odds of delayed or inadequate antenatal care,<sup>878</sup> exacerbating risk to physical health during pregnancy. Further, the restrictions

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<sup>872</sup> Ryo Yokoe et al, 'Unsafe Abortion and Abortion-Related Death among 1.8 Million Women in India' (2019) 4 *BMJ Global Health* e001491.

<sup>873</sup> Hussain (n 792) 2.

<sup>874</sup> See Chapter 2, Part II(A).

<sup>875</sup> See Chapter 2, Part II(A).

<sup>876</sup> See Chapter 1, Part III.

<sup>877</sup> Studies noting that women denied abortions report several physical health problems—low haemoglobin levels, eclampsia, postpartum haemorrhage—during birth, and more than three times the average length of limitations on physical activity after birth: Zekiye Karaçam et al, 'Effects of Unplanned Pregnancy on Maternal Health in Turkey' (2011) 27 *Midwifery* 288; Samuel Nyarko, 'Unintended Pregnancy among Pregnant Women in Ghana: Prevalence and Predictors' (2019) 2019 *Journal of Pregnancy* 1; Caitlin Gerdtts, 'Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy' (2016) 26 *Women's Health Issues* 55.

<sup>878</sup> Yohannes Dibaba et al, 'The Effects of Pregnancy Intention on the Use of Antenatal Care Services: Systematic Review and Meta-Analysis' (2013) 10 *Reproductive Health* 50; Mohammad Hajizadeh and Son Nghiem, 'Does Unwanted Pregnancy Lead to Adverse Health and Healthcare Utilization for Mother and Child? Evidence from Low- and Middle-Income Countries' (2020) 65 *International Journal of Public Health* 457.

built into the law cause delay in accessing abortions. This, too, harms women's physical health; later-term abortions are, in general, more medically risky than early-term abortions.<sup>879</sup>

Apart from harm to physical health, being compelled to undergo the intimate physical process of pregnancy harms women's mental health: 'The simple notion of carrying an unwanted pregnancy to term becomes a kind of psychological torture for many women.'<sup>880</sup> Several studies note that unwanted pregnancies are a risk factor for poor maternal mental health,<sup>881</sup> establishing a strong correlation between unwanted pregnancy and poorer mental health outcomes later in life.<sup>882</sup> Harm to mental health can also arise from being replaced as the decision-maker by an external third party; being required to artificially fit one's reproductive experience into a pre-existing list of conditions operating within specific time limits; and, on account of the delay incurred in waiting for third parties to determine whether the said conditions have been met within the prescribed time.<sup>883</sup>

In contrast, Article 21's 'personal liberty' clause emphasises the centrality of reproductive decision-making to the 'core of human personality', constituting 'crucial aspects of personhood'.<sup>884</sup> This emerges both from the intimate relationship between women's bodies and reproduction—

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<sup>879</sup> Marge Berer, 'A Critical Appraisal of Laws on Second Trimester Abortion1' (2009) e-cadernos CES 201.

<sup>880</sup> Grupo Medico, 'Unwanted Pregnancy, Forced Continuation of Pregnancy and Effects on Mental Health' (2011) 14 <<https://globaldoctorsforchoice.org/wp-content/uploads/Unwanted-Pregnancy-Forced-Continuation-of-Pregnancy-and-Effects-on-Mental-Health-v2.pdf>> accessed 6 May 2021.

<sup>881</sup> Studies noting that unwanted pregnancy causes psychological distress amongst pregnant women, including antepartum and postpartum depression: Katherine Barton, 'Unplanned Pregnancy and Subsequent Psychological Distress in Partnered Women: A Cross-Sectional Study of the Role of Relationship Quality and Wider Social Support' (2017) 17 *BMC Pregnancy and Childbirth* 44; Julia Steinberg and Lisa Rubin, 'Psychological Aspects of Contraception, Unintended Pregnancy, and Abortion' (2014) 1 *Policy Insights from the Behavioral and Brain Sciences* 239; Jessica Gipson et al, 'The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature' (2008) 39 *Studies in Family Planning* 18.

<sup>882</sup> Pamela Herd, 'The Implications of Unintended Pregnancies for Mental Health in Later Life' (2016) 106 *American Journal of Public Health* 3; See also Chandra et al, *Legal Barriers* (n 777) 69-70.

<sup>883</sup> Chandra et al, *Legal Barriers* (n 777) 53.

<sup>884</sup> *Puttaswamy* (n 31) [168] (Chandrachud J).

their right to ‘bodily integrity’<sup>885</sup>—and from recognising reproductive choices as decisions involving a women’s sense of self—their right to ‘decisional autonomy’ in making the ‘most personal life choices’.<sup>886</sup> In restricting reproductive decision-making (at the three levels), India’s law on abortion fails to respect women’s ‘zone of choice and self-determination...the ability of each individual to make choices and to take decisions governing matters intimate and personal’.<sup>887</sup> And, in compelling women to carry to term unwanted pregnancies within their bodies, the law violates their ‘exclusive and inalienable right over [their bodies]’.<sup>888</sup> Moreover, in disregarding women’s reproductive decisions, taking control of their body and deciding how it should be used, the law treats women as reproductive instruments, or as the means to achieve an end, violating their dignity,<sup>889</sup> a central value underlying Article 21.

At this stage, it should be noted that Article 21’s ‘personal liberty’ clause applies irrespective of harms to health (physical or mental) caused by the denial of reproductive decision-making, accounted for under its ‘right to life’ clause. This allows Article 21, as the constitutional home for reproductive rights, to transcend the limitations of the public health justification for abortion. In arguing for abortion as a tool to guarantee women’s health, the public health justification (which the ‘right to life’ clause employs) indicates ‘hesitation around endorsing abortion as an unencumbered and positive choice’.<sup>890</sup> In contrast, ‘deploying a narrative about

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<sup>885</sup> *Sarmishtha* (n 317) [11]; *Marimuthu* (n 323) [39]; *Z v Bihar* (n 37) [58]; *High Court on its own Motion* (n 320) [15], [20].

<sup>886</sup> *Puttaswamy* (n 31) [141] (Chandrachud J), [227] (Chelameshwar J), [361] (Nariman J).

<sup>887</sup> *ibid* [168] (Chandrachud J); Making a similar argument, see Barua et al (n 868); Arathi Madhavan, ‘Miscarriage to Medical Termination: The Experiences of Legislating Abortion in India’ (2014) XIV(2) *Samyukta* 185; Chandra, *Privacy and Women’s Rights* (n 76); Magill (n 76) 160.

<sup>888</sup> *R v Haryana* (n 325) [33.4].

<sup>889</sup> V Undurraga, ‘Criminalisation under Scrutiny: How Constitutional Courts Are Changing Their Narrative by Using Public Health Evidence in Abortion Cases’ (2019) 27 *Sexual and Reproductive Health Matters* 48 (‘Criminalisation under Scrutiny’); P Bergallo and AR Michel, ‘Abortion’ in JF Gonzalez-Bertomeu and R Gargarella (eds), *The Latin American Casebook: Courts, Constitutions, and Rights, 2016* (Routledge 2018) 29–30 (‘Abortion’); Grover Report (n 838) [15].

<sup>890</sup> Albertyn (n 74) 91, 92.

abortion as autonomy’, as under Article 21’s ‘personal liberty’ clause, ‘sends a message about capability that is important for feminists: namely that women do not want or need tutelage and are perfectly capable of governing ourselves’.<sup>891</sup>

Having interrogated India’s law on abortion under the ‘right to life’ and ‘personal liberty’ clauses, and assessed their differing scopes and contributions, I now move to the non-discrimination claim.

#### B. Article 15

The denial of reproductive decision-making, within India’s law on abortion, amounts to sex and intersectional discrimination under Article 15’s substantive equality reading, set out in Chapter 3. The law on abortion discriminates against women on ground of sex because it has the effect of perpetuating women’s group-based disadvantage, along Fredman’s four interacting dimensions.

The restrictions built into the law on abortion entrench women’s disadvantage materially, harming women’s bodies. They compel women either to carry to term an unwanted pregnancy—severely affecting their physical and mental health—or resort to unsafe abortions, threatening their life. This material impact is experienced by women alone, and exists irrespective of whether the child is eventually given up for adoption or not. If women do not opt for adoption, the restrictions on abortion compel them to parent within the patriarchal institution of motherhood. This disadvantages them socio-economically, furthering their underrepresentation in jobs, hampering their financial independence and in turn restricting their access to property, credit and other resources. Under patriarchal motherhood, as Chapter 1 shows, women bear unilateral responsibilities of childcare, either confining them to the private sphere where their labour is devalued or forcing them to work the ‘double day’ within the public sphere. This is especially so

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<sup>891</sup> Zuloaga (n 61) 920.

for women from disadvantaged groups, who cannot escape the ‘squeeze of reproduction’<sup>892</sup> by relying on the reproductive labour of other women. Tellingly, empirical studies reveal that economic factors commonly motivate abortions in India,<sup>893</sup> with women noting the absence of support during or after pregnancy, including for childcare.<sup>894</sup>

The law on abortion also entrenches stereotypes about women as mothers and untrustworthy decision-makers requiring State protection. Stereotypes are intrinsically harmful, moulding women’s own sense of identity.<sup>895</sup> They are also instrumentally harmful, having a ‘deep social effect on how society perceives the...agency of women’.<sup>896</sup> Stereotypes additionally impact State decision-making outside the abortion context, with several recent regulations in India reflecting assumptions about women as mothers<sup>897</sup> or as victims in need of State protection.<sup>898</sup>

Further, the restrictions on reproductive decision-making built into India’s law on abortion maintain the patriarchal institution of motherhood in India, perpetuating women’s structural disadvantage. To understand how, it is important to look closely at some common factors motivating abortion in India. Women in India often seek abortions to limit family size, increase

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<sup>892</sup> Colleen (n 217) 97.

<sup>893</sup> Leela Visaria, ‘Abortion in India: Emerging Issues from the Qualitative Studies’ (2004) 39 *Economic and Political Weekly* 5044–5052; Johnston (n 790) 16.

<sup>894</sup> TK Ravindran and P Balasubramanian, ‘“Yes” to Abortion but “No” to Sexual Rights: The Paradoxical Reality of Married Women in Rural Tamil Nadu, India’ (2004) 12 *Reproductive Health Matters* 88; Shelly Makleff et al, ‘Exploring Stigma and Social Norms in Women’s Abortion Experiences and Their Expectations of Care’ (2019) 27 *Sexual and Reproductive Health Matters* 55-6 (‘When I took [medical abortion] pills my neighbor told me, ‘Don’t do it [...]’ She was trying to convince me [...] [not to] abort it. But I said [to] her that no one is there to look after my baby. I have to do it.’)

<sup>895</sup> Fredman, *Substantive Equality Revisited* (n 515) 731.

<sup>896</sup> *Joseph Shine* (n 350) [45].

<sup>897</sup> Maternity Benefit Act 1961, s 4, which provides maternity rather than parental leave. This position is retained in the Maternity Benefit (Amendment) Act 2017. The All India Service (Leave) Rules 1955, r 18B grants paternity leave for 15 days to a certain class of government employees. None of these legislations provide for parental leave.

<sup>898</sup> The Surrogacy (Regulation) Bill 2019, ss 4, 35, which prohibits commercial surrogacy allegedly to protect women from exploitation.

spacing between births,<sup>899</sup> and delay first pregnancy.<sup>900</sup> That is, abortion in India serves as a method of contraception,<sup>901</sup> due to inadequate State supply of contraceptive services—particularly temporary methods of contraception—lack of awareness about these methods, or misapprehensions regarding their use.<sup>902</sup> Non-use is also perpetuated by unequal power structures within families that restrict women’s access to contraceptive information and services and prevent women from being able to negotiate contraceptive use when they do not desire a pregnancy.<sup>903</sup> Other studies demonstrate the link between violence and abortion, with women in violent relationships being more likely to have an abortion, as well as to experience violence after (and possibly because of) the abortion.<sup>904</sup> For instance, in Tamil Nadu, qualitative interviews with 66 women showed that rape and physical violence were strongly associated with having had an abortion, and being unable to refuse sex or use contraceptives effectively.<sup>905</sup> Both these factors speak to women’s structural disadvantage within patriarchy: that women do not have the power within their relationships to insist on contraception; that women are raped by their partners, acquaintances and strangers. Moreover, the difficulties involved in providing childcare without familial or State support also motivate abortions in India, as noted above. Once again, at play here

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<sup>899</sup> Visaria (n 893) 5044-5022; Bela Ganatra and Siddivinayak Hirve, ‘Induced Abortions Among Adolescent Women in Rural Maharashtra, India’ (2002) 10 *Reproductive Health Matters* 76-85.

<sup>900</sup> Visaria (n 893); Shireen Jejeebhoy et al, ‘Experience Seeking Abortion among Unmarried Young Women in Bihar and Jharkhand, India: Delays and Disadvantages’ (2010) 18 *Reproductive Health Matters* 163.

<sup>901</sup> Anjali Singh et al, ‘Abortions Followed by Contraceptive Failures in Northern India: An Analysis of Contraceptive Histories (2009–2014)’ (2020) 76 *Genus*; Amenda Davis, ‘Perceptions and Practices of Rural Indian Women in Contraception, Abortion, and Sexual Health: A Cross Sectional Study’ (2019) 8 *International Journal of Reproduction, Contraception, Obstetrics and Gynecology* 1022 (‘Perceptions and Practices’).

<sup>902</sup> Deepanjali Behera et al, ‘Induced Abortion Practices in an Urban Indian Slum: Exploring Reasons, Pathways and Experiences’ (2015) 9 *Journal of Family & Reproductive Health* 129; Susheela Singh et al, ‘The Incidence of Abortion and Unintended Pregnancy in India, 2015’ (2018) 6 *The Lancet Global Health* e111, e118.

<sup>903</sup> Melissa Stillman, ‘Abortion in India: Literature Review’ (Guttmacher Institute 2014) 16; Behera et al (n 902); Davis, *Perceptions and Practices* (n 901) 1024.

<sup>904</sup> Jay Silverman et al, ‘Reproductive Coercion in Uttar Pradesh, India: Prevalence and Associations with Partner Violence and Reproductive Health’ (2019) 9 *SSM - Population Health* 100484; Visaria (n 893).

<sup>905</sup> Ravindran and Balasubramanian (n 894) 88.

is women's structural disadvantage, a product of the patriarchal institution of motherhood: women bearing primary responsibility for childcare; childcare being grossly undervalued; and, the ideal participant in the public sphere being a person without responsibilities of care (in other words, men). As a result of these conditions:

women are prevented from having children they do want and forced to have children they do not want and cannot want because they are not in a position responsibly to care for them *because they are women*. This is what an inequality looks like.<sup>906</sup>

Against this, permitting unconditional abortions throughout the gestation period gives women 'a moment of power in a life otherwise led under unequal conditions which preclude choice in ways [they] cannot control, [thus providing] a window of relief in an unequal situation from which there is no exit'.<sup>907</sup> Abortions allow these women to 'negotiate the harsh realities of work' and increase control over their sexuality in the workplace and the home.<sup>908</sup> On the contrary, restricting abortions closes off escape routes, feeds into the historical structures of disadvantage identified above and maintains the patriarchal institution of motherhood. A caveat is however necessary at this point. It is not my claim that women in India opt for abortion only when compelled to by the tragic circumstances discussed above. Women's decisions to abortion are also exercises of 'individual, self-influential, intentionality' in their attempt to 'practice agency and reproductive control'.<sup>909</sup>

Finally, the law on abortion denies women's participation in decisions concerning them. On an immediate level, the law replaces them with third party decision-makers: doctors, courts, and Medical Boards. The woman's request is granted when it aligns with medical opinion and often *because* it does so; as a necessary consequence, it is brushed aside when the two deviate. Denial

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<sup>906</sup> MacKinnon, Reflections (n 66) 1313 (emphasis added).

<sup>907</sup> *ibid* 1317.

<sup>908</sup> S. Anandhi, 'Women, Work and Abortion: A Case Study from Tamil Nadu' (2007) 42 Economic and Political Weekly 1059.

<sup>909</sup> M Paul et al, 'Negotiating Collective and Individual Agency: A Qualitative Study of Young Women's Reproductive Health in Rural India' (2017) 27 Qualitative Health Research 311, 315–6.

of participation also occurs more broadly, with the law restricting women's participation in decisions within the home—the timing and spacing of the family or whether to continue with an unwanted pregnancy which is a result of forced sex—and outside of it—the nature and frequency of participation within the public sphere.

Crucially, the four dimensions of disadvantage interact with one another, in a cyclical fashion, to cement women's group-based disadvantage. For instance, stereotypes about women as mothers (second dimension) are used to restrict women's access to abortions. This disadvantages women socio-economically (first dimension), which, in turn, contributes to their structural disadvantage within the home (third dimension). As a result, women are denied participation in reproductive decision-making; they are instead replaced by their husband or other members of their family (fourth dimension). This entrenches assumptions about women as untrustworthy decision-makers requiring supervision (second dimension), which is then used by the State to vest decision-making in the hands of medical professionals (fourth dimension). And so it goes.

The interaction across these dimensions also brings intersectionality into focus, such that the whole group of women is not affected in an identical way. To illustrate this point, take the example of later term abortions. Later term abortions are common amongst women from marginalised groups, who experience intersectional disadvantage due to an interaction between sex and other indices of disadvantage, especially rurality, socio-economic status, age, and marital status.<sup>910</sup> For instance, one study notes that a majority of women who have approached the Supreme Court and State High Courts with post-20 week requests for abortion are in very impoverished circumstances, 'all struggling to make ends meet...all dependent on public health

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<sup>910</sup> Though these grounds are not expressly listed under Article 15(1), the reach of the provision has been extended to analogous grounds like sexual orientation (*Naz Foundation* (n 375) [104]), gender identity (*NALSA* (n 33)) and class or socio-economic status (*Indian Hotel* (n 555) [120]).

services'.<sup>911</sup> These women are compelled to seek later term abortions because they are unable to access first trimester abortions on account of the costs involved,<sup>912</sup> the poor quality of public sector care available,<sup>913</sup> the delay in accessing courts<sup>914</sup> and constituting Medical Boards,<sup>915</sup> and the stigma attached to going to court, making it difficult for them to 'proceed normally' with their lives after that.<sup>916</sup> Another study observes that women from disadvantaged socio-economic backgrounds, for whom poor nutrition is the norm, often have irregular periods, and thus do not realise that they are pregnant until other symptoms, such as morning sickness, appear, thereby delaying abortion.<sup>917</sup> Women from rural areas are similarly disproportionately likely to have second-trimester abortions due to shortage of public sector abortion facilities. For instance, in Rajasthan, 41% of abortions among rural women occurred during the second trimester, compared with 26% among urban women.<sup>918</sup> Additionally, pregnancy is so stigmatised amongst adolescents and other unmarried women that they either do not recognise that they are pregnant, or try to conceal the pregnancy until it becomes obvious, causing delay.<sup>919</sup> Moreover, they are refused abortions, even if they

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<sup>911</sup> Chandra et al, *Legal Barriers* (n 777) 50.

<sup>912</sup> Palak Sharma and Manas Pradhan, 'Abortion Care Seeking in India: Patterns and Predictors' (2020) 52 *Journal of Biosocial Science* 353, 361; Ravi Duggal and Vimala Ramachandran, 'The Abortion Assessment Project—India: Key Findings and Recommendations' (2004) 12 *Reproductive Health Matters* 122, 126; Ramamani Sundar, 'Abortion Costs and Financing: A Review' (CEHAT 2003) 1.

<sup>913</sup> Duggal and Ramachandran (n 912) 125; SAMA and Partners for Law in Development, 'Country Assessment on Human Rights in the Context of Sexual Health and Reproductive Health Rights' (2018) 104 ('study reported that less than 1 percent of primary health centres provide abortion services, 95 per cent of centres do not have a trained doctor and nearly all lack necessary equipment or even basic infrastructure like water and electricity'); Sushanta Banerjee et al, 'An Exploration of the Socio-Economic Profile of Women and Costs of Receiving Abortion Services at Public Health Facilities of Madhya Pradesh, India' (2017) 17 *BMC Health Services Research* 223; Stillman (n 903) 34.

<sup>914</sup> Edward Pinto, 'The Jurisprudence of Emergency Medical Care in India: An Ethics Perspective' (2017) 2 *Indian Journal of Medical Ethics* 236.

<sup>915</sup> Barua et al (n 868) 2.

<sup>916</sup> Chandra et al, *Legal Barriers* (n 777) 53

<sup>917</sup> Suchitra Dalvie, 'Second Trimester Abortions in India' (2008) 16 *Reproductive Health Matters* 37, 40.

<sup>918</sup> Batya Elul et al, 'Unwanted Pregnancy and Induced Abortion: Data from Men and Women in Rajasthan, India' (Population Council 2004).

<sup>919</sup> Dalvie (n 917); Johnston (n 790) 14.

approach the service provider during the first trimester, due to the absence of consent from the husband or guardian, even though this is not a legal requirement under the MTPA.<sup>920</sup> As a result, unmarried women and adolescents—25% and 80%—are more likely than married women and older women—9% and 34%—to undergo later term abortions.<sup>921</sup> In essence, women from marginalised groups are forced to seek later term abortions due to their group-based disadvantage. At the same time, later term abortions are heavily restricted under the law on abortion, both in terms of the number of medical professionals involved and the conditions required to be satisfied. In imposing these heightened restrictions on later term abortions, the law on abortion thus, in effect, entrenches the disadvantage of women from these marginalised groups.

Summing up, India's law on abortion perpetuates women's group-based disadvantage along the four interacting dimensions, wholly as a group and within the group, concentrating amongst women from marginalised groups. Translated into the doctrinal language of Article 15(1), the restrictions on reproductive decision-making built into the law on abortion directly discriminate against women on ground of 'sex'. 'Sex', under the substantive equality reading of Article 15(1) includes physiological disparities between sexes—here, pregnancy—gendered assumptions about women—here, as mothers and untrustworthy decision-makers—and implications of sex inequality—here, parenting within the patriarchal institution of motherhood, lack of access to contraception and violence against women. At the same time, the law on abortion also indirectly discriminates against women from marginalised groups, with the restrictions on reproductive decision-making disproportionately affecting these women, even if the law does not so intend. Thus, the law on abortion engages Article 15(1), directly (on ground of sex) and

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<sup>920</sup> Duggal and Ramachandran (n 912).

<sup>921</sup> Shveta Kalyanwala et al, 'Experience Seeking Abortion among Unmarried Young Women in Bihar and Jharkhand, India: Delays and Disadvantages' (2010) 18 *Reproductive Health Matters* 163; Johnston (n 790) 19; Shireen Jejeebhoy, 'Adolescent Sexual and Reproductive Behavior: A Review of the Evidence from India' (1998) 46 *Social Science & Medicine* 1275, 1283.

indirectly (on ground of sex in intersection with other grounds). However, as Chapter 3 points out, the law violates Article 15(1) only if the law does not constitute a ‘special provision’ for women under Article 15(3).

The law, as Part II(B) shows, is a protectionist statute. It fails to recognise that abortions ‘must be decided from the point of view of how women feel about it and how they would assess it...it is for her to decide...and not for the male dominated legislature or the male dominated bureaucratic machinery’.<sup>922</sup> Instead, it paternalistically takes away decision-making power from women, based on assumptions about them as untrustworthy decision-makers, and replaces them with third parties. These assumptions are a product of ‘social prejudices’<sup>923</sup> within patriarchy and are not supported by evidence of any nature.<sup>924</sup> As I argue in Chapter 3, protectionism has been rejected as the constitutional philosophy underlying Article 15(3) in light of its ‘ultimate effect’ in ‘perpetuating the oppression of women’<sup>925</sup> by ‘entrenching sexual differences’,<sup>926</sup> ‘victimizing its subject in the name of protection’<sup>927</sup> and perpetuating ‘a deeply entrenched patriarchal order.’<sup>928</sup> Thus, the law on abortion falls outside the scope of Article 15(3), and, in turn, amounts to unconstitutional discrimination under Article 15(1), unless justified by the State.

This is a helpful point to pause, and take stock of the independent contributions of Articles 21 and 15 within the constitutional home for reproductive rights, as they emerge from the discussion above. In challenging the constitutionality of India’s law on abortion, Article 21 centres

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<sup>922</sup> *Rajamma* (n 664) [34].

<sup>923</sup> *Sakamma* (n 657) [10].

<sup>924</sup> Need for evidence noted in *Dimple Singla* (n 662); *Kush Kalra* (n 660).

<sup>925</sup> *Anuj Garg* (n 643) [44]-[45]; *Joseph Shine* (n 350) [14] (Malhotra J).

<sup>926</sup> *Anuj Garg* (n 643) [53].

<sup>927</sup> *ibid* [35]; *Ramesh* (n 647) [24], [27], [31].

<sup>928</sup> *Joseph Shine* (n 350) [38] (Chandrachud J).

individual as an individual, and protects the interests represented by the individual dimension. Through its 'right to life' clause, it prohibits harm to women's life and health (bodily component) caused by the restrictions on reproductive decision-making built into India's law on abortion. Through its 'personal liberty' clause, Article 21 goes one step further. It recognises reproductive decision-making as central to an individual's sense of self (identity component), a function of the interaction between one's body (bodily component) and mind. Thus, on the one hand, Article 21's 'right to life' clause reinforces its 'personal liberty' clause by shielding women from harm to life and health caused by the denial of personal liberty. On the other hand, its 'personal liberty' clause goes further than its 'right to life' clause, to protect an individual's interest in reproductive decision-making, irrespective of the impact of its denial on the individual's health. Together, the two clauses preserve the 'positive potential of individual conduct and eccentricity' within reproductive decision-making, as an element of an individual's core personality.

Article 15, in contrast, centres the individual as a member of a group and protects the interests represented by the social dimension. That is, it narrows in on, and looks particularly at, group membership, and the effect of the law on abortion in advancing (or redressing) group-based disadvantage. As a result, it identifies how India's law on abortion perpetuates women's historical disadvantage along four interacting dimensions through restricting reproductive decision-making (historical component). At the same, it is careful not to treat women as a monolith, with universal reproductive experiences. Instead, it foregrounds that the effect of the law is most adversely experienced by women from marginalised groups (intersectional component). Thus, Articles 21 and 15, independently, protect two distinct sets of interests at the heart of the abortion decision. What one does the other cannot do; one without the other is incomplete; and together, they identify the whole range of rights violations caused by the restrictions on reproductive decision-making within India's law on abortion.

However, the ‘new’ constitutional home I propose for reproductive rights is not built simply on Articles 21 and 15 as independent pillars, but on the synthesis between the two provisions. Roberts’ observations on the ‘connection’ between privacy and equality are instructive in understanding the working of the synthesis. Condemning the prosecution of pregnant women addicted to drugs, many of whom are black, Roberts powerfully remarks:

The harm caused by the prosecution of crack addicted mothers *is not simply the incursion of each individual crack addict’s decision-making; it is perpetuation of a degraded image that affects the status of an entire race.* The devaluation of a poor black addict’s decision to bear a child is tied to the dominant society’s disregard for the motherhood of all black women. The diminished value placed on black motherhood, in turn, is a badge of racial inferiority worn by all black people.<sup>929</sup>

The ‘connection’ between privacy and equality, Roberts argues, thus shines light on the relationship between ‘the dehumanization of the individual and subordination of the group’.<sup>930</sup>

The synthesis between Articles 21 and 15, as the ‘new’ constitutional home, has an identical effect. While Article 21 highlights the value of reproductive decision-making in general to all individuals, Article 15 emphasises the link between the denial of reproductive-decision making and women’s history of group disadvantage. The centrality of reproductive decision-making to an individual heightens the egregiousness of discriminating against women within the reproductive sphere: Article 21 magnifies the claim under Article 15. In turn, the relationship between women’s history of disadvantage within patriarchal motherhood and the denial of reproductive decision-making means that reproductive decision-making is that much more significant to women as a group: Article 15 magnifies the claim under Article 21. Working in synthesis, the two provisions thus identify not just the whole range but also the full extent of rights violation caused by the restrictions built into India’s law on abortion.

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<sup>929</sup> Roberts (n 84) 1480 (emphasis added).

<sup>930</sup> *ibid.*

#### IV. Conducting the Limitations Analysis

To assess whether India's law of abortion can be justified in violating Articles 21 and 15 as set out above, I start by identifying the standard of justification applicable: the proportionality test (**Part A**). I then test the justifications for the restrictions within the law on abortion against this standard. I look at two main justifications: the State interest in preserving women's health (**Part B**) and in protecting potential foetal life (**Part C**). It should be noted that the analysis here is restricted to justifications that have already been offered within the literature and primary legal materials, and is necessarily abstracted to that extent. However, it provides guidance for constitutional scrutiny to be undertaken by future courts on a case-by-case basis.

##### A. Standard of Justification

The proportionality test is a four-stage assessment, requiring that a rights-limiting measure pursue a legitimate purpose, through means that are suitable and necessary for achieving the purpose, and strike a proper balance between the importance of the purpose and the harm caused by limiting the right.<sup>931</sup> The language of proportionality was common even within early judicial decisions in India, with the Supreme Court holding that a measure restricting a fundamental right must bear a proportional relationship to the right.<sup>932</sup> The four-part proportionality test, however, was adopted for the first time only in 2016, in *Modern Dental*,<sup>933</sup> a five-judge bench decision of the Supreme Court. Applying the test to a measure infringing the right to freedom of trade and occupation under Article 19(1)(g), the Court held that the measure had to meet the following requirements:

First, [it] must have a legitimate goal (legitimate goal stage).

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<sup>931</sup> Aharon Barak, *Constitutional Rights and Their Limitations* (CUP 2012) 3.

<sup>932</sup> *Chintaman Rao v State of Madhya Pradesh* AIR 1951 SC 118; *VG Row v State of Madras* AIR 1952 SC 196; *Om Kumar v Union of India* (2001) 2 SCC 386 [28]; *Teri Oat Estates v UT Chandigarh* (2004) 2 SCC 130 [46]

<sup>933</sup> *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 (*Modern Dental*); See also *Subramanian Swamy v Union of India* (2016) 7 SCC 221 [184] (*Subramanian Swamy*); *Binoy Viswam v Union of India* (2017) 7 SCC 59 [112], [115] (*Binoy Viswam*).

Second, it must be a suitable means of furthering this goal (suitability or rationale connection stage).

Third, there must not be any less restrictive but equally effective alternative (necessity stage).

Fourth, the measure must not have a disproportionate impact on the right holder (balancing stage).<sup>934</sup>

The Supreme Court extended the proportionality test ‘to all restraints on privacy’ under Article 21 in *Puttaswamy*<sup>935</sup> in 2017, with the test ‘emanating from the procedural and content-based mandate of Article 21’.<sup>936</sup> *Puttaswamy* was a nine-judge bench decision of the Supreme Court. However, the Court in *Puttaswamy* did not endorse a clear doctrinal standard for proportionality. The plurality decision, authored by Chandrachud J., held that a rights-restrictive measure, to satisfy the proportionality test, must be in pursuance of a ‘legitimate State aim’, and ensure ‘a **rational nexus** between the objects and the means adopted to achieve them’.<sup>937</sup> There was no reference to the necessity or proportionality limbs, therein conflating the proportionality test with the more deferential rational nexus test.<sup>938</sup> Kaul J.’s concurring opinion, however, adopted a different version of the proportionality test, focusing explicitly on the necessity and proportionality limbs: ‘the proposed action must be necessary in a democratic society for a legitimate aim’ and ‘the extent of such interference must be proportionate to the need for such interference’.<sup>939</sup> The overall standard emerging from the majority of the Court in *Puttaswamy*, thus, remained unclear.

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<sup>934</sup> *Modern Dental* (n 933) [53] citing Barak (n 931).

<sup>935</sup> *Puttaswamy* (n 31).

<sup>936</sup> *ibid* [80] (Chandrachud J.). While it remains unclear whether proportionality applies to violations of other rights beyond the right to privacy under Article 21, since a right to privacy violation is involved here, I do not pursue this question further.

<sup>937</sup> *ibid* [188(H)] (Chandrachud J.).

<sup>938</sup> Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’ (2021) 3(2) University of Oxford Human Rights Hub Journal 71 (‘Bridge to Nowhere’); Mariyam Kamil, ‘Puttaswamy: Jury still out on some Privacy Concerns?’ (2017) 1(2) Indian Law Review 190-204.

<sup>939</sup> *Puttaswamy* (n 31) [490] (Kaul J.).

A clearer version of the proportionality standard was offered in *Aadhar*,<sup>940</sup> another five-judge bench decision of the Supreme Court from 2018, which ‘tempered’ *Modern Dental* with a ‘more nuanced approach’.<sup>941</sup> The *Aadhar* standard requires that a rights-restricting measure pursue a legitimate aim, ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.<sup>942</sup> The measure must be a suitable means of achieving the aim, implying a rational connection between the measure and the aim. There must be no less rights intrusive measure which realises the aim in a ‘real and substantial manner’.<sup>943</sup> And, the measure must strike a proportionate balance between the ‘importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right’.<sup>944</sup> It is at the necessity stage that the *Aadhar* standard differs from the *Modern Dental* one. The latter imposes a stricter requirement that the alternate measures be ‘equally effective’ in achieving the aim, not just achieve it to a ‘real and substantial’ extent as under the former. The *Aadhar* standard was endorsed by the Supreme Court in its three-judge bench decision in *Anuradha Bhasin*<sup>945</sup> in 2020, though the Court also referred to the *Modern Dental* standard; it is not clear which version it finally applied. As *Aadhar* came after *Modern Dental*, I will apply the *Aadhar* standard below. However, the results of my analysis would not change even if the *Modern Dental* standard were to be applied, because the alternate measures I point to are not just ‘equally effective’ in achieving the stated aim, but are in fact more effective.

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<sup>940</sup> *Puttaswamy (II) v Union of India (Aadhaar)* (2019) 1 SCC 1 (‘*Aadhar*’).

<sup>941</sup> *ibid* [118], [158] (Sikri J.).

<sup>942</sup> *ibid* [126] (Sikri J.).

<sup>943</sup> *ibid* [123] (Sikri J.).

<sup>944</sup> *ibid* [124] (Sikri J.).

<sup>945</sup> *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 [66].

The proportionality standard also applies to violations of Article 15, as recognised by the Supreme Court in *Anuj Garg*<sup>946</sup> in 2009. In declaring unconstitutional protectionist legislation which barred women from being employed in places serving alcohol, the Supreme Court held that any rule ‘perpetuat[ing] the oppression of women’ would be subject to a proportionality standard of review,<sup>947</sup> under which the Court would assess whether the objective sought to be achieved by the rule—here, protecting women from sexual harassment—was proportionate to women’s autonomy, equality of opportunity, and right to privacy: ‘the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims’.<sup>948</sup> Though the Court did not lay out the structured four-part proportionality test in *Anuj Garg*, the Court undoubtedly applied the proportionality standard.<sup>949</sup> The impugned rule was struck down because it failed the necessity prong, as there existed less rights-restrictive alternatives to prohibiting women’s employment in order to achieve the objective of safety of female employees. The Court pointed to one such example: new models of security could be put in place to safeguard women at the workplace, with the costs being shared between the State and the employer.<sup>950</sup> *Anuj Garg* also clarified that the proportionality test places the burden on the State to demonstrate that its curtailment of a right is proportionate.<sup>951</sup>

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<sup>946</sup> *Anuj Garg* (n 643).

<sup>947</sup> *ibid* [48].

<sup>948</sup> *ibid* [35], [49]; See also *Nax Foundation* (n 376) [92] (‘state interest be **‘legitimate and relevant’** and the rule be **‘proportionate** towards achieving the state interest’) (emphasis added); *Dhanyamo* (n 685) [30]; *Mabila* (n 681) [14], [18].

<sup>949</sup> Chandra, *Bridge to Nowhere* (n 938) 65. The Court initially referred to the heightened standard of review as ‘strict scrutiny’ (*Anuj Garg* (n 643) [44]), a standard applied in the United States to race discrimination, which requires that the rights infringing measure fulfil a compelling state interest and is narrowly tailored to serve that interest. However, the eventual standard laid down in *Anuj Garg* resembled proportionality; Also noted by Sujit Choudhry, ‘Postcolonial Proportionality’ in Philip Dan et al (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) 193.

<sup>950</sup> *Anuj Garg* (n 643) [37].

<sup>951</sup> *Duara* (n 470) 122; *Bhatia, Equal Moral Membership* (n 460) [128].

Unfortunately, in their application of proportionality, courts have diluted its force. The necessity limb is rarely applied—or applied with any rigour—despite its inclusion within the doctrinal standard.<sup>952</sup> The burden of proof is also placed on the petitioner to point to the existence of alternate measures, rather than the State to demonstrate that alternatives were examined and rejected, therein imposing on the petitioner the burden of factual uncertainty.<sup>953</sup> Thus, some argue that even though the Indian courts use the language of proportionality, the actual applicable standard of review is a ‘veiled’ *Wednesbury* reasonableness review,<sup>954</sup> where courts simply ‘review state action to determine whether the State is pursuing a legitimate aim through suitable means, and that such action is justified, given the various interests at stake in the matter’.<sup>955</sup>

Yet, there are other examples where the proportionality test has been applied as envisaged. In *Anuj Garg*, for instance, the Supreme Court held the impugned rule unconstitutional under the necessity limb, and placed the burden of proof on the State to prove that the rule was proportional. This approach was also adopted by the majority in *Aadhar* with respect to the money laundering rules, and the minority in *Aadhar* with respect to all rules under challenge.<sup>956</sup> Crucially, it is this version of the proportionality standard that is consistent with the ‘culture of justification’<sup>957</sup>

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<sup>952</sup> Chandra, *Bridge to Nowhere* (n 938) 86; Vrinda Bhandari and Karan Lahiri, ‘The Surveillance State, Privacy and Criminal Investigation in India: Possible Futures in a Post-Puttaswamy World’ (2020) 3(2) *Oxford Human Rights Hub Journal* 24. As examples see *Subramanian Swamy* (n 933); *Binoy Vishwam* (n 933); *Aadhar* (n 933).

<sup>953</sup> Chandra, *Bridge to Nowhere* (n 938) 78, 81, citing examples of *Subramanian Swamy* (n 933); *Binoy Vishwam* (n 933); *Aadhar* (n 933).

<sup>954</sup> See Abhinav Chandrachud, ‘*Wednesbury* Reformulated: Proportionality and the Supreme Court of India’ (2013) 13(1) *Oxford University Commonwealth Law Journal* 192; Prateek Jalan and Ritin Rai, ‘Review of Administrative Action’ in Sujit Choudhury et al (eds), *Oxford Handbook of the Indian Constitution* (OUP 2016); Ashish Chugh, ‘Is the Supreme Court Disproportionately Applying the Proportionality Principle?’ (2004) 8 *Supreme Court Cases (Journal)* 33; Chintan Chandrachud, ‘Proportionality, Judicial Review, and the Indian Supreme Court’ (2016) 1 *Anti-Discrimination Law Review* 87.

<sup>955</sup> Aparna Chandra, ‘Limitation Analysis by the Indian Supreme Court’ in Mordechai Kremnitzer et al (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 540.

<sup>956</sup> Chandra, *Bridge to Nowhere* (n 938) 81-83.

<sup>957</sup> Term introduced by Etienne Mureinik, ‘A Bridge to Where – Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31, 32 (defined as ‘a culture in which every exercise of power is expected to be justified’).

adopted within the Indian Constitution, where ‘the state has a duty to justify its actions, given Constitutional protections for fundamental rights [and] the judiciary is entrusted with the duty to evaluate these justifications to protect fundamental rights’.<sup>958</sup> Thus, it is this version of the proportionality standard that I apply below, against which I test both justifications the State offers for the restrictions built into India’s law on abortion.

#### B. Women’s Health: Operation of Paternalism

The first justification put forward is the preservation of women’s health, which, it has been argued, accounts for both the gestational limit of 20 weeks and the prominence accorded to the medical professional within the abortion decision. The gestational limit has been accepted in light of the ‘*clear medical consensus* that an abortion performed during the later stages of pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same’.<sup>959</sup> As a result, when there is a request for termination beyond 20 weeks, medical opinion is sought on whether termination poses any risk to the life or health of the pregnant woman. In cases where the medical opinion notes such risk, ‘obviously, no permission can or will be granted’.<sup>960</sup>

Preserving women’s health is a legitimate aim of ‘sufficient importance’, as required by *Aadhar*. It is in line with Article 21, which guarantees protection to an individual’s life, including physical health. It also reflects commitments embodied in the Directive Principles of State Policy, specifically Article 39(e) which provides that the State shall direct its policy towards securing the ‘health and strength of...men and women’ and Article 47 which requires the State to regard the ‘improvement of public health’ as amongst its ‘primary duties’.

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<sup>958</sup> Narayan and Sindhu (n 42) 53.

<sup>959</sup> *Suchitra Srivastava* (n 34) [23] (emphasis added); *Poornima Devu* (n 302) [87].

<sup>960</sup> *Poornima Devu* (n 302) [89]; Chandra et al, *Legal Barriers* (n 777) 33, noting how doctors restrict abortions even in the first trimester, claiming that abortions cause infertility, fibrosis, blocking of tubes, infections, or cervical stenosis, with no proven association between abortions and these forms of harm to health.

However, restrictions on abortion are not suitable means to achieve the aim of preserving women's health. At the outset, the gestational limit of 20 weeks assumes that abortions beyond 20 weeks are necessarily unsafe for women. This ignores the substantial progress in medical technology since 1971. As noted in the literature, abortion restrictions typically 'overstay their evidence', receiving unwarranted scrutiny through excessive regulation due to 'falsehoods about its inherent risks or dangerousness, a function of abortion stigma'.<sup>961</sup> The overregulation of medical abortion, explored earlier, is a helpful example of this trend. Medical professionals have repeatedly stated that in light of medical advancement in methods of abortion, late term abortions can now be performed safely; even 'a third trimester abortion in experienced hands is at least as safe as delivery at term, and may be safer'.<sup>962</sup> Put differently, the normal risk of abortion at *any* stage is lower than the risk of delivery at term.<sup>963</sup> In fact, several judicial decisions in India have permitted late term abortions, similarly noting that the medical risk of continuing the pregnancy is greater than the risk of termination.<sup>964</sup> However, these cases remain the exception and are decided on an ad hoc basis, with the general rule being the limit of 20 weeks. Further, and crucially, it is

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<sup>961</sup> Joanna Erdman, 'Theorising Time in Abortion Law and Human Rights' (2017) 19 Health and Human Rights Journal 34 ('Theorising Time'). Other examples of excessive regulation of abortion in the name of ensuring safety include the requirement in Maharashtra for there to be a blood bank within 5km of the abortion facility, and the requirement in Delhi and Haryana for the floor area, architectural plans, and provision of car parking to be submitted before registration, noted in Hirve (n 743) 117.

<sup>962</sup> International Campaign for Women's Right to Safe Abortion, 'India – Sexual Abuse of Girls Followed by Refusal of Abortion: Adding Insult to Injury' (4 August 2017) <<https://www.safeabortionwomensright.org/news/india-sexual-abuse-of-girls-followed-by-refusal-of-abortion-adding-insult-to-injury/>> accessed 6 May 2021; British Medical Association, 'The Removal of Criminal Sanctions for Abortion' 2 <<https://www.bma.org.uk/media/1963/bma-removal-of-criminal-sanctions-for-abortion-position-paper-july-2019.pdf>> accessed 6 May 2021 ('Today, abortion is a safe procedure for which major complications and mortality are rare *at all gestations*'); Nushaiba Iqbal, 'Medical Termination of Pregnancy Act Failing Women Who Need It The Most' *IndiaSpend* (22 October 2019) <<https://www.indiaspend.com/medical-termination-of-pregnancy-act-failing-women-who-need-it-the-most/>> accessed 6 May 2021; Akshi Chawla, 'Why 243 Indian Women Had to Ask a Court for Permission to Abort' *Business Standard* (5 September 2020) <[https://www.business-standard.com/article/health/why-243-women-had-to-ask-a-court-for-permission-to-abort-says-report-120090500257\\_1.html](https://www.business-standard.com/article/health/why-243-women-had-to-ask-a-court-for-permission-to-abort-says-report-120090500257_1.html)> accessed 5 May 2021; Rastogi and Chandrashekhar (n 860) 12.

<sup>963</sup> Chandra et al, Legal Barriers (n 777) 62.

<sup>964</sup> *A Malar v The Principal Secretary* W.P.(MD) No. 22802/2018 and 20675/2018 (Madras High Court, 18 December 2018) (24 weeks); *Mamta Verma v Union of India* (2018) 14 SCC 289 (25 weeks); *A v Union of India* (2018) 14 SCC 75 (26-27 weeks); *Sonali Gaikwad v Union of India* W.P.(C) 929/2017 (Supreme Court, 9 October 2017) (28 weeks).

empirically established that restricting access to legal abortion only compels women to resort to unsafe abortions outside the healthcare system,<sup>965</sup> thus in fact leading to greater risk of threat to their life and health.<sup>966</sup> In the language of the proportionality test, restricting abortion pushes women to seek unsafe abortion, defeating the very aim of preserving their health, rendering it unsuitable for the purpose.

Moreover, restricting abortion is also not necessary to preserve women's health, as there exist alternative, less rights restrictive measures which promote women's health to a 'real and substantial' extent. Take the example of restrictions on the sale of medical abortion drugs. These measures are prompted by the fear that the administration of these drugs over-the-counter by pharmacists without adequate information about the drug and the procedure involved would cause incomplete abortion and excessive bleeding, threatening the health of pregnant women.<sup>967</sup> While a valid concern, as one study notes quoting a senior health official:

the solution does not lie in restricting the sale of MA drugs as it affects the right to a safe abortion method, which provides greater privacy and confidentiality than other methods. Instead...abortions "should be a day-care service and must be anonymous and we must go through the extra-mile to ensure it" to protect the rights of the pregnant person.<sup>968</sup>

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<sup>965</sup> World Health Organisation, 'Safe Abortion: Technical and Policy Guidance for Health Systems' (2012) 90 <[http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf?sequence=1)> accessed 5 May 2021 ('Legal restrictions on abortion do not result in fewer abortions nor do they result in significant increases in birth rates... The principle effect is to shift previously clandestine, unsafe procedures to legal and safe ones'); Gilda Sedgh et al, 'Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008' (2012) 379 *The Lancet* 625; David Grimes et al, 'Unsafe Abortion: The Preventable Pandemic' (2006) 368 *The Lancet* 1908; Fredman, *Comparative Human Rights Law* (n 57) 223; Undurraga, 'Criminalisation under Scrutiny' (n 889) 41-2; Sheldon, 'Modernisation' (n 846) 352.

<sup>966</sup> British Medical Association (n 962); Anibal Faúndes and Iqbal Shah, 'Evidence Supporting Broader Access to Safe Legal Abortion' (2015) 131 *International Journal of Gynecology & Obstetrics* S56.

<sup>967</sup> Chandra et al, 'Legal Barriers' (n 777) 130.

<sup>968</sup> *ibid* 130.

In other words, safeguarding women’s health does not lie in ‘clamping down on chemists as this will only reduce access to prescription sales’,<sup>969</sup> compelling women to turn to unsafe options. Instead, viable alternatives which alleviate the risks of over-the-counter sale of MA drugs—such as the ‘enhancement of the knowledge and skill of the pharmacists’—ought to be adopted.<sup>970</sup>

When restricting abortion is neither suitable nor necessary to preserve women’s health, why does the law on abortion, then, adopt this route? Siegel argues that woman-protectionist arguments for restricting abortion (as in India) draw persuasive force from familiar stereotypes about women’s agency:

The common law of coverture long excused women from responsibility while limiting their autonomy. In depicting women as lacking capacity to make independent decisions and justifying restrictions on women’s choices as necessary to protect their welfare, these ancient traditions of gender paternalism [are perpetuated].<sup>971</sup>

The strength of this stereotype comes through when abortion decision-making post 20-weeks is examined. Cases show that once this limit is crossed, and medical opinion indicates risk from termination, the woman’s decision to terminate is automatically rendered irrelevant.<sup>972</sup> She is not consulted to enquire whether she would want to continue with the pregnancy or not, taking into account the medical risk from termination.<sup>973</sup> One would imagine that if informed that termination

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<sup>969</sup> Bela Ganatra et al, ‘Availability of Medical Abortion Pills and the Role of Chemists: A Study from Bihar and Jharkhand’ (2005) 13(26) *Reproductive Health Matters* 65.

<sup>970</sup> Tania Boler et al, ‘Medical Abortion in India: A Model for the Rest of the World’ (Marie Stopes International, 2009) 8 <<https://www.msichoice.org/media/2131/medical-abortion-in-india.pdf>> accessed 24 April 2022.

<sup>971</sup> Siegel, *Woman-Protective Abortion Restrictions* (n 837) 1306 ; David Gans, ‘Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law’ (1995) 104 *The Yale Law Journal* 1902–3; Sheldon, *Modernisation* (n 846) 345; Pizzarossa (n 757) 51.

<sup>972</sup> *R v Haryana* (n 325) [37]-[38]; *Sikander* (n 819); *Poornima Devu* (n 302) [91]; *L v Karnataka* 2019(1) AKR 848 [7]; *Alakh Alok Srivastava v Union Of India* W.P.(C) No. 565/2017 (Supreme Court, 28 July 2017); *Varshaben Hanubhai Gobil v State Of Gujarat* SCA No. 1637/2013 (Gujarat High Court, 31 May 2013).

<sup>973</sup> There are cases where this form of consultation does happen, and women assess the risk from termination and decide to go ahead with it anyway. For instance, see: *Rajashri Chadar v Union of India* W.P.(C) 13728/2017 (Bombay High Court, 18 December 2017); *Mandakini Bele v Union of India* W.P.(C) No. 420/2019 (Bombay High Court, 15 January 2019); *Kavita Wahule v State of Maharashtra* W.P.(C) No. 400/2019 (Bombay High Court, 16 January 2019);

would endanger her life, she might choose not to terminate, to avoid risk to life. Or, she might decide to go ahead with the termination, despite the medical risks of it, after assessing the risk from termination against the harm from continuation of pregnancy. In fact, medical decision-making in other contexts operates on this basis. The Indian Medical Council Regulations 2002 limit the doctor's role to ensuring that 'the patient, his relatives or his responsible friends have such knowledge of the patient's condition as will serve the best interests of the patient and the family',<sup>974</sup> with the final decision resting with the patient. Doctors are also prohibited from 'arbitrarily refusing treatment to a patient', unless a patient is suffering from an ailment which is not within their range of experience. Even then, they are under an obligation to refer the patient to another physician.<sup>975</sup> In contrast, in the abortion context, the State—through the doctor—is allowed to decide that certain abortions are too dangerous for the woman, replacing her as decision-maker, ignoring her assessment of risk, and denying her medical care.

The woman's health justification thus collapses under the proportionality assessment. Restricting abortion is neither suitable nor necessary to preserve women's health. Yet, India's law on abortion adopts this route to achieve the aim *because of* stereotypes about women as untrustworthy decision-makers. At this junction, the role of Article 15 within the constitutional home becomes especially prominent. Article 15, as Chapter 3 shows, finds suspect a law perpetuating pernicious stereotypes about women, even if it seeks to promote a legitimate aim. This is why despite recognising that reducing the threat of sexual harassment faced by women is a legitimate aim, the use of protectionist employment laws prohibiting their employment in certain industries as the means to achieve the said aim has been struck down under Article 15.<sup>976</sup> Article

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*Paramjeet Kaur v State of Punjab* W.P.(C) 2181/2018 (P&H High Court, 7 February 2018). However, this is not the rule, and happens only on an ad-hoc basis.

<sup>974</sup> Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, reg 2.3

<sup>975</sup> *ibid* reg 2.1.1

<sup>976</sup> *Anuj Garg* (n 643).

15 is better able to smoke out these assumptions because of the interests it protects constitutionally, as identified in Chapter 3: an individual's interest in redressing group-based disadvantage, including through targeting direct or indirect acts entrenching stigma (or stereotype) arising from group membership. In contrast, Article 21 tends to gloss over stereotypes underlying laws, as the interests it protects are simply an individual's interests in preserving her life, physical and mental health and her interest in making decisions central to her sense of self, including decisions involving her body. In other words, the distinct interests protected by the two provisions means that a stereotyping analysis lends itself better to Article 15 rather than Article 21. Thus, the synthesis between Articles 21 and 15, compared to Article 21 alone, fortifies the proportionality test. It unearths, and rejects, constitutionally suspect assumptions underlying restrictions on abortion imposed allegedly to promote women's health.

### C. Foetal Potentiality: Operation of Motherhood Narratives

The second justification offered for the architecture of the law on abortion in India is the State interest in protecting potential foetal life, or 'foetal potentiality'. It could be argued that applying the proportionality test to this interest pits women's rights against foetal interests, which is undesirable. Pitting one against the other allows the State to set the two up in opposition. This ignores that the two may overlap significantly:

Many women have abortions as a desperate act of love for their unborn children...Many abortions occur because the woman needs to try to give herself a life. But many also occur because the woman faces the fact that she cannot give this child a life. Women's impotence to make this not so may make the decision tragic, but it is nonetheless one of absolute realism and deep responsibility as a mother.<sup>977</sup>

Placing the woman and the foetus within an adversarial relationship also makes it easier to vilify the woman seeking an abortion, especially with the foetus being seen as 'innocent',<sup>978</sup> 'vulnerable'

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<sup>977</sup> MacKinnon, Reflections (n 66) 1318.

<sup>978</sup> Alison McColloch, 'The Rise of the Foetal Citizen' (2012) 26(2) Women's Studies Journal 21.

and ‘voiceless’:<sup>979</sup> a ‘pure soul’.<sup>980</sup> This, in turn, paves the way for the State to restrict women’s rights to protect foetal interests:<sup>981</sup> ‘the more rights the unborn receive, the fewer rights the woman carrying the fetus is entitled to’.<sup>982</sup>

In response, it is important to remember that the proportionality test is the standard of review applicable to violations of Articles 21 and 15; its application within the Thesis is thus less a normative choice and more a doctrinal requirement. At the same time, the proportionality test can be applied in a way that does not fall into the trap of reductively pitting the woman against the foetus. As seen below, the suitability and necessity limbs of the proportionality test reveal that measures supporting women through guaranteeing them ‘real and effective’ reproductive decision-making are also more effective in protecting foetal potentiality than measures restricting women’s rights. And, to the extent that the proportionality test, in its final limb, requires one to be balanced against the other, the synthesis ensures that women’s rights are not disregarded or devalued within the balance.

Now, moving to applying proportionality to foetal potentiality. At the outset, it is crucial to note that Indian law does not recognise the foetus as possessing a right to life. Though two members of the Parliament in 1971 and one member in 2020 opposed the MTPA on the basis that abortion is ‘virtually murder’<sup>983</sup> and a ‘crime against humanity’,<sup>984</sup> their objections were rejected,

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<sup>979</sup> Faith Agostinone-Wilson, ‘Abortion through the Lens of Fetal Personhood’ in Faith Agostinone-Wilson (ed) *Enough Already! A Socialist Feminist Response to the Re-emergence of Right Wing Populism and Fascism in Media* (Brill 2020).

<sup>980</sup> Jean Heriot, ‘Fetal Rights versus the Female Body: Contested Domains’ (1996) 10(2) *Medical Anthropology Quarterly New Series* 185.

<sup>981</sup> *ibid* 181; Johnsen (n 437) 600.

<sup>982</sup> Agostinone-Wilson (n 979); McCulloch (n 978) 20; Johnsen (n 437) 610.

<sup>983</sup> 1971 Debates (n 756) (MM Joseph; Muhammad Sheriff).

<sup>984</sup> 2020 Debates (n 759) (Dean Kuriakose).

pointing out that ‘there is no violation of [the right to life] in *any* manner’.<sup>985</sup> Similarly, in *Nand Kishore Sharma*,<sup>986</sup> responding to a constitutional challenge to the MTPA for violating foetal right to life under Article 21, the Rajasthan High Court refused to ‘enter upon a debate as to when foetus comes to life or the larger question touching upon the ethics of abortion’.<sup>987</sup> In *High Court on its Own Motion*,<sup>988</sup> the Bombay High Court went one step further, holding that ‘*an unborn foetus is not an entity with human rights...* A child when born and takes first breath, is a human entity’.<sup>989</sup> Some High Court decisions have quoted extensively from religious texts, medical textbooks and comparative law sources pointing to a foetal right to life, and treating abortion as taking away such life.<sup>990</sup> Yet, none of these decisions have affirmatively held that the foetus, at any stage of the gestation period, is an entity with a right to life under the constitutional or statutory framework in India. However, this does not imply that foetal interests are irrelevant in the legal regulation of abortion. The Supreme Court, in *Suchitra Srivastava*,<sup>991</sup> held that the State has a ‘compelling interest’ in protecting the ‘prospective child’ or the ‘potentiality of human life’ which then places ‘reasonable restrictions’ on the reproductive rights of the woman through the MTPA.<sup>992</sup>

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<sup>985</sup> *ibid* (Dr. Harshvardhan) (emphasis added). Though Chandra et al, *Legal Barriers* (n 777) 57 note doctors interviewed as opining that abortions are ‘ethically unadvisable’; no woman should have the right to an abortion; abortion is wrong and the pregnancy should be carried to term; ‘God is watching’, women will suffer for the rest of their lives if they get an abortion; and asking women ‘do you want to kill your child?’. By allowing doctors to be decision-makers, these religious beliefs are given space within the law, even though the *law* itself does not see the foetus as a human being.

<sup>986</sup> *Nand Kishore* (n 298).

<sup>987</sup> *ibid* [4]. For an overview of the ethical arguments on when the foetus attains personhood, see J Herring and I Goold, *Great Debates in Medical Law and Ethics* (Palgrave 2014) 137–48.

<sup>988</sup> *High Court on its Own Motion* (n 320).

<sup>989</sup> *ibid* [15], [20] (emphasis added).

<sup>990</sup> *Jacob* (n 744); *Ashaben* (n 766).

<sup>991</sup> *Suchitra Srivastava* (n 34).

<sup>992</sup> *ibid* [11]; Cited with approval in *Poornima Devu* (n 302) [87] and *Bhatou* (n 761) [6].

One such accepted ‘reasonable restriction’ is the imposition of gestational limits. In *R v Haryana*,<sup>993</sup> the P&H High Court ‘balanced’ the ‘right of the mother’ with the ‘right of the unborn’: ‘When pregnancy has progressed to *a point* where the *foetus has become viable*, one is compelled to view the situation from the point of the woman as well as the *potential child*’.<sup>994</sup> Note here that viability is not seen as the point of personhood, but the point at which potentiality of the foetus comes into the ‘balance’. Following on, in *Suparna Debanath*,<sup>995</sup> where the request for termination was brought at 26 weeks, the Calcutta High Court observed:

There is always a difficulty in choosing a precise point when the unborn gets a right to life. *The right answer may lie in accepting that there are degrees of right to life and the foetus gets a stronger right to life as it develops in the mother's womb.* The more it develops, the more difficult it becomes to take a decision to abort the same.

Another ‘reasonable restriction’ is the presence of conditions for abortions within the MTPA, as observed by the Supreme Court in *Suchitra Srivastava*:

in the case of pregnant women there is also a “*compelling state interest*” in protecting the life of the prospective child. *Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled.*<sup>996</sup>

Thus, in light of State interest in protecting potentiality of the foetus, women are allowed abortions only if they meet specific conditions. And, the conditions are of a certain high threshold—threat to life, or *grave* injury to physical or mental health, especially on account of rape or foetal anomaly—because in other situations, women’s rights are outweighed by foetal potentiality. Further, the criminalisation of abortion is itself typically a restriction introduced to protect foetal potentiality.<sup>997</sup>

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<sup>993</sup> *R v Haryana* (n 325).

<sup>994</sup> *ibid* [33.4] (emphasis added).

<sup>995</sup> *Suparna* (n 776).

<sup>996</sup> *Suchitra Srivastava* (n 34) [11] (emphasis added).

<sup>997</sup> Undurraga, *Criminalisation under Scrutiny* (n 889) 42; Sheldon, *Modernisation* (n 846) 351; Erdman, *Theorising Time* (n 961) 31.

As the first step, is foetal potentiality an aim that the law can legitimately pursue? I only ask the question here, and air some constitutional concerns; I do not definitively answer it. What, then, makes an aim illegitimate? Protectionism has not been accepted as a legitimate aim by courts in light of its effect in ‘perpetuating the oppression of women’,<sup>998</sup> an effect contrary to the interests protected by the ‘equality code’ which aims to redress disadvantage experienced by groups of ‘citizens who [have] *suffered historical disadvantage*, whether it be of a political, social, or economic nature’.<sup>999</sup> It could be argued that laws recognising foetal potentiality have a similar effect, influencing whether it ought to be seen as a legitimate aim or not.<sup>1000</sup>

Taking into account the location of the foetus within the body of women and the patriarchal institution of motherhood in India within which women unilaterally perform responsibilities of childcare, any legal measure recognising foetal potentiality, and protecting it, necessarily affects women, and most affect them adversely. Take the example of restrictive abortion laws. *At the minimum*, they require the woman to provide bodily assistance to the foetus, to keep it alive till birth. In no other context does the law expect such assistance of another individual. The law does not mandate that one jump into a river to save a child from drowning. Closer to the context of pregnancy, the law does not require that a parent run into a burning house to rescue a child, or compel a parent to donate a kidney to a child who needs one.<sup>1001</sup> Of course, a parent might willingly go into a burning house or donate a kidney to save her child, just like a

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<sup>998</sup> *Anuj Garg* (n 643) [44], [45]; *Joseph Shine* (n 350) [47], [56] (Chandrachud J.).

<sup>999</sup> *Navej Jobar* (n 32) [15] (Malhotra J.) (emphasis added).

<sup>1000</sup> For example, some authors argue that the status that is conferred upon the foetus by the law ought to depend on the effect of such status on competing values: Johnsen (n 437) 599; Lynn Morgan, ‘Fetal Relationality in Feminist Philosophy: An Anthropological Critique’ (1996) 11 *Hypatia* 47–70.

<sup>1001</sup> Pointing out that restrictive abortion laws compel women to be ‘good Samaritans’, an obligation not required in other contexts: Judith Thomson, ‘A Defense of Abortion’ (1971) 1 *Philosophy & Public Affairs* 47; Regan (n 88) 1569; Katha Pollitt, ‘Fetal Rights’: A New Assault on Feminism’ (1990) 26 *Nation* 411 (‘at present, no court would require a parent to have surgery to benefit a two-year-old’); The ‘good Samaritan’ argument has been critiqued. See Hendricks, *Body and Soul* (n 72) 351–2 and Herring and Goold (n 987) 148–52. However, it remains useful to highlight the unique nature of responsibility the law on abortion places on pregnant women.

pregnant woman, who desires the pregnancy, willingly provides her body to nurture the foetus. However, at issue here is an unwanted pregnancy, not a wanted one. Despite refusing to impose a similar responsibility in other analogous contexts, the law on abortion expects pregnant women to protect foetal potentiality in *this* manner.<sup>1002</sup> Crucially, this responsibility exists irrespective of whether women give up the child for adoption after birth or not.

Measures recognising foetal potentiality thus represent a ‘powerful form of objectification’, viewing women as nothing more than ‘vessels for carrying the foetus’. They deny women subjectivity and force them to the margins of the abortion question.<sup>1003</sup> ‘the more the fetus is hypostatized and catches public imagination, the more the pregnant woman is treated as its mere container and, eventually, as its potential adversary and threat’.<sup>1004</sup> The recognition of foetal potentiality within the law also typically subjects women to the control of the State, with their actions being placed under intensified surveillance:<sup>1005</sup> ‘an intimate female experience—namely, the coming of a child—is turned into a matter of medical and public administration’.<sup>1006</sup> For instance, pregnant women may be sanctioned criminally for consuming drugs and alcohol when pregnant, or forced to have blood transfusions and caesareans for the benefit of the foetus,<sup>1007</sup> measures

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<sup>1002</sup> McDonagh, *Next Step After Roe* (n 160) 1188; Sunstein, *Neutrality* (n 70) 34; MacKinnon, *Reflections* (n 66) 1320.

<sup>1003</sup> Agostinone-Wilson (n 979); Monica Casper, *The Making of the Unborn Patient: A Social Anatomy of Fetal Surgery* (Rutgers University Press 1998) 16.

<sup>1004</sup> Silja Samerksi, ‘Pregnancy, Personhood and the Making of the Fetus’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (OUP 2016) 700.

<sup>1005</sup> Agostinone-Wilson (n 979).

<sup>1006</sup> Samerksi (n 1004) 702.

<sup>1007</sup> Johnsen (n 437) 606:

She could also be held liable for any behavior during her pregnancy having potentially adverse effects on her fetus, including failing to eat properly, using prescription, non-prescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease or workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using a general anesthetic or drugs to induce rapid labor during delivery.

‘linked to the continued metamorphosis of embryo into person, and person into citizen’.<sup>1008</sup> In essence, ‘[s]eparate fetal status *of any sort*...risks further entrenchment of women's inequality’.<sup>1009</sup>

Of course, not all measures protecting foetal potentiality have this effect on women. Below, I point to measures which both guarantee women ‘real and effective’ reproductive decision-making and, in turn, protect foetal potentiality. However, these measures are less likely to be adopted by States due to their financial implications,<sup>1010</sup> meaning that measures protecting foetal potentiality are *most likely* to perpetuate women’s oppression. At the same time, with improvements in medical technology, the point of viability—where foetal potentiality comes into existence<sup>1011</sup>—is pushed earlier along the gestation period,<sup>1012</sup> implying that these effects are triggered sooner. And, foetal potentiality could easily, in theory, slip into a recognition of the foetal right to life, though in India’s socio-political context, where abortion is seen as a tool of population control,<sup>1013</sup> that appears less likely. Foetal right to life will only exacerbate the risk of the adverse impact borne by women as bearers of foetuses. In light of these grave constitutional concerns, the ready acceptance of foetal potentiality as a legitimate aim must, at the very least, be interrogated.

However, even if foetal potentiality is seen as a legitimate aim,<sup>1014</sup> restricting abortion is not suitable as the means to achieve this aim. As I pointed out with respect to the women’s health

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<sup>1008</sup> McCulloch (n 978) 17.

<sup>1009</sup> MacKinnon, Reflections (n 66) 1315 (emphasis added).

<sup>1010</sup> See Chapter 4, Part IV(C).

<sup>1011</sup> The viability standard was endorsed in *R v Haryana* (n 325) [33.4].

<sup>1012</sup> Herring and Goold (n 987) 142.

<sup>1013</sup> Menon (n 785) 373–4; Patel (n 743) 702–3; Madhavan, Aborting Reproductive Justice (n 784) 145; 1971 Debates (n 756) (Shri J M Gowder; Dr. Melkote), though the State vehemently denies this claim, see 1971 Debates (n 756) (Shri DP Chattopadhyaya).

<sup>1014</sup> Accepted, for instance, by Erdman, Theorising Time (n 961) 31 and Veronica Undurraga, ‘Proportionality in the Constitutional Review of Abortion Law’, in Joanna Erdman et al (ed), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2019) 83 (‘Proportionality’).

justification, empirical evidence shows that even the most stringent attempts to enforce restrictive abortion laws will not succeed in all cases. Instead, they typically push the abortion seeker outside the healthcare system, and towards unsafe abortions.<sup>1015</sup> That is, restrictive abortion regimes do not help protect the foetus; they only harm the woman. Despite this, the continuing insistence on restricting abortion as the means to protect foetal potentiality, Undurraga argues:

suggests that the underlying rationale...is not—or at least not only—the protection of the constitutional right to life, but something less articulated and more difficult to grasp...*conceptions on gender relations and the place of women in society*.<sup>1016</sup>

Similarly, restrictive abortion laws are not necessary to protect foetal potentiality. The State often has a variety of methods at its disposal for this purpose. Some methods support women in their efforts to bear and raise a healthy child while others subject women to State coercion in their capacity as potential mothers.<sup>1017</sup> For instance, to reduce the exposure of the foetus to lead, the State can eliminate the use of lead-based paint in public housing, introduce requirements or incentives for its removal within private housing, and improve regulations governing auto emissions and employee exposure to toxic conditions in workplaces. Or, the State can pursue the same aim by excluding (or allowing the exclusion of) fertile women from jobs presenting a risk to lead exposure. The latter imposes the costs of protecting potential foetal life solely on women, while the former distributes them across the community as a whole.<sup>1018</sup>

Now, extend this analogy to abortion. As discussed earlier, non-use of contraception, absence of State and familial support for childcare and violence against women—in other words, structural disadvantage experienced by women within patriarchal motherhood—are significant

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<sup>1015</sup> See (n 965); See also Faúndes and Shah (n 966) S57-8 noting that liberalising abortion need not increase rates of abortion, but in fact, has been empirically noted to reduce abortion rates, due to open and honest conversation on post-abortion contraception, bringing down the chance of repeat abortions.

<sup>1016</sup> Undurraga, *Criminalisation under Scrutiny* (n 889) 43; Sunstein, *Neutrality* (n 70) 38.

<sup>1017</sup> Siegel, *Reasoning From the Body* (n 232) 345.

<sup>1018</sup> *ibid* 346; Undurraga, *Criminalisation under Scrutiny* (n 889) 48.

drivers of abortions in India (though not the only drivers, as acknowledged above). Against this, the State can protect foetal potentiality in two ways. First, through measures redressing such group-based disadvantage, for instance by ensuring access to temporary contraception, providing support for childcare, and eliminating violence against women. These measures would reduce the number of abortions being sought, and in turn protect the potential life of foetuses.<sup>1019</sup> This is, of course, with respect to the unborn *in general* rather than a specific foetus in a given case. These measures also distribute the costs of foetal protection amongst the community. Alternatively, the State can protect foetal potentiality through restricting abortions, thereby imposing these costs on women alone. When placed side-by-side, the first alternative is evidently less restrictive of women's rights to life, personal liberty and non-discrimination than the second. However, does the first alternative achieve the State's aim of preserving foetal potentiality in a 'real and substantial manner'? In fact, the first fares even better because 'lower abortion rates are not achieved through criminalisation, but through preventative policies'<sup>1020</sup> like the ones suggested above:

there is a wealth of evidence that suggests that a concern for protecting fetal life can be *more effectively* pursued through policies that attack the incidence of unwanted pregnancy (for example, through improving the quality of sex education and contraceptive provision, and making motherhood a more realistic possibility for women struggling to balance childcare alongside other commitments).<sup>1021</sup>

This does not imply that alternative measures—like access to contraception, or adequate childcare—are important only, or even primarily, because they protect the potentiality of the foetus. To the contrary, these measures assist women in preventing an unwanted pregnancy or offer them support post-pregnancy. However, it cannot be denied that they have the additional

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<sup>1019</sup> Centre for Reproductive Rights, 'Whose Right to Life' 12-13 <[https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL\\_3%2014%2012.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf)> accessed 24 April 2022.

<sup>1020</sup> Undurraga, *Criminalisation under Scrutiny* (n 889) 41.

<sup>1021</sup> Sheldon, *Modernisation* (n 846) 358 (emphasis added); Undurraga, *Proportionality* (n 1014) 88; MacKinnon, *Reflections* (n 66) 1320 ('The *most effective route* to protecting the fetus—given illegal abortion, *perhaps the only effective route*—is supporting the woman') (emphasis added).

effect of preserving foetal potentiality simply by reducing the need for abortions. Thus, in the language of the proportionality test, these alternative measures offer less rights restrictive—and more effective—means to achieve the State aim of protecting foetal potentiality. To be clear, it is not my claim that these alternatives ought to eventually *replace* abortions, such that abortions are seen as a temporarily necessary evil. Instead, I argue that if certain alternatives—such as childcare—exist, *some* women might decide not to have an abortion; these alternatives thus enhance *these* women’s reproductive decision-making. These alternatives also ensure that the State does not simply rely on the availability of abortion to rid itself of the responsibility of ensuring access to contraception and childcare, and eliminating violence against women.<sup>1022</sup> For other women, abortions continue to remain necessary, *irrespective of the presence of alternatives*. In other words, I see these alternatives as existing *alongside* abortions, enhancing the range of options available to women, and denoting ‘real and effective’ State support for reproductive decision-making.

As with suitability, the State’s continued insistence on restrictive abortion laws as the means to protect foetal potentiality despite the presence of less rights restrictive—and more effective—alternatives, is the State resorting to the more convenient option of:

promoting the welfare of the unborn only when it can use women’s bodies and lives to realise the potential of unborn life—and not when the community as a whole would have to bear the costs of its moral preferences’.<sup>1023</sup>

And, the State is able to fall back on this option, and justify it as necessary, because it sees women as mothers who ought to, and would be happy to, bear the costs, whether the pregnancy is wanted or unwanted.

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<sup>1022</sup> West (n 56) 1409-1411.

<sup>1023</sup> Siegel, *Reasoning from the Body* (n 232) 366, 347; Pollitt (n 1001) 411 (abortion restrictions ‘allow the government to appear to be concern about babies without having to spend any money, change any priorities or challenge vested interests’).

Along similar lines, the motherhood narrative also influences the fourth stage of the proportionality test. In ‘balancing’ foetal potentiality against women’s rights, restrictive abortion laws typically underestimate, or even disregard, the effect of foetal-protective regulation on women:

a latent assumption that motherhood is women’s ‘normal’ condition can easily render state actors oblivious to the life-consuming consequences of forcing women to perform its work—just as a latent assumption that motherhood is women’s ‘deserved’ condition will cause indifference to the burdens the legislation will inflict. *[A] legislature may not decide that it is reasonable to save unborn life by compelling pregnancy ‘but for’ the archaic or stereotypic assumptions about women it holds.*<sup>1024</sup>

India’s law on abortion is no exception. As Chandra et al note, under India’s law, harm to women from carrying to term an unwanted pregnancy is often ‘minimised’:

unwanted pregnancy is seen by courts and medical boards as a “mere” nine-month episode, with no lasting impact; this is also evident in the oft-quoted “solution” to women’s inability to access safe abortion as being to deliver and give the child up for adoption.<sup>1025</sup>

As an example, consider *Suparna Debanath*<sup>1026</sup> where termination of pregnancy was sought under the MTPA at 26 weeks on account of foetal anomaly. The request for termination was denied by the Calcutta High Court, which struck the ‘balance’ in favour of the foetus: ‘At this advanced stage of 26 weeks, the right of the foetus to live...*outweighs* the mental trauma that *may be* suffered by the mother in giving birth to the said child’.<sup>1027</sup> In ‘balancing’, the Court disregarded the physical burdens an unwanted pregnancy imposes on the woman and the difficulties involved in providing care for a disabled child. And, the Court underestimated the extent of harm to mental health, by holding that the woman ‘may’ suffer mental health harm, despite explicit claims made to that effect

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<sup>1024</sup> Siegel, Reasoning from the Body (n 232) 362-3 (emphasis added); Undurraga, Proportionality (n 1014) 92-3.

<sup>1025</sup> Chandra et al, Legal Barriers (n 777) 69.

<sup>1026</sup> *Suparna* (n 776).

<sup>1027</sup> *ibid* (emphasis added).

by the petitioner. This does not imply that the harm to the foetus is illusory, but only that the law often treats particular measures—here, restricting abortion under the MTPA—as the proportionate means to protect foetal potentiality *because of* stereotypical assumptions about women’s maternal role. These assumptions drive the law to impose the cost of protecting foetal potentiality solely on women, and simultaneously undervalue such cost: ‘only by viewing pregnancy and motherhood as part of the natural order can a legislature dismiss these costs as modest in size’.<sup>1028</sup>

Thus, as with the women’s health justification, the foetal potentiality justification also disintegrates under a structured proportionality assessment. Restrictive abortion laws are neither suitable nor necessary in protecting foetal potentiality, even if such protection is an aim the law can legitimately pursue. Yet, the State clings to restricting abortion to promote foetal potentiality under the influence of assumptions about women’s maternal role. These assumptions also direct how the law, and third-party decision-makers the law authorises, balance foetal potentiality against women’s rights, with the law often disregarding or devaluing harm to the latter.

In response, it could be argued that restrictive abortion laws impose on women a unique responsibility to care for foetuses not because of underlying assumptions about women as mothers but due to particularities of women’s bodies: ‘the fact that women alone may gestate life [appears to] provide a sufficient and unimpeachable reason for regulating their conduct’.<sup>1029</sup> At the outset, it is important to recognise that assumptions about gender roles are often closely tied up with physical differences between the sexes, with the ‘rhetoric of biological difference’ being deployed to make any given societal arrangement seem ‘natural’.<sup>1030</sup> In other words, any justification relying

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<sup>1028</sup> Siegel and Siegel (n 64) 163.

<sup>1029</sup> Siegel, Reasoning from the Body (n 232) 332.

<sup>1030</sup> Kenney (n 442) 254–5; Sunstein, Neutrality (n 70) 32; Siegel, Woman-Protective Abortion Restrictions (n 837) 1045.

on women's bodies is also likely to implicitly rely on assumptions about women's roles. Even otherwise, this justification would pass muster only under a formal equality reading of Article 15(1), with women's difference—here, their biological ability to reproduce—rendering them unlike, and thus justifying their differential (and detrimental) treatment. The substantive equality reading, in contrast, aims not to offer like treatment to likes, but to redress women's group-based disadvantage. As a result, it prohibits the use of women's biology to perpetuate their disadvantage. A doctrinal parallel can be seen in *Sabarimala*,<sup>1031</sup> where women's biological ability to menstruate was not used to justify their exclusion from the temple. Similarly, in *Neetu Bala*,<sup>1032</sup> the discriminatory act of refusing to hire a woman deemed 'unfit for service' on account of pregnancy was not justified by falling back on women's reproductive ability. Extending this reasoning to the abortion context, that women's bodies dictate that they bear this unique responsibility towards foetuses is no longer a *constitutionally* acceptable justification under Article 15 for a law discriminating against women.

A proportionality assessment also assists greatly when thinking through tricky questions about the permissibility of disability-selective or sex-selective abortions. The latter is especially relevant in India, with stringent prohibitions on sex determination in place<sup>1033</sup> to tackle India's disparate sex ratio.<sup>1034</sup> Preventing discrimination against persons with disabilities or girl children is undoubtedly a legitimate aim. However, are restrictions on abortion suitable to achieve the aim of preventing disability or sex selective abortions, or do they simply make pregnant women worse

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<sup>1031</sup> *Indian Young Lawyers* (n 397).

<sup>1032</sup> *Neetu Bala* (n 615).

<sup>1033</sup> Pre-Conception and Pre-Natal Diagnostic Techniques Act 1994.

<sup>1034</sup> Anita Jain, 'Sex Selection and Abortion in India' (2013) 346 *BMJ* 8.

off?<sup>1035</sup> As Jain and Shah note, restrictions on abortion and monitoring of pregnant women could contribute to women's low status, thus perpetuating rather than curtailing son-preference, and sex-selection.<sup>1036</sup> Moreover, are there less rights-restrictive alternatives that achieve the stated aim in a 'real and substantial' sense? These could include forms of State support for bringing up children with disabilities, measures eliminating wider societal discrimination against persons with disabilities or girl children and raising awareness to change mindsets,<sup>1037</sup> in essence redressing 'root causes' behind such abortions.<sup>1038</sup> And crucially, in balancing the benefit from the measure—its role in preventing discrimination—against the harm caused to women, does the measure understand such harm appropriately, including within its assessment harm caused by discrimination against women through restrictions on abortion?

Going back now to the synthesis. As I argued with respect to the women's health justification, Article 21, as the sole constitutional home for reproductive rights, tends to gloss over assumptions about women underlying the foetal potentiality justification. Tellingly, no existing case on the right to abortion under Article 21 identifies these stereotypes. However, Article 15, when introduced within the constitutional home, would remedy this shortcoming. Working to redress group-based disadvantage, which commonly manifests through stereotypes about

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<sup>1035</sup> Monica Gupta, 'Is banning sex-selection the best approach for reducing prenatal discrimination?' (2019) 15(3) *Asian Population Studies* 319-36; Aksel Sterri, 'Sex selection in India: Why a ban is not justified' (2020) 20(3) *Bioethics* 150-56.

<sup>1036</sup> Jain and Shah (n 77) 36.

<sup>1037</sup> World Health Organisation, 'Preventing Gender Biased Sex-Selection' (2011) v <[http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460\\_eng.pdf?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460_eng.pdf?sequence=1)> accessed 24 April 2022; Carole Petersen, 'Reproductive Autonomy and Laws Prohibiting "Discriminatory" Abortions: Constitutional and Ethical Challenges' (2019) 96 *University of Detroit Law Review* 619-26.

<sup>1038</sup> Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women, Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities (2018) <<https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations>> accessed 24 April 2022.

members of groups, Article 15 would exhume the role of the motherhood narrative in driving State interest in foetal potentiality, and the means it chooses to protect these interests. Once the assumptions are aired, the burden shifts to the State to demonstrate that restrictive abortion laws are suitable, necessary and proportional to protect foetal potentiality *absent* reliance on stereotypes about women. The State also cannot fall back on women's biological particularities to justify placing foetal protective obligations on women alone. The State instead has to discharge its burden by putting forth evidence that it equitably distributes the costs of protecting foetal potentiality, and does not impose them solely on women through compelling their bodily and caring labour. Illustratively, this would require the State to ensure access to affordable and effective birth control; meet pregnant women's medical, nutritional and mental health needs; institute maternity and parental leave, and public daycare; eliminate discrimination against pregnant girls and women in schools and at work; and redress violence against women.<sup>1039</sup>

The synthesis between Articles 21 and 15 thus curtails the discretion offered to the State under the proportionality test. The proportionality assessment rightfully does not replace the State with courts as decision-makers. Instead, it only requires the State to justify the rights-restrictive measure as the suitable, necessary and proportional means to pursue a legitimate aim. That is, even though proportionality offers less discretion to the State than other standards of review—like *Wednesbury* reasonableness—it still offers a degree of leeway to the State to pursue its aim through a range of measures. The State could, for instance, argue that even if restricting abortion is not *the* most effective means of preserving women's health or protecting foetal potentiality, it is one amongst an acceptable range of measures. The court, then, ought to grant the State the discretion to choose the appropriate measure, in light of its democratic legitimacy and institutional expertise. This is only heightened by the budgetary implications the alternate measures discussed above will

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<sup>1039</sup> West (n 56) 1425; Undurraga, *Criminalisation under Scrutiny* (n 889) 47; Siegel, *Reasoning from the Body* (n 232) 367.

have. Arguments of this nature are not novel. They have been made, and accepted, by the Supreme Court in both *Puttaswamy* and *Aadhar*.<sup>1040</sup> The synthesis, however, provides a fitting response to these claims. It rejects outright measures which reflect constitutionally suspect assumptions about women. It thus limits the basket of possible options available to the State, ensuring that the State does not justify a restriction on women's rights by simply pointing to justifications which entrench pernicious stereotypes about women. The synthesis, thus, gives teeth to the limitations analysis.

The arguments in Parts III and IV of the Chapter therefore harness the power of the synthesis to constitutionally challenge India's law on abortion. At the same time, these arguments also perform two additional functions. *First*, Part III constructs a positive case for a constitutional right to abortion, located within the synthesis. This is especially important because a right to abortion has not been explicitly identified within India's statutory or constitutional jurisprudence. Article 21 argues for a right to abortion because abortion is an exercise of an individual woman's self-determination over her body and sense of self, the denial of which affects her health—physical and mental—and life. In contrast, Article 15 argues for the right to abortion because restrictions on abortion perpetuate women's group-based disadvantage along several interacting dimensions; they disadvantage women materially and socio-economically, cement stereotypes about women's roles and capacities, maintain patriarchal structures of oppression, and deny women participation. Further, these forms of disadvantage are most severely entrenched amongst women from marginalised groups. The synthesis thus argues for a right to abortion because it guarantees women's *life and personal liberty*, and *women's* life and personal liberty. *Second*, Part IV provides a constitutional framework to test the validity of restrictions—present or future—placed upon this right to abortion. Apart from demonstrating a legitimate aim, the State bears the burden of proving that the means adopted to fulfil the aim are suitable, necessary and proportionate, without relying on stereotypes about women's roles or capacities, or falling back on their physiological differences

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<sup>1040</sup> Chandra, *Bridge to Nowhere* (n 938) 72-8.

from men. The existing law on abortion in India fails to satisfy this standard. This does not necessarily imply that a new law on abortion ought to be introduced. Abortion can simply be regulated as an ordinary healthcare procedure,<sup>1041</sup> in accordance with existing regulations on registration and licensing,<sup>1042</sup> confidentiality,<sup>1043</sup> sale and advertisement of medicines,<sup>1044</sup> supervision of healthcare services,<sup>1045</sup> and criminal law, where required.<sup>1046</sup> Alternatively, a new law on abortion may be introduced, remedying the constitutional failings of the current law. While prescribing the precise contours of such a law is beyond the scope of the Thesis, Parts III and IV offer a rights framework both to fashion this law, and test any law that the State may introduce.

## V. Interpreting the Law on Abortion

Before holding the law on abortion unconstitutional under the synthesis, courts have another option: interpreting the law in line with the synthesis. Here, I illustrate the potential of the synthesis to expand the interpretation of the law on abortion. I use Section 5 of the MTPA as an example, permitting abortions post 20 weeks only when ‘immediately necessary to save the life of the pregnant woman’. I focus specifically on the meaning of ‘life’ under Section 5. I choose this provision because judicial decision-making under the MTPA has primarily centred around interpreting Section 5; prior to 20 weeks, decision-making typically remains between the medical professional and the woman and does not involve courts. However, the method of interpretation

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<sup>1041</sup> As seen in Canada, after the Supreme Court struck down the criminalisation of abortion in *R v Morgentaler* [1988] 1 SCR 30. For how abortion is regulated in Canada, see W Norman and J Downie, ‘Abortion Care in Canada Is Decided between a Woman and Her Doctor, without Recourse to Criminal Law’ [2017] BMJ 356. A similar approach has been proposed in the United Kingdom, from which India draws its law on abortion: Jonathan Herring et al, ‘Would Decriminalisation Mean Deregulation?’ in Sally Sheldon and Kaye Wellings (eds), *Decriminalising Abortion in the UK* (OUP 2020).

<sup>1042</sup> Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, regs 1.13, 1.4.1, 7.3.

<sup>1043</sup> *ibid* regs 2.2 and 7.14.

<sup>1044</sup> *ibid* reg 6.5

<sup>1045</sup> *ibid* reg 8.2-8.5

<sup>1046</sup> When miscarriage of a wanted pregnancy is caused, reliance may be placed on IPC ss 352 (Assault) and 319-320 (Hurt and Grievous Hurt).

I propose below would equally apply to other provisions, for instance in determining what ‘grave injury to physical or mental health’, assessed in light of ‘actual or reasonable foreseeable circumstances’, ought to mean under Section 3.

Initially, courts interpreted ‘life’ under Section 5 literally, such that abortion was denied unless continuation of pregnancy would cause the death of the pregnant woman.<sup>1047</sup> However, subsequently, courts began to interpret ‘life’ to include cases where continuation of pregnancy would cause injury to physical health (though not death),<sup>1048</sup> or mental health of the woman, specifically pregnancy on account of rape,<sup>1049</sup> and pregnancy involving a substantial foetal anomaly.<sup>1050</sup> And crucially for the argument in this Thesis, courts relied on Article 21 as an interpretative tool to move towards this more expansive reading of ‘life’.<sup>1051</sup> For instance, in *Poornima Devu*,<sup>1052</sup> drawing on the interpretation of ‘life’ and ‘personal liberty’ within Article 21,<sup>1053</sup> the Bombay High Court held:

when it comes to the expression “life” in Section 5 of the MTP Act, we cannot construe the same as restricted to mere physical existence or mere animal existence or mere survival of the pregnant mother. The expression cannot be confined to

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<sup>1047</sup> *Nikhil* (n 776); *Ashaben* (n 766) [4.4]; *Chandrakant* (n 780) [28].

<sup>1048</sup> *Karishma Rai v State of Gujarat* SCrA No 6858/2019 (Gujarat High Court, 24 June 2019); *Mujim Khan v State of Chhattisgarh* W.P.(C) 886/2018 (Chhattisgarh High Court, 3 April 2018); *X v Union of India* (2017) 3 SCC 462 (‘*X v UoI*’); *Geeta Devi v State Of Himachal Pradesh* W.P.(C) 2250/2017 (Himachal Pradesh High Court, 17 October 2017).

<sup>1049</sup> *Bhatou* (n 761); *Venkatalakshmi v State of Karnataka* Civil Appeal No 15378/2017 (Karnataka High Court, 21 September 2017); *Dharmendra v Public Health Department* W.P.(C) No. 13081/2018 (Madhya Pradesh High Court, 5 July 2018); *Sunita Kumari v State of Jharkhand* W.P.(Cr) No. 399/2017 (Jharkhand High Court, 15 October 2017); *Minor Bhagwati v State of Gujarat* SCrA No 5859/2019 (Gujarat High Court, 31 May 2019).

<sup>1050</sup> *X v UoI* (n 1048); *Sajikumar v State of Kerala* W.P.(C) No. 14818/2019 (Kerala High Court, 30 May 2019); *Meera Santosh* (n 35); *Priti Rawal v Union of India* W.P.(C)No. 11940/2017 (Supreme Court, 6 November 2017).

<sup>1051</sup> Gautam Bhatia, ‘Directive Principles of State Policy’ in Khosla, Mehta, Choudhury (eds) (n 22) 652 (‘Directive Principles’) notes how judicial decisions, in harmonising legislation with the Constitution, have adopted a ‘strong form standard’ which allows for any interpretation—no matter how strained—to be preferred if it is consistent with the Constitution and is an intelligible reading of the statute in question (*Balwant Raj v Union of India* AIR 1968 All 14). Sometimes, they have adopted even a ‘modifier review’ where the meaning of legislation itself is to be determined by referring to the background right (*UPSEB v Hari Shankar* 1979 SCR (2) 355).

<sup>1052</sup> *Poornima Devu* (n 302).

<sup>1053</sup> *ibid* [81]-[85].

the integrity of the physical body alone but will comprehend one's being in its fullest sense. That which facilitates fulfillment of life [is] as much within the protection of the guarantee of life. The expression will include the right to live with dignity and not to merely survive with indignity.<sup>1054</sup>

If the expression "life" in section 5(1) of the MTP Act is not to be confined to mere physical existence or survival, then, permission will have to be granted under section 5 (1) of the MTP Act for medical termination of pregnancy which may have exceeded 20 weeks, if the continuance of such pregnancy would involve ***grave injury to the mental health*** of the pregnant woman.<sup>1055</sup>

Through such interpretative expansion, driven by Article 21, courts have brought within 'life' under Section 5 the contingencies listed in Section 3: grave injury to mental and physical health on account of rape or foetal anomaly. Courts have held that being denied termination in these circumstances would compel the woman to lead an 'undignified life', depriving her of her 'fundamental rights of personal liberty and dignified life, as guaranteed under Article 21'.<sup>1056</sup> Such fundamental right as conferred on the petitioner would not allow her to lead and live a life of misery'.<sup>1057</sup>

However, courts have shied away from extending 'life' under Section 5 to include harm to mental health not arising from rape or foetal anomaly. For instance, in *Neelam Choudhury*,<sup>1058</sup> Neelam was subject to continuous physical and mental harassment from her husband and parents-in-law. Though she repeatedly asked her husband to use contraception, he refused to do so. She could not use oral contraceptive pills because she was on medication for epilepsy. As a result, she

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<sup>1054</sup> *ibid* [88].

<sup>1055</sup> *ibid* [105] (emphasis added).

<sup>1056</sup> *Ab v State of Bihar* W.P.(C) No. 590/2018 (Patna High Court, 31 January 2018); *Gausiya Pathan v Union of India* W.P.(C) 13228/2017 (Bombay High Court, 5 December 2017) [5]; *X v State of Maharashtra* W.P.(C) No. 12408/2017 (Bombay High Court, 13 October 2017) [12].

<sup>1057</sup> *Beenu Yadav v Union of India* W.P.(L) No. 3323/2017 (Bombay High Court, 5 December 2017) [6]; *Monisha Mazumdar v Union of India* W.P. No. 13428/2017 (Bombay High Court, 20 December 2017) [5].

<sup>1058</sup> *Neelam* (n 317).

became pregnant. She petitioned for termination at 23 weeks, as she had decided to file for divorce and pursue further education. The Bombay High Court denied her request:

the petitioner is seeking termination of pregnancy based on...her matrimonial discord with her husband, her intention to initiate divorce proceedings and to pursue her career and improve her education qualification...[the] same [is] **not at all recognized** to form basis for accepting the prayer of the petitioner to terminate the pregnancy...[the] petitioner is seeking permission to terminate pregnancy **merely** for...the fact...that she is carrying pregnancy out of her marital life and she is major and educated...the prayer put forth by the petitioner **does not warrant any indulgence** at the hands of this Court.<sup>1059</sup>

Here, Neelam undoubtedly suffered grave injury to mental health from continuation of the pregnancy. The pregnancy itself was unwanted, as it occurred due to her husband's refusal to use contraception. Giving birth to a child could also affect her decision to remove herself from the abusive environment she lived in through a divorce, and hamper her chances at financial self-sufficiency through education. Yet, the Court refused to see this harm as triggering Section 5 by threatening Neelam's 'life', even when interpreted expansively to include harm to mental health. Thus, as an interpretative tool, Article 21 appears to be unable to push the reading of 'life' under Section 5 to include forms of injury to mental health beyond cases of rape and foetal anomaly. Why is this?

A review of judicial decisions indicates that this inability arises on account of concerns about foetal potentiality. In interpreting 'life' under Section 5 to permit abortions beyond 20 weeks, courts appear to be implicitly balancing the woman's rights against the State interest in protecting potential foetal life. This is evident in *Poornima Devu*,<sup>1060</sup> where in discussing the role of Article 21 in reading 'life' under Section 5 expansively, the Bombay High Court made reference to the 'compelling State interest in protecting the right of the prospective child or the potentiality of

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<sup>1059</sup> *ibid* [11]-[17] (emphasis added).

<sup>1060</sup> *Poornima Devu* (n 302).

human life'.<sup>1061</sup> The Court then held this compelling state interest becomes relevant in a case where 'circumstances set out in clauses (i) and (ii) of section 3(2) of the MTP Act'—rape and foetal anomaly—'do not exist and yet the pregnant mother seeks medical termination of pregnancy'.<sup>1062</sup> In other words, the Court observed that where the rape and foetal anomaly contingencies in Section 3 are absent, foetal potentiality entails that 'life' be interpreted restrictively, and abortion be denied under Section 5; any other interpretation would fail to protect such 'compelling state interest'.

As discussed in Part IV, Article 15 is better equipped to challenge the use of restrictive abortion laws—here, through adopting a limiting interpretation of 'life' under Section 5—as the means to achieve the State aim of protecting foetal potentiality. At the outset, Article 15 interrogates whether protecting foetal potentiality ought to be seen as an aim the law can legitimately pursue. It also unveils how assumptions about the maternal role as 'normal' influence the means adopted to preserve foetal potentiality. In Neelam's case, the State could protect foetal potentiality by ensuring that Neelam had adequate access to contraception thus helping her prevent the pregnancy, or by supporting her in bringing up the child, so that she would not have to rely on her husband or his family. Both these options might have removed the need for the abortion. Or, the State could pursue the same aim by denying Neelam an abortion. The latter is easier for the State, as it imposes the cost of preserving foetal potentiality solely on Neelam. And, as Article 15 highlights, such imposition is easily seen as necessary—even in light of existing alternatives—due to motherhood narratives which expect Neelam to perform her maternal role and carry the pregnancy to term. These narratives also influence the 'balancing' of Neelam's rights against the State interest in foetal potentiality, with the Court undervaluing the harm to Neelam from continuation of pregnancy. This is illustrated by the Court's remark that seeking termination

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<sup>1061</sup> *ibid* [87].

<sup>1062</sup> *ibid* [91].

‘merely’ because of ‘her matrimonial discord with her husband, her intention to initiate divorce proceedings and to pursue her career’ would not warrant any indulgence at the hands of the Court. The use of the word ‘merely’ suggests that something exceptional like rape, or foetal anomaly is required for women’s rights to prevail over foetal potentiality beyond 20 weeks. Other forms of harm—say, being forced to stay in an abusive marriage or compromise their education, employment, and financial independence—are seen as ‘normal’, something all women do (or are required to do), and thus trivialised as ‘self-indulgence’.<sup>1063</sup>

Once again note the independent arguments offered by Article 15, how they differ from those under Article 21, and how the two interact to strengthen the constitutional protection granted to Neelam’s abortion decision. Article 21, in line with the individual dimension, interprets ‘life’ under Section 5 as going beyond mere survival because ‘life’ ought to include that which facilitates ‘fulfilment of life’, which is confined not just to the ‘integrity of the physical body’ (bodily component) but also ‘one’s being in its fullest sense’ (identity component).<sup>1064</sup> Article 15, in contrast, reflects the social dimension and argues for an expansive interpretation of ‘life’ because a restrictive interpretation would discriminate against Neelam by perpetuating her disadvantage as a woman (historical component). In refusing termination, a restrictive interpretation would prevent Neelam from pursuing her education and career, disadvantaging her socio-economically, entrench stereotypes about her role as a mother, deny her participation in decisions affecting her, and maintain the patriarchal institution of motherhood, under which she experienced domestic violence, was unable to insist on the use of contraception and would be unilaterally responsible for childcare. Articles 21 and 15, independently, thus capture the whole range of rights violation caused by denying Neelam an abortion under Section 5. At the same time, in synthesis, they capture its full extent. Denying Neelam an abortion is especially wrong because she is a woman, a member

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<sup>1063</sup> Rich (n 185) xvi.

<sup>1064</sup> *Poornima Devu* (n 302) [85].

of a group who has a history of such denial, relevant under Article 15. Neelam's claim of discrimination is, in turn, magnified because it takes away reproductive decision-making, central to her identity as an individual under Article 21. However, Article 21, on its own, is unable to include Neelam's case within the definition of 'life' under Section 5 due to concerns that such interpretation would harm State interest in foetal potentiality. Article 15, on the other hand, resists relying on restricting abortion as the means to preserve foetal potentiality. The synthesis therefore offers a more effective constitutional tool to advance an expansive interpretation of 'life' under Section 5 to grant Neelam an abortion.

In response, it could be argued that such interpretation violates separation of powers. In fact, the initial judicial reluctance to go beyond the literal interpretation of 'life' to mean absence of death was based on courts' concern that interpreting Section 5 expansively would amount to legislating: 'it is not the duty of the Court either to enlarge the scope of the legislation...when the language of the provision is plain and unambiguous.'<sup>1065</sup> However, a purposive interpretation of 'life', relying on Article 21, was subsequently adopted to read the particular contingencies listed under Section 3—grave injury to mental health on account of rape and foetal anomaly—into Section 5.<sup>1066</sup> It is important to note that Section 3 also provides that in assessing grave injury to mental health, a woman's 'actual or reasonable foreseeable environment' be taken into consideration. Judicial decisions have previously included within the relevant 'actual or reasonable foreseeable environment' the fact the petitioner is from 'poor strata of the society and is likely to

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<sup>1065</sup> *Nikhil* (n 776) [19], [25]; *Ashaben* (n 766) [11.2]-[11.4]; *Chandrakant* (n 780) [31].

<sup>1066</sup> *Poornima Devu* (n 302) [45]-[77]; *Ayesha Khatoon v Union of India* W.P.(ST) No36727/2017 (Bombay High Court, 9 January 2018) [15]-[22]. *Ayesha Khatoon* cited to extend 'life' under Section 5 to rape (*Ramesh Rathod v State of Maharashtra* W.P. No. 5289/2018 (Bombay High Court, 11 June 2018) [8]; *Mukesh v State of Madhya Pradesh* W.P. No. 7701/2018 (Madhya Pradesh High Court, 21 April 2018) [12]) and foetal anomaly (*Nirmala Raner v Union of India* W.P. No. 01041/2019 (Bombay High Court, 28 January 2019); *Sarla Jadhav v State of Maharashtra* W.P. No. 1343/2019 (Bombay High Court, 1 February 2019); *Namiratabeji Momin v Union of India* W.P. No. 970/2018 (Bombay High Court, 25 January 2018).

face innumerable mental, physical, social and economic problems in future’,<sup>1067</sup> the absence of social and economic support from husband and an independent source of income,<sup>1068</sup> and the presence of ‘strained relations’ between the husband and wife.<sup>1069</sup> When assessed against this standard, Neelam’s ‘actual or reasonable foreseeable environment’ indicates grave injury to her mental health from continuation of pregnancy. If some parts of Section 3 can be read into Section 5 without violating the constitutional separation of powers, there is no reason that other parts of Section 3 should not be extended, *solely* on account of concerns about separation of powers. State interest in protecting foetal potentiality might be the other reason to treat the two forms of harm differently, with the former being seen as greater than harm to foetal potentiality from termination, and the latter being seen as lesser. However, as set out above, Article 15 would challenge the use of restrictive abortion laws as the means to preserve foetal potentiality, therefore offering a robust response to the role of foetal potentiality in limiting the interpretation of the MTPA.

## VI. Conclusion

The Chapter offers a powerful illustration of the potential of the synthesis between Articles 21 and 15. Using the example of abortion, it shows how the synthesis strengthens the constitutional protection granted to reproductive rights in three central ways. It identifies the whole range and full extent of rights violations caused by the restrictions built into India’s law on abortion. It limits the discretion offered to the State in restricting reproductive rights. And, it uses constitutional rights creatively as a tool to trigger an expansive interpretation of the law on abortion.

This leaves one last question to be answered. In so strengthening reproductive rights, does the synthesis capture the interrelationship between the individual and social dimension? If so, the

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<sup>1067</sup> *X v Govt of NCT of Delhi* W.P.(Crl) No 2008/2013 [9]; *Priya Girishkumar v Principal Secretary* SCA No 93/2013 (Gujarat High Court, 17 January 2013); *Appearance v Chandigarh* SCrA 707/2010 (Gujarat High Court, 7 May 2010).

<sup>1068</sup> *Aarti Rani v State of Punjab* W.P.(C) 4160/2018 (P&H High Court, 21 March 2018).

<sup>1069</sup> *Mangal Dogra* (n 315) [19].

synthesis offers the appropriate constitutional home for reproductive rights, as understood in Chapter 1. Chapter 1 identifies the individual and social dimension as interrelating in two senses, the first of which is relevant here. The two dimensions interrelate in the first sense, Chapter 1 argues, to reinforce the value attributed to reproductive decision-making by women.

The synthesis performs this role in India's constitutional context. It reaffirms the constitutional weight granted to reproductive decision-making by women by *first* identifying that the denial of such decision-making to women not only threatens their life, physical and mental health and disregards their decisional autonomy and bodily integrity, but also perpetuates their group-based disadvantage. Crucially, these harms feed into, and magnify, each other. Women's history of group-based disadvantage aggravates the denial of reproductive decision-making to them. At the same time, the overall centrality of reproductive decision-making to an individual makes discrimination in the reproductive sphere especially wrongful. *Second*, the synthesis prevents the State from smuggling in stereotypes about women to restrict their reproductive decision-making. It thus functions as a constitutional safeguard against disregarding or undervaluing the significance of reproductive decision-making to women. And *third*, the synthesis interprets the law on abortion expansively, to extend it to previously excluded circumstances. It thus offers a wider berth to women's reproductive decisions.

In conclusion, Articles 21 and 15, as the pillars of the synthesis, protect the independent interests represented by the individual and social dimension. At the same time, their interaction, within the synthesis, captures the interrelationship between the dimensions. The Chapter therefore strongly supports the central hypothesis of the Thesis: a shift from Article 21 alone to the synthesis between Articles 21 and 15 as the 'new' constitutional home for reproductive rights in India.

## CHAPTER 5

### Preventable Maternal Mortality and Morbidity: The State's Positive Duties

#### I. Introduction

Having illustrated the power of the synthesis through the example of India's law on abortion, in Chapter 5 I consider a second example: India's high rates of preventable maternal mortality and morbidity. On the one hand, Chapter 5 mirrors the arguments in Chapter 4. I assess the contribution of the synthesis in shaping both the rights violation identified as being caused by State failure to redress preventable maternal mortality and morbidity, and the Constitution's response to the State's justifications for such failure. Through this second example, I thus confirm the ability of the synthesis to strengthen the constitutional protection granted to reproductive rights. On the other hand, there is a fundamental difference between Chapters 4 and 5. The former uses the synthesis to challenge a form of State *action* violating constitutional rights, the restrictions on reproductive decision-making built into India's law on abortion (at the three levels). The latter, in contrast, draws on the synthesis to respond to State *inaction* violating constitutional rights, the State's failure to redress preventable maternal mortality and morbidity, to compel State action through positive duties. In this sense, Chapter 5 not only confirms the findings in Chapter 4 but also goes beyond the latter to showcase the contributions of the synthesis in requiring, and scoping, the State's positive duties.

Two preliminary caveats are necessary here. *First*, Chapter 5's conclusions on positive duties apply not only to maternal mortality and morbidity but also to abortion. Guaranteeing women 'real and effective' reproductive decision-making in the abortion context requires the State not only to abstain from intervening in women's abortion decisions, but also to facilitate these decisions through positive duties.<sup>1070</sup> However, this Chapter will explore the scope of positive

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<sup>1070</sup> West (n 56) 1403; Smith (n 239); Solinger (n 244).

duties required by the synthesis in the specific context of maternal mortality and morbidity. These arguments may, in later work, be used to scope out the State's positive duties in relation to abortion. *Second*, the distinction between negative and positive duties, or State action and inaction, is not watertight. The State's failure to act can itself be seen as a form of State action preserving status quo.<sup>1071</sup> While accepting this, here I rely on the distinction between the two for the purposes of analytical clarity.

I begin by identifying the causal factors behind preventable maternal mortality and morbidity in India, narrowing in on the role of healthcare system deficiencies and group-based disadvantage, and the interaction between the two. Crucially, I point to State failure in remedying both these factors as responsible for India's high rate of preventable maternal mortality and morbidity (**Part II**). I then test the State failure, so understood, against the synthesis. I trace the rights violation caused by State inaction and the nature and scope of duties on the State to redress such violation. Specifically, I draw out both the independent contributions of Article 21 and 15 within the constitutional home, and the implications of their synthesis on the State's positive duties (**Part III**). I then explore the appropriate role for courts in requiring the State to positively act in fulfilling its constitutional obligations. I consider both the applicable standard of review under the synthesis and the model of intervention courts ought to adopt in adjudicating on the State's performance of its positive duties (**Part IV**). I conclude by showing how the synthesis between Articles 21 and 15 affirms that women can be guaranteed 'real and effective' reproductive decision-making only by acknowledging and redressing group-based disadvantage. The synthesis thus captures the interrelationship between the individual and social dimensions in the second sense, as understood in Chapter 1 (**Part V**).

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<sup>1071</sup> Sunstein, *Neutrality* (n 70) 9.

## II. Preventable Maternal Mortality and Morbidity: Causal Factors

India has the highest maternal mortality rate in the world,<sup>1072</sup> with 117,000 (22%) of the 536,000 global yearly maternal deaths occurring in India.<sup>1073</sup> For every woman who dies from pregnancy-related causes in India, another 30 suffer maternal morbidity through injury, infection, and disability.<sup>1074</sup> Maternal mortality in India has declined over the years, from 556 per 100,000 births in 1990 to 174 in 2015<sup>1075</sup> and 130 in 2019.<sup>1076</sup> However, it still remains far from India's national goal of reducing the maternal mortality rate to less than 100 deaths per 100,000 births by 2010,<sup>1077</sup> with deaths being disproportionately concentrated amongst women from certain groups, as shown below. Moreover, though maternal mortality has been declining in India, its relative global share remains the same.<sup>1078</sup> And most crucially, 88-98% of India's maternal deaths are preventable.<sup>1079</sup>

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<sup>1072</sup> M Bhatia et al, 'Pro-Poor Policies and Improvements in Maternal Health Outcomes in India' (2021) 21 BMC Pregnancy and Childbirth 389. Citing the Tenth Revision of the International Classification of Diseases, the World Health Organisation defines maternal deaths as 'the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes'. See 'Reduction of Maternal Mortality: A Joint WHO/UNFPA/UNICEF/World Bank Statement. World Health Organization.' (World Health Organisation 1999) 39 <<https://apps.who.int/iris/handle/10665/42191>> accessed 4 May 2022 (Joint Statement).

<sup>1073</sup> Harish Nair and Rajmohan Panda, 'Quality of Maternal Healthcare in India: Has the National Rural Health Mission Made a Difference?' (2011) 1 Journal of Global Health 79.

<sup>1074</sup> Louisa Cabal and Morgan Stoffregen, 'Calling a Spade a Spade: Maternal Mortality as a Human Rights Violation' (2009) 16(2) Human Rights Brief 2; Tabassum Firoz et al, 'Measuring Maternal Health: Focus on Maternal Morbidity' (2013) 91 Bulletin of the World Health Organization 794. (Maternal morbidity is defined as any health condition with a negative impact on the woman's well-being that is attributed to and/or aggravated by pregnancy and childbirth).

<sup>1075</sup> Bhatia et al (n 1072).

<sup>1076</sup> Yuvaraj Krishnamoorthy, Marie Gilbert Majella and Sathish Rajaa, 'Equity in Coverage of Maternal and Newborn Care in India: Evidence from a Nationally Representative Survey' (2020) 35 Health Policy and Planning 616.

<sup>1077</sup> Candace Johnson and Surma Das, 'The Human Rights Framing of Maternal Health: A Strategy for Politicization or a Path to Genuine Empowerment?' in George Andreopoulos and Zehra F Kabasakal Arat (eds), *The Uses and Misuses of Human Rights* (Palgrave Macmillan US 2014) 130.

<sup>1078</sup> KS James et al, 'Sequential Impact of Components of Maternal and Child Health Care Services on the Continuum of Care in India' (2022) 54 Journal of Biosocial Science 452.

<sup>1079</sup> World Health Organization, 'Maternal Mortality: Helping Women off the Road to Death' (1986) 40(5) WHO Chronicle 175-83; Joint Statement (n 1072) understands the range of causal factors responsible for 'preventable' maternal death very broadly ('any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes'); they are not restricted purely to medical factors.

What lies behind preventable maternal mortality and morbidity in India? A straightforward answer is India's deficient public healthcare system. Healthcare financing in India remains inadequate, with State expenditure on healthcare constituting just 1.28% of India's Gross Domestic Product ("GDP").<sup>1080</sup> This is much lower than the global average, and even lower than healthcare spending in other Global South countries.<sup>1081</sup> Infrastructurally, a vast proportion of India's healthcare centres are short on labour rooms, medical equipment, drugs, beds, sanitary toilets, water and electricity, means of communication (like telephones), transport facilities (ambulances), linkages with district blood banks, and laboratory services.<sup>1082</sup> Many health centres also fall severely short on skilled staff, including obstetricians and anaesthetists.<sup>1083</sup> As a result, existing staff are overworked. This affects quality of care,<sup>1084</sup> causes delay in providing care,<sup>1085</sup> creates conditions for verbal and physical abuse of pregnant women,<sup>1086</sup> and discourages them from opting for institutional births during subsequent pregnancies.<sup>1087</sup> Poor transportation facilities

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<sup>1080</sup> Bhatia et al (n 1072).

<sup>1081</sup> Imtiyaz Ali et al, 'Health Insurance Support on Maternal Health Care: Evidence from Survey Data in India' (Health Economics 2020) preprint <<http://medrxiv.org/lookup/doi/10.1101/2020.10.20.20216093>> accessed 2 May 2022.

<sup>1082</sup> Kranti S Vora et al, 'Maternal Health Situation in India: A Case Study' (2009) 27 *Journal of Health, Population and Nutrition* 184; Manmeet Kaur et al, 'Contribution of Social Factors to Maternal Deaths in Urban India: Use of Care Pathway and Delay Models' (2018) 13 *PLOS ONE* e0203209; Hamal et al (n 277) 11; Tej Ram Jat et al, 'Socio-Cultural and Service Delivery Dimensions of Maternal Mortality in Rural Central India: A Qualitative Exploration Using a Human Rights Lens' (2015) 8 *Global Health Action* 14.

<sup>1083</sup> Vora et al (n 1082); See also cases and petitions highlighting poor quality of obstetric care in India: *Kali Bali* (n 284); *Duna Bai v State of Madhya Pradesh* W.P.(C) No. 597/2011 (Indore High Court, 8 November 2012); *Gangaram v Public Health and Family Welfare Department* W.P. No. 6000/2018 (Indore High Court, 3 May 2018) ('*Gangaram*'); *Moba Changakai v State of Nagaland* W.P. No. 179/2016 (Guwahati High Court, 27 September 2017); *Court v UoI* (n 286).

<sup>1084</sup> Nair and Panda (n 1073).

<sup>1085</sup> Kaur et al (n 1082); Renu Khanna and Subha Sri, 'Social Determinants of Maternal Health: Dead Women Talking' in Devaki Nambiar and Arundati Muralidharan (eds), *The Social Determinants of Health in India* (Springer 2017) 199 ('Social Determinants'); *Kabita Barik* (n 288); *Trinath Swain* (n 288); *Rupasingh Majhi* (n 288); *Sambhunath* (n 288).

<sup>1086</sup> Nair and Panda (n 1073); Katie Naeve, So O'Neil, and Rajani Ved, 'An Examination of the Maternal Health Quality of Care Landscape in India' (Mathematica Policy Research 2017) <[https://www.macfound.org/media/files/50268\\_landscape\\_report\\_2017.03.02.pdf](https://www.macfound.org/media/files/50268_landscape_report_2017.03.02.pdf)> accessed 2 May 2022; *Gangaram* (n 1083); *Sambhunath* (n 288); *Nirmal Chandra* (n 288); *Rupasingh Majhi* (n 288); Naeve, O'Neil and Ved (n 1086); *Trinath Swain* (n 288).

<sup>1087</sup> Kaur et al (n 1082); Hamal et al (n 277) 12.

linked to hospitals force some women to travel several miles—on foot, or sometimes carried on chairs or on the backs of family members—to reach a healthcare centre, delaying access to care.<sup>1088</sup> Absence of an efficient referral system between hospitals compels women with complications to shuttle between facilities,<sup>1089</sup> with some women visiting up to 7 facilities in search of care.<sup>1090</sup> Lack of accountability and the absence of grievance redressal mechanisms in public sector institutions<sup>1091</sup> causes apathy, increased demands for bribes, and frequent flouting of ethical principles amongst healthcare workers.<sup>1092</sup>

At the same time, preventable maternal mortality and morbidity is also a product of disadvantage associated with group membership: ‘the social power that individual women possess is influenced by their economic position, gender norms, and social class and this in turn affects their access to and use of health’.<sup>1093</sup> The educational status of women influences their utilisation of obstetric care,<sup>1094</sup> with literate women being more vocal about challenging gender norms and articulating their needs.<sup>1095</sup> Yet, only 55% of women in India are literate, compared to 78% of

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<sup>1088</sup> Nair and Panda (n 1073); Naeve, O’Neil and Ved (n 1086); Kaur et al (n 1082); Jat et al (n 1082) 8; *Gangaram* (n 1083); *Kabita Barik* (n 288); *Rupasingh Majhi* (n 288); *Sambhunath* (n 288); *Nirmal Chandra* (n 288).

<sup>1089</sup> Nair and Panda (n 1073); Kaur et al (n 1082); *Alin* (n 288); *Nirmal Chandra* (n 288).

<sup>1090</sup> Khanna and Sri, *Social Determinants* (n 1085) 200.

<sup>1091</sup> Nair and Panda (n 1073).

<sup>1092</sup> Deepak Saxena et al, ‘Inequity in Maternal Health Care Service Utilization in Gujarat: Analyses of District-Level Health Survey Data’ (2013) 6 *Global Health Action* 15.

<sup>1093</sup> Sanneving et al (n 277) 9.

<sup>1094</sup> Vora et al (n 1082) (noting how only 18% of illiterate women had institutional births, compared with 89% of women with 12 or more years of education); Balhasan Ali and Shekhar Chauhan, ‘Inequalities in the Utilisation of Maternal Health Care in Rural India: Evidences from National Family Health Survey III & IV’ (2020) 20 *BMC Public Health* 369; Arabinda Ghosh and Rohini Ghosh, ‘Maternal Health Care in India: A Reflection of 10 Years of National Health Mission on the Indian Maternal Health Scenario’ (2020) 25 *Sexual & Reproductive Healthcare* 100530; Dinabandhu Mondal, Suranjana Karmakar and Anuradha Banerjee, ‘Women’s Autonomy and Utilization of Maternal Healthcare in India: Evidence from a Recent National Survey’ (2020) 15 *PLOS ONE* e0243553.

<sup>1095</sup> Madhumita Mukherjee and ManasPratim Roy, ‘Factors Determining Institutional Delivery in Eastern Part of India’ (2020) 32 *Tzu Chi Medical Journal* 171.

men.<sup>1096</sup> Low decision-making autonomy, assessed based on access to and control of resources, participation in decision-making and freedom of movement, also adversely influences women's use of obstetric care.<sup>1097</sup> Violence against women similarly affects their health status, with women experiencing violence being less likely to have institutional deliveries<sup>1098</sup> and obtain ante-natal care, on account of lack of mobility, partners' controlling behaviour and fear of further violence.<sup>1099</sup> Malnutrition amongst women, due to gender norms which deprioritise their nutrition within the family,<sup>1100</sup> causes anaemia during pregnancy,<sup>1101</sup> with 60% of pregnant women in India being anemic.<sup>1102</sup> Yet, detection and treatment of anemia is not a priority during ante-natal care in India.<sup>1103</sup> Moreover, women's lack of access to contraception leads to rapid repeat pregnancies amongst women, adversely affecting their health:<sup>1104</sup> 'women become old bearing children. They can't keep their strength. Their spirit drains away'.<sup>1105</sup>

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<sup>1096</sup> Sanneving et al (n 277).

<sup>1097</sup> Mondal, Karmakar and Banerjee (n 1094); Sanneving et al (n 277); Jat et al (n 1082) 11.

<sup>1097</sup> Hamal (n 277) 8; Sanneving et al (n 277).

<sup>1098</sup> Hamal (n 277) 8; Sanneving et al (n 277).

<sup>1099</sup> Alissa D Koski, Rob Stephenson and Michael R Koenig, 'Physical Violence by Partner during Pregnancy and Use of Prenatal Care in Rural India' (2011) 29 *Journal of Health, Population and Nutrition* 245.

<sup>1100</sup> Veetilakath Jithesh and TK Sundari Ravindran, 'Social and Health System Factors Contributing to Maternal Deaths in a Less Developed District of Kerala, India' (2016) 2 *Journal of Reproductive Health and Medicine* 30.

<sup>1101</sup> Phuong Hong Nguyen and others, 'Maternal Nutrition Practices in Uttar Pradesh, India: Role of Key Influential Demand and Supply Factors' (2019) 15 *Maternal & Child Nutrition*.

<sup>1102</sup> Vora et al (n 1082); Sanneving et al (n 277).

<sup>1103</sup> Khanna and Sri, *Social Determinants* (n 1085) 200.

<sup>1104</sup> Sanneving et al (n 277); Kaur et al (n 1082).

<sup>1105</sup> Patricia Jeffery and Roger Jeffery, 'Only When the Boat Has Started Sinking: A Maternal Death in Rural North India' (2010) 71 *Social Science & Medicine* 1711.

Age is another relevant factor. Child marriages, while illegal, remain common in India.<sup>1106</sup> They influence women's reproductive health, with a significant proportion of maternal deaths in India occurring amongst young women.<sup>1107</sup> Young age of marriage is associated with low use of contraceptives, unmet demand for spacing methods, multiple unwanted pregnancies, and poor obstetric outcomes.<sup>1108</sup> Early pregnancies are also medically riskier: pregnant adolescent mothers are 2.5 times higher at risk of dying from pregnancy-related complications than adults.<sup>1109</sup>

Similarly, socio-economic status (or class) influences access to quality obstetric care.<sup>1110</sup> Women belonging to poorer households have 'significantly higher maternal mortality',<sup>1111</sup> and receive 'virtually no maternal care'.<sup>1112</sup> For instance, one study notes that only 13% and 19% of women in the lowest wealth quintile undergo institutional deliveries and receive postnatal care respectively, while the figures are 84% and 79% for women in the highest wealth quintile.<sup>1113</sup> Moreover, due to poor quality of public sector care, women from impoverished economic backgrounds are compelled to approach the private sector, which raises costs.<sup>1114</sup> Thus, the poor

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<sup>1106</sup> The Prohibition of Child Marriage Act 2006.

<sup>1107</sup> Hamal (n 277) 8.

<sup>1108</sup> Mondal, Karmakar and Banerjee (n 1094); Anita Raj et al, 'Prevalence of Child Marriage and Its Effect on Fertility and Fertility-Control Outcomes of Young Women in India: A Cross-Sectional, Observational Study' (2009) 373 *The Lancet* 1883.

<sup>1109</sup> Sanneving et al (n 277); Mukherjee and Roy (n 1095) 173; Sanyukta Mathur, Margaret Greene, and Anju Malhotra, 'Too Young to Wed' (International Center for Research on Women 2003) <<https://www.issuelab.org/resources/11421/11421.pdf>> accessed 2 May 2022.

<sup>1110</sup> Ali and Chauhan (n 1094); Ghosh and Ghosh (n 1094); James et al (n 1078).

<sup>1111</sup> Bhatia et al (n 1072).

<sup>1112</sup> Laishram Ladusingh and Chungkham Holendro Singh, 'Rich-Poor Gap in Maternal Care: The Case of Northeast India' (2007) 3 *Asian Population Studies* 87.

<sup>1113</sup> Vora et al (n 1082).

<sup>1114</sup> Jeffery and Jeffery (n 1105) 8 (noting that costs of obstetric care within the private sector is 200 days of a daily wage worker's wage).

face the ‘double burden’ of poverty and ill health, with the financial implications of ill health pushing even the non-poor into poverty.<sup>1115</sup>

Geographical location is similarly telling, with disparity in access existing between urban and rural areas.<sup>1116</sup> Approximately 67% of India’s population lives in rural areas, where only a quarter of healthcare facilities are located. In contrast, urban India, where one-third of the population lives, has 75% of India’s healthcare centres.<sup>1117</sup> As a result, 62.4% and 70% women in urban areas receive four antenatal visits and undergo institutional birth, compared to 27.7% and 38% of women in rural areas.<sup>1118</sup>

Religion and caste also play a role, with Muslim women and women from Scheduled Castes and Tribes and Other Backward Classes, experiencing barriers to access.<sup>1119</sup> Studies document a ‘disproportionately high number’ of maternal deaths (50–80%) among the socially backward castes,<sup>1120</sup> on account of segregation in habitation—a form of ‘spatial disadvantage’—along with socio-economic disadvantage.<sup>1121</sup> Further, caste and religion affect service providers’ behaviour towards pregnant women. Poor pregnant Muslim women are treated as ‘backward’, with

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<sup>1115</sup> Nair and Panda (n 1073); Balhasan Ali, Paramita Debnath and Tarique Anwar, ‘Inequalities in Utilisation of Maternal Health Services in Urban India: Evidences from National Family Health Survey-4’ (2021) 10 *Clinical Epidemiology and Global Health* 100672.

<sup>1116</sup> Mondal, Karmakar and Banerjee (n 1094); Krishnamoorthy, Majella and Rajaa (n 1076); Sanneving et al (n 277).

<sup>1117</sup> Naeve, O’Neil and Ved (n 1086); Jeffery and Jeffery (n 1105) 4.

<sup>1118</sup> Nair and Panda (n 1073); Rajesh Kumar Rai and Theodore Herzl Tulchinsky, ‘Addressing the Sluggish Progress in Reducing Maternal Mortality in India’ (2015) 27 *Asia Pacific Journal of Public Health* 1164-65

<sup>1119</sup> Ali and Chauhan (n 1094); Mondal, Karmakar and Banerjee (n 1094); Sanneving et al (n 277).

<sup>1120</sup> Hamal et al (n 277) 7.

<sup>1121</sup> Alok Chauhan, ‘Antenatal Care among Currently Married Women in Rajasthan, India’ (2012) 2 *Asian Pacific Journal of Tropical Disease* S622.

‘unfettered fertility’,<sup>1122</sup> and subject to pressure to sterilise.<sup>1123</sup> Tribal women, who are perceived as ‘recalcitrant and savage-like’, are abused by healthcare staff for screaming too loudly during childbirth, or asking too many questions.<sup>1124</sup> Community health workers visit only a low percentage of lower caste homes,<sup>1125</sup> and service providers refuse to touch Scheduled Caste women and children who are seen as ‘dirty and backward’. Even when in labour, they are forced to wait for long periods, given beds away from high caste women or asked to give birth on the floor.<sup>1126</sup>

Crucially, the group membership factors work in intersection:

Women, particularly from low economic status, socially backward and marginalized castes like SC/ST, uneducated, Muslim, rural, childbearing at a young age, and with two or more children, who had hardly any exposure to mass media or maternal health messages, *[are] more disadvantaged in terms of maternal health service use or more prone to maternal deaths in India.*<sup>1127</sup>

Thus, ‘social *and* health system factors [are] *equally important* contributors to maternal deaths [in India]...In fact, these factors *[act] in synergy* to compound the adverse effects of each other such that the final output [is] highly adverse to women from disadvantaged groups’.<sup>1128</sup>

How do the Indian State’s efforts to redress preventable maternal mortality and morbidity fare, when assessed against these factors? On the one hand, the State has introduced a network of

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<sup>1122</sup> Sreeparna Chattopadhyay, ‘The Shifting Axes of Marginalities: The Politics of Identities Shaping Women’s Experiences during Childbirth in Northeast India’ (2018) 26 *Reproductive Health Matters* 65 (‘Shifting Axes’).

<sup>1123</sup> Jeffery and Jeffery (n 1105) 12.

<sup>1124</sup> Chattopadhyay, *Shifting Axes* (n 1122) 66.

<sup>1125</sup> Nidhi S Sabharwal et al, ‘Caste Discrimination As A Factor in Poor Access to Public Health Service System: A Case Study of Janani Suraksha Yojana Scheme’ (2014) 1 *Journal of Social Inclusion Studies* 153.

<sup>1126</sup> *ibid* 158-63; Parisa Patel, Mahua Das and Utpal Das, ‘The Perceptions, Health-Seeking Behaviours and Access of Scheduled Caste Women to Maternal Health Services in Bihar, India’ (2018) 26 *Reproductive Health Matters* 118-20.

<sup>1127</sup> Hamal et al (n 277) 12 (emphasis added); See also Ranjana Singh et al, ‘Utilization of Maternal Health Services and Its Determinants: A Cross-Sectional Study among Women in Rural Uttar Pradesh, India’ (2019) 38 *Journal of Health, Population and Nutrition* 13; Ladusingh and Singh (n 1112) 79-94.

<sup>1128</sup> Jithesh and Ravindran (n 1100) 31 (emphasis added); See also Johnson and Das (n 1077) 119.

schemes to improve access to obstetric care. Some examples include the Janani Suraksha Yojana (JSY), offering financial incentives to women to encourage institutional birth by overcoming economic barriers to accessing care; the Janani Express, providing free transport to women from their homes to health facilities; the Janani Shishu Suraksha Karyakram (JSSK), entitling women to several services—such as caesarean, diagnostics and drugs—free of cost at public sector institutions;<sup>1129</sup> and the Pradhan Mantri Surakshit Matritva Abhiyan, guaranteeing pregnant women a free, comprehensive healthcare package in public sector facilities.<sup>1130</sup> These interventions focus not just on expanding the scale of healthcare infrastructure<sup>1131</sup> but also on ensuring quality of care,<sup>1132</sup> extending across rural and urban regions.<sup>1133</sup> On the other hand, empirical studies repeatedly note that while programmes like the JSY have significantly increased the proportion of institutional births, there is ‘no significant association’ between the rise in institutional births and fall in preventable maternal mortality rates.<sup>1134</sup> Why is this?

At the outset, despite the schemes, India’s healthcare system remains weak, riddled with the deficiencies described above. Yet, the investment in public health has increased from 0.9% of

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<sup>1129</sup> Jat et al (n 1082) 2-3.

<sup>1130</sup> Bhatia et al (n 1072).

<sup>1131</sup> India’s maternal healthcare programme initially focused purely on scale as noted by Bilal Avan et al, ‘Evolution of Quality in Maternal Health in India: Lessons and Priorities’ (2014) 4 *International Journal of Medicine and Public Health* 34.

<sup>1132</sup> The focus on quality was introduced after the ICPD 1994, as noted by Aradhana Srivastava et al, ‘Putting Women at the Center: A Review of Indian Policy to Address Person-Centered Care in Maternal and Newborn Health, Family Planning and Abortion’ (2018) 18 *BMC Public Health* 20. Note especially the introduction of the Indian Public Health Standards 2006 and the Operational Guidelines on Quality Assurance in Public Health Facilities 2013.

<sup>1133</sup> The National Rural Health Mission 2005 was extended to urban areas in 2013, introducing the National Health Mission 2013.

<sup>1134</sup> Bharat Randive, Vishal Diwan and Ayesha De Costa, ‘India’s Conditional Cash Transfer Programme (the JSY) to Promote Institutional Birth: Is There an Association between Institutional Birth Proportion and Maternal Mortality?’ (2013) 8 *PLoS ONE* e67452; Stephen S Lim et al, ‘India’s Janani Suraksha Yojana, a Conditional Cash Transfer Programme to Increase Births in Health Facilities: An Impact Evaluation’ (2010) 375 *The Lancet* 2009.

GDP to a mere 1.2%, as against the promised 2-3%.<sup>1135</sup> Further, the spending of earmarked funds has progressed slowly, with 30-40% of funds remaining unspent.<sup>1136</sup> Due to these systemic failures, the central assumption underlying the schemes—that institutional births would automatically result in better care and reduce maternal deaths<sup>1137</sup>—fails to hold true. Thus, as the UN Special Rapporteur on the Right to Health rightly notes: ‘There is a yawning gulf between India’s commendable maternal mortality policies and their urgent, focused, sustained, systematic and effective implementation. *For the most part, maternal mortality reduction is still not a priority in India*’.<sup>1138</sup> It is then no surprise that beneficiaries of schemes such as the JSY face delayed payments,<sup>1139</sup> requiring multiple hospital visits before the amount is transferred, incurring further costs of transport.<sup>1140</sup> Similarly, ante-natal and post-natal care are neglected due to the narrow focus on institutional deliveries.<sup>1141</sup>

At the same time, the existing schemes are ‘heavily oriented towards the biomedical framework and healthcare delivery system’ in redressing preventable maternal mortality and morbidity,<sup>1142</sup> ignoring the role of group-based disadvantage:<sup>1143</sup> ‘the approach has typically been

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<sup>1135</sup> Subha Sri B, Sarojini N and Renu Khanna, ‘An Investigation of Maternal Deaths Following Public Protests in a Tribal District of Madhya Pradesh, Central India’ (2012) 20 *Reproductive Health Matters* 11.

<sup>1136</sup> Jeffrey and Jeffrey (n 1105) 5

<sup>1137</sup> Sri, Sarojini N and Khanna (n 1135) 20.

<sup>1138</sup> UNGA, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health (Paul Hunt) Mission to India’ (2010) UN Doc. No.A/HRC/14/20Add.2 [98] (emphasis added).

<sup>1139</sup> Kaur et al (n 1082) 15; Vinod K Paul, ‘India: Conditional Cash Transfers for in-Facility Deliveries’ (2010) 375 *The Lancet* 1943.

<sup>1140</sup> Subha Sri and Renu Khanna, ‘Maternal Health Policy in India: From Institutional Deliveries to Safe Deliveries’ (CommonHealth 2012) 12 <<https://www.commonhealth.in/wp-content/uploads/2020/02/Monograph-Maternal-Health-Policy-in-India-Aug-2012-1.pdf>> accessed 2 May 2022 (‘Maternal Health Policy’).

<sup>1141</sup> Sri, Sarojini N and Khanna (n 1135) 20; Marie Ng et al, ‘An Assessment of the Impact of the JSY Cash Transfer Program on Maternal Mortality Reduction in Madhya Pradesh, India’ (2014) 7 *Global Health Action* 24939; *Alin* (n 288).

<sup>1142</sup> Khanna and Sri, *Social Determinants* (n 1085) 189.

<sup>1143</sup> Khanna and Sri, *Maternal Health Policy* (n 1140) 13.

top-down and narrowly medical in orientation'.<sup>1144</sup> Sustained improvements in maternal health cannot be made through improving obstetric care services in isolation:

Unlike erecting new buildings and buying in more drugs, such shifts require the dismantling of a long-standing political economy of health care provision. *The most poverty-stricken and powerless members of Indian society experience deep-seated class, caste and urban prejudices against them in many contexts, including when they seek health care.* Encouraging institutional deliveries without rectifying these serious shortcomings...is a seriously flawed approach to reducing maternal mortality.<sup>1145</sup>

Thus, targeted interventions are required which explicitly take group-based disadvantage into account, as a determinant of poor health outcomes and access to quality obstetric care.<sup>1146</sup> In other words, redressing maternal mortality and morbidity mandates 'simultaneous attention to immediate health interventions *and the longer-term social transformation*'.<sup>1147</sup> India's schemes fall short here. As an example, consider the JSY. While hospitalisation, drugs and transport are free under the scheme, hospitalisation may incur loss of wages for women belonging to socio-economically disadvantaged backgrounds, discouraging them from opting for institutional birth.<sup>1148</sup> Yet, the JSY offers incentive for home births only to women above the age of 19, and for the first two births alone.<sup>1149</sup> Similarly, documentary requirements under the JSY, like proof of poverty and of residence, which many women from marginalised groups may not possess, hinders them from accessing services.<sup>1150</sup> The scheme thus fails to take into account specific forms of disadvantage arising from women's group membership, here the widespread prevalence of child

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<sup>1144</sup> Jeffrey and Jeffrey (n 1105) 4.

<sup>1145</sup> *ibid* 13 (emphasis added).

<sup>1146</sup> Khanna and Sri, *Social Determinants* (n 1085) 202; Saxena et al (n 1092) 7.

<sup>1147</sup> UNHCR, 'Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality' (2012) UN Doc. A/HRC/21/22 [65] ('Technical Guidance') (emphasis added); See also Johnson and Das (n 1077) 138.

<sup>1148</sup> James et al (n 1078) 173.

<sup>1149</sup> Khanna and Sri, *Maternal Health Policy* (n 1140) 12.

<sup>1150</sup> Kaur et al (n 1082); Hamal et al (n 277) 15.

marriages in India, women's lack of control over the number of births within patriarchal motherhood, and their non-possession of documentary proof; these women thus fall through the cracks.

From the above, three conclusions come through clearly. *First*, the Indian State has failed to adequately remedy deficiencies in India's public healthcare system. *Second*, the Indian State's maternal health schemes do not adequately take group-based disadvantage into account, both as a driver of poor health outcomes amongst women, and a factor influencing their access to timely and quality obstetric care. And *third*, the State's failures on both these counts is responsible for the high rate of preventable maternal mortality and morbidity in India, especially its concentration amongst women from marginalised groups. Now, I challenge the State's failure, so understood, using the synthesis between Articles 21 and 15.

### **III. Rights Violation and State Duties**

I begin, as in Chapter 4, with Article 21 (**Part A**), and then move to Article 15 (**Part B**). I set out the whole range of rights violation each provision independently identifies in its role within the constitutional home, in turn protecting the interests represented by the individual and social dimensions. I also demonstrate the working of the synthesis as the 'new' constitutional home for reproductive rights. I show how the provisions interact within the 'new' home to identify the full extent of rights violation, and transform the scope of positive duties on the State to redress preventable maternal mortality and morbidity.

#### **A. Article 21**

##### ***i. Tracing the Rights Violation***

As is by now familiar, Article 21 guarantees to all the fundamental right to life, including the right to survival during pregnancy and childbirth. Preventable maternal mortality is a clear violation of

this right.<sup>1151</sup> At the same time, Article 21's 'right to life' clause extends beyond survival to guaranteeing physical health,<sup>1152</sup> which is adversely affected through State failure to prevent maternal morbidity during childbirth. Maternal morbidity affects health-related functioning in the immediate or extended post-partum period, and has been recorded as causing a wide range of threats to physical health, which 'while not pathologic, can persist and affect [women's] quality of life'.<sup>1153</sup> These include obstructed labour, gestational hypertension, eclampsia, postpartum hemorrhage, diabetes, deep vein thrombosis, perineal laceration, urinary/fecal/anal incontinence, nausea and vomiting,<sup>1154</sup> and adverse delivery outcomes.<sup>1155</sup> A pregnancy complicated by severe maternal morbidity also increases longer term risks of mortality,<sup>1156</sup> including during a later pregnancy.<sup>1157</sup> It further exacerbates risks of conditions like cardio-vascular disease, even up to three decades later.<sup>1158</sup>

The 'right to life' clause additionally prohibits harm to mental health,<sup>1159</sup> caused by the undignified or degrading treatment women from certain groups experience during pregnancy and

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<sup>1151</sup> See Chapter 2, Part II(A).

<sup>1152</sup> *ibid.*

<sup>1153</sup> Tabassum Firoz et al, 'A Framework for Healthcare Interventions to Address Maternal Morbidity' (2018) 141 *International Journal of Gynecology & Obstetrics* 62.

<sup>1154</sup> Kazuyo Machiyama and others, 'Consequences of Maternal Morbidity on Health-Related Functioning: A Systematic Scoping Review' (2017) 7 *BMJ Open* e013903; Fahad Aftab et al, 'Direct Maternal Morbidity and the Risk of Pregnancy-Related Deaths, Stillbirths, and Neonatal Deaths in South Asia and Sub-Saharan Africa: A Population-Based Prospective Cohort Study in 8 Countries' (2021) 18 *PLOS Medicine* e1003644.

<sup>1155</sup> Stacie E Geller et al, 'A Global View of Severe Maternal Morbidity: Moving beyond Maternal Mortality' (2018) 15 *Reproductive Health* 98.

<sup>1156</sup> U Vivian Ukah et al, 'Severe Maternal Morbidity and Risk of Mortality Beyond the Postpartum Period' (2021) 137 *Obstetrics & Gynecology* 277.

<sup>1157</sup> Veronique Filippi et al, 'A New Conceptual Framework for Maternal Morbidity' (2018) 141 *International Journal of Gynecology & Obstetrics* 4.

<sup>1158</sup> Ukah et al (n 1156).

<sup>1159</sup> See Chapter 2, Part II(A).

childbirth.<sup>1160</sup> This includes hospital staff refusing to touch the pregnant woman, or forcing her (or her family members) to clean the place of delivery, change her sanitary pads, and dispose of the medical waste leaking from her wounds.<sup>1161</sup> Human dignity recognises the intrinsic worth of human beings,<sup>1162</sup> with the ‘jurisprudence of personhood’ under Article 21 ‘enlarg[ing] its sweep to encompass human personality in its full blossom’,<sup>1163</sup> to achieve ‘self-expression of personality’.<sup>1164</sup>

The Government’s failure in “not enabling” pregnant women to benefit from medically necessary reproductive health services, whether through outright denial, obstacles to accessing care, or delivery of care in deplorable facility conditions, necessarily inflicts suffering and humiliation, threatening their physical and mental health. This type of government action or inaction is ‘offensive to human dignity’ and ‘constitute[s] an inroad into th[e] right to life’ and is thus, prohibited by Article 21.<sup>1165</sup>

*ii. Positive Duties*

Even if State failure to act in redressing preventable maternal mortality and morbidity is at odds with Article 21, does State inaction, as opposed to State action, trigger violations of Article 21? In *Paschim Banga*,<sup>1166</sup> the Supreme Court answered this question in affirmative, holding that:

Article 21 imposes an obligation on the State to safeguard the right to life of every person...***Failure on the part of the Government hospital*** to provide timely medical

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<sup>1160</sup> Rebecca J Cook, Bernard M Dickens and Mahmoud F Fathalla, *Reproductive Health and Human Rights* (OUP 2003) 173.

<sup>1161</sup> *Shyamsunder v Government of NCT of Delhi* W.P.(C) No. 6967/2013 (Delhi High Court, 16 July 2010); *Ratnabali Ray v State of West Bengal* W.P. No. 15158/2013 (Calcutta High Court, 14 August 2013).

<sup>1162</sup> Beatrice Odallo, Evelyne Opondo and Martin Onyango, ‘Litigating to Ensure Access to Quality Maternal Health Care for Women and Girls in Kenya’ (2018) 26 *Reproductive Health Matters* 126.

<sup>1163</sup> *Consumer Education and Research Centre v Union of India* AIR 1995 SC 922 [22] (‘CERC’) cited in *Snehalatha Singh* (n 292) [21].

<sup>1164</sup> CERC (n 1163) [20].

<sup>1165</sup> *National Alliance for Maternal Health and Human Rights v State of Chhattisgarh* W.P.(PIL) No\_\_/2014 (Chhattisgarh High Court, 4 Jan 2017) [9.17] <<http://www.slic.org.in/uploads/2017/12/NAMHHR-v-State.pdf>> accessed 5 May 2022 (‘NAMHR Petition’).

<sup>1166</sup> *Paschim Banga* (n 30).

treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.<sup>1167</sup>

In turn, courts can, under Article 21, compel State action, through imposing positive duties on the State. In *Ram Lubhaya Bhagga*<sup>1168</sup> and *CERC*,<sup>1169</sup> the Supreme Court identified the obligation on the State under Article 21 to ‘secure’ the health of its citizens in a ‘meaningful’ manner by setting up public sector healthcare institutions ‘within the reach of its people’. The Court required the State to reduce queues, maintain clean and safe infrastructure, employ skilled staff, and allocate ‘sufficient funds’ for the performance of its obligations.<sup>1170</sup>

Applying these standards to the redressal of preventable maternal mortality and morbidity, the Madhya Pradesh High Court in *Sandesh Bansal*<sup>1171</sup> held: ‘it is the primary duty of the government to ensure that every woman survives pregnancy and child birth, for that, the State of Madhya Pradesh is under obligation to secure their life’.<sup>1172</sup> In *Laxmi Mandal*,<sup>1173</sup> the Delhi High Court observed that the right to health included the right to ‘access and receive a minimum standard of treatment and care in public health facilities’.<sup>1174</sup> In *Kali Bali*,<sup>1175</sup> the Chhattisgarh High Court went one step further, holding that the ‘identification of high risk pregnancies, followed by appropriate and prompt referral of cases needing specialist care’ are ‘indefeasible components’ of this

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<sup>1167</sup> *ibid* [9] (emphasis added).

<sup>1168</sup> *State of Punjab v Ram Lubhaya Bagga* (1998) 4 SCC 117 (‘*Ram Lubhaya Bhagga*’).

<sup>1169</sup> *CERC* (n 1163).

<sup>1170</sup> *ibid* [30]; *Ram Lubhaya Bagga* (n 1168) [23].

<sup>1171</sup> *Sandesh Bansal* (n 282).

<sup>1172</sup> *ibid* [22].

<sup>1173</sup> *Laxmi Mandal* (n 38).

<sup>1174</sup> *ibid* [2].

<sup>1175</sup> *Kali Bali* (n 284).

‘minimum standard’.<sup>1176</sup> In *Dinanath Wagbmare*,<sup>1177</sup> the Bombay High Court emphasised that the fundamental right to health is not an ‘empty right’: the right to health would also include the provision of facilities ‘which are conducive [to the] maintenance of health’ and not detrimental to it.<sup>1178</sup> Similarly, in *Snehalatha Singh*<sup>1179</sup> the Allahabad High Court held that the right to health requires the State to maintain healthcare services in an ‘appropriate manner’: ‘Poor, shabby and inadequate health care institutions, if are maintained by State, [are] a blatant invasion on fundamental right of persons, which is a part of Article 21 of Constitution’.<sup>1180</sup> Thus, evidently, Article 21 targets both State action and inaction, and can be used by courts to compel State action through positive duties.<sup>1181</sup> This reaffirms the conclusion in Chapter 2 that Article 21 goes beyond a traditional liberal understanding of reproductive choice, to require positive State action facilitating reproductive decision-making.<sup>1182</sup>

### *iii. Non-Conditional Duties*

Even if Article 21 could be used to compel State action, its force would be tremendously diluted if, as Khosla argues,<sup>1183</sup> the right to health under Article 21 is simply a conditional rather than a systemic right. The nature and scope of a systemic right is independent of State action. In contrast,

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<sup>1176</sup> *ibid* [7].

<sup>1177</sup> *Dinanath Wagbmare* (n 295).

<sup>1178</sup> *ibid* [5].

<sup>1179</sup> *Snehalatha Singh* (n 292).

<sup>1180</sup> *ibid* [24]; See also *Bichem Pondi v Union of India* W.P.(PIL) No. 11/2016 (Chhattisgarh High Court, 26 September 2017); *Court v UoI* (n 286).

<sup>1181</sup> Jayna Kothari, ‘Social Rights Litigation in India: Developments of the Last Decade’ in Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 192 (‘Social Rights’); Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 89.

<sup>1182</sup> See Chapter 2, Part III.

<sup>1183</sup> Madhav Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8 *International Journal of Constitutional Law* 739.

the nature of a conditional right, and by implication the duties emerging from the right, are contingent upon State action such that a violation occurs *only* if the State undertakes an obligation but does not fulfil it. In other words, per Khosla, a conditional right is violated only when the State initiates a scheme but does not implement it appropriately.<sup>1184</sup> The nature and scope of the right, and the corresponding duties, thus emerge from the particulars of existing State policy.<sup>1185</sup> Courts therefore, by implication, cannot ask the State to take steps, if there is no policy—or other form of State action—already in existence.

Khosla arrives at this conclusion through a perusal of cases on the right to health,<sup>1186</sup> housing<sup>1187</sup> and education.<sup>1188</sup> One explanation for Khosla's observation could be the very nature of petitions before courts. As some form of State action typically exists with respect to issues like health, housing and education, petitions commonly ask for, and courts in turn order, the implementation of existing schemes. This is commonly the case with obstetric care.<sup>1189</sup> A related explanation could be concerns about separation of powers, with courts recognising the limits on their democratic legitimacy and institutional competence in adjudicating on positive duties. Respecting these limits, if the duty sought from the State falls within the ambit of an existing scheme, courts simply choose to implement the scheme.<sup>1190</sup> However, Khosla's claim appears to be independent of both these factors, as he uses the courts' tendency to implement schemes to

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<sup>1184</sup> *ibid* 751.

<sup>1185</sup> *ibid* 748.

<sup>1186</sup> *Rakesh Chandra Narayan v State of Bihar* (1989) AIR SC 348; *Paschim Banga* (n 30).

<sup>1187</sup> *Olga Tellis* (n 26).

<sup>1188</sup> *Mohini Jain v State of Karnataka* (1992) AIR SC 1858; *Unni Krishnan v State of Andhra Pradesh* (1993) AIR SC 217.

<sup>1189</sup> See for instance, *Anami Shobor v State of Assam* W.P.(C) No. 6079/2016 (Guwahati High Court, 16 July 2017); *Rupasisingh Majhi* (n 288).

<sup>1190</sup> *Rinzing Chewang Kasi v State of Sikkim* W.P.(PIL) No. 30/2012 (Gangtok High Court, 5 April 2016) [29] ('*Rinzing*') where, in giving directions to the State to set up blood banks, the Court held: 'We are conscious that we are not experts, however, the view which we have taken, is based upon the documents of NRHM'.

argue that the right itself, and the duties emerging from the right, are conditional on the very existence of a scheme. If Khosla's claim is to hold true, and if the right to health under Article 21 is conditional on there being a scheme in the first place, then, two additional observations would necessarily follow. *First*, that if there is no scheme in existence, courts refuse to impose positive duties on the State and *second*, that courts do not go beyond existing schemes in imposing duties as the scope of the duty is circumscribed by the bounds of the scheme. However, the obstetric care cases show that neither of these observations hold true, indicating that Khosla's claim, even if true with respect to the specific examples he relies on, is not generalisable.

Consider *Court on its Own Motion*,<sup>1191</sup> responding to the death of a destitute woman after giving birth on the street, which the Delhi High Court identified as violating Article 21. No claim was made by the petitioners for implementing existing schemes, pointing to the absence of schemes on pregnancy amongst homeless women. At this stage, going by Khosla's thesis, the Court ought to have refused to impose obligations on the State. However, instead, the Court initiated a process of deliberation—the process is explored in greater detail in Part IV(B) of the Chapter—with the State and non-governmental organisations. After this process, the Court required the State to take several specific steps: demarcate shelter homes for destitute pregnant women; provide them food and medical care; set up mobile medical units; and raise awareness about the homes. Crucially, these obligations were not sourced by the Court from existing schemes—as Khosla argues—but rather from the right to health under Article 21.

Similarly, courts go beyond existing schemes in imposing obligations on the State under Article 21. For instance, the Delhi High Court in *Laxmi Mandal*<sup>1192</sup> suggested several improvements to existing maternal health schemes including through the setting up an efficient system of referral

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<sup>1191</sup> *Court v UoI* (n 286).

<sup>1192</sup> *Laxmi Mandal* (n 38).

between healthcare institutions; ensuring ‘safe and prompt’ transport for women from their homes to hospitals and vice versa; overhauling anganwadi centres, which are in a ‘deplorable condition’; recognising women in the family who are ‘home-makers’ as ‘primary breadwinners’ for the purpose of compensation; and, introducing monitoring mechanisms.<sup>1193</sup> Similarly, in *Sandesh Bansal*,<sup>1194</sup> the Madhya Pradesh High Court drew on the State’s constitutional obligations under Article 21 to place on the State ‘additional obligations’ going beyond existing schemes, including appointment of staff, ensuring uninterrupted electricity, water and modern sanitation, providing vaccinations and constituting monitoring committees.<sup>1195</sup>

Thus, contrary to Khosla’s conditional rights thesis, courts do not, under Article 21, simply pass orders for the implementation of existing schemes. Rather, having laid down a robust reading of the ‘right to life’, they implicitly assess existing schemes against this right, identify where the schemes fall short, and explicitly go beyond them to impose positive duties on the State. This form of judicial action could raise concerns of separation of powers; the deliberative framework, discussed in Part IV(B), attempts to address these concerns. For now, however, these cases illustrate the systemic nature of the right to health under Article 21.

#### *iv. Scope of Positive Duties*

Here, I discuss the scope of positive duties that courts have so far imposed on the State under Article 21 to redress preventable maternal mortality and morbidity. Let me begin with a caveat. In most cases examined below, courts proceed directly from identifying the rights violation to ordering the remedies. That is, there is no clear articulation of the scope of State duties. As a result,

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<sup>1193</sup> *ibid* [62]-[69].

<sup>1194</sup> *Sandesh Bansal* (n 282).

<sup>1195</sup> *ibid* [23], [24].

I reconstruct the duties courts have identified as required by Article 21 based on the remedies courts grant.

In *Laxmi Mandal*,<sup>1196</sup> which I discussed briefly in Chapter 2, Shanti died giving birth to her sixth child. The maternal death audit revealed that the ‘direct cause’ for Shanti’s death was a hemorrhage. However, the audit identified that there were ‘many indirect and contributing factors to her death, which broadly include, her dismal socio-economic status which denied access to needed resources and services, and her poor health condition which is a culmination of anemia, tuberculosis and repeated, unsafe pregnancies’. Shanti belonged to the State of Bihar, where women’s social status is low, evident in the ‘unfavourable ratio of women to men, low female literacy, higher incidence of death due to childbirth, higher percentage of anaemic married women, etc’. Shanti migrated with her husband to Haryana. As they did not have a ration card in Haryana, they did not have access to subsidised food, education and healthcare, and could not avail of the JSY entitlements, causing ‘poor living conditions, low access to food, information, resources, services which reduced her capacity to cope up with her physiological processes’. Shanti had ‘severe anaemia’, which placed an ‘additional burden’ on her while pregnant due to the increased demand for nutrition. She was malnourished, and sat ‘sick and thin and depressed all the time’, especially during her last pregnancy.<sup>1197</sup>

These facts starkly highlight how Shanti’s status as a poor, Scheduled Caste woman made her especially vulnerable to ill health even before she approached the healthcare system during her pregnancy. Gender norms resulted in early marriage, low literacy, multiple pregnancies and anaemia. Belonging to an socio-economically disadvantaged class meant that she relied on the State

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<sup>1196</sup> *Laxmi Mandal* (n 38).

<sup>1197</sup> *ibid* [28.10].

for basic health, nutrition and education, which the State failed to provide as evident from her illiteracy and struggle to obtain a ration card.

From this position of ill health, Shanti's experiences within the healthcare system only exacerbated her disadvantage. Shanti fell down the stairs in the seventh month of her fifth pregnancy, fracturing multiple ribs, which caused a miscarriage. However, she was unable to access medical care for two weeks because she could not afford it. She also hesitated to go to a hospital, fearing that she would not receive appropriate care. Her fears unfortunately came true. At the first hospital, despite discovering the miscarriage, Shanti was not offered treatment, and was instead referred to another facility. The second hospital did not have a bed in the Intensive Care Unit for the removal of the foetus, and thus referred her to a third institution. At the third hospital, she was asked to either produce a 'below poverty line' ('BPL') card—which she did not possess—or pay Rs. 50,000, which she could not afford. She was then taken back to the second hospital, from where she was referred to the fourth hospital, where the foetus was finally removed from her body.<sup>1198</sup> Despite recognising that a sixth pregnancy would risk Shanti's life, the fourth hospital did not refer her or her husband to counselling for contraceptive use.<sup>1199</sup> The maternal death audit stated that the non-use of contraception was the 'most critical' factor in her death.<sup>1200</sup>

From the above, it is clear that several healthcare system deficiencies contributed to Shanti's death: an inefficient referral procedure, shortage of beds, and delayed obstetric care. At the same time, her intersecting group-based disadvantage as a poor, Scheduled Caste woman also shaped Shanti's experiences within the healthcare system, adversely affecting her already poor health. Her well-being was not treated as a priority, and she was made to shuttle from institution

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<sup>1198</sup> *ibid* [28.3]-[28.5].

<sup>1199</sup> *ibid* [28.10].

<sup>1200</sup> Jameen Kaur, 'The Role of Litigation in Ensuring Women's Reproductive Rights: An Analysis of the Shanti Devi Judgement in India' (2012) 20 *Reproductive Health Matters* 21-30, 25.

to institution, as she feared would happen. She was asked for documents she did not possess and money she could not afford. She was also given no information about contraception, information she relied on the State for. In essence, Shanti died ‘*because* she was a pregnant woman of lower caste and economic status who depended on government programs for prenatal and postnatal care’.<sup>1201</sup>

Against this factual matrix, the Delhi High Court recognised that ‘in Shanti Devi’s case...the maternal mortality was clearly avoidable.’<sup>1202</sup> The Court chastised the State for failing to implement existing schemes, as Shanti was unable to ‘effectively access’ the healthcare system and did not receive ‘minimum health care’. The Court also pointed out that the quality of services was lacking. Moving to remedies, the Court required the State to provide compensation to Shanti’s family, for her ‘avoidable death’.<sup>1203</sup> At the same time, the Court passed orders to improve the referral system, ensure portability of schemes across states taking into account the reality of inter-state migration, provide ‘safe and prompt’ transport to healthcare facilities, set up a common point for collection of benefits across schemes, collect information on the working of schemes and put in place a monitoring system for the implementation of schemes.<sup>1204</sup>

At this point, it is instructive to identify Article 21’s contributions in responding to State failure to redress preventable maternal mortality and morbidity. As Part III(A)(i) of the Chapter shows, in centring the individual as an individual, Article 21 offers protection to the interests represented by the individual dimension. It preserves the sanctity of the individual’s (here, the woman’s) body from threats to life and health during pregnancy and childbirth (bodily

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<sup>1201</sup> Jennifer Templeton Dunn, Katherine Lesyna and Anna Zaret, ‘The Role of Human Rights Litigation in Improving Access to Reproductive Health Care and Achieving Reductions in Maternal Mortality’ (2017) 17 BMC Pregnancy and Childbirth 367, 380 (emphasis added); *ibid* 27.

<sup>1202</sup> *Laxmi Mandal* (n 38) [53].

<sup>1203</sup> *ibid* [55(g)].

<sup>1204</sup> *ibid* [62]-[69].

component). At the same time, it prohibits forms of treatment which harm the individual's (here, the woman's) dignity through degrading their sense of self or their innate human personality (identity component). The harm to their sense of self is also seen as emerging from harm to their bodies—through acts disrespecting them during childbirth—thus understanding personhood as developing through an interaction between the individual's body and mind. Drawing on this core of interests (which align with those represented by the individual dimension), Article 21 imposes systemic positive duties on the State.

Moreover, and crucially, the positive duties under Article 21 are not purely individualistic in nature. They do not simply offer the petitioner compensation or the specific healthcare benefit sought, or hold a given healthcare professional responsible for mistreatment. Rather, they are structural, transcending the perspective of the 'single perpetrator or single victim'<sup>1205</sup> and targeting the deficiencies of the healthcare system more generally, thus benefiting other women like Shanti who seek obstetric care at public institutions. This structural focus, in turn, allows Article 21 to respond to common critiques of right to health litigation as being too individualistic, emerging from other constitutional contexts.<sup>1206</sup> Thus, Article 21's contributions in responding to Shanti's death are significant.

Yet, Article 21 does not go far enough. It only requires the State to remedy healthcare system failures, which are important but incomplete because they ignore the role of group-based disadvantage in driving preventable maternal mortality and morbidity. As Johnson and Das rightly ask about *Laxmi Mandal*:

how should one interpret the entitlements that follow from the [Delhi] high court's decision? Would the entitlements be sufficiently actualized through strengthening the

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<sup>1205</sup> Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010) 28.

<sup>1206</sup> See, for instance, Octavio Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (CUP 2021) 225-64; Alicia Ely Yamin, 'Editorial: Promoting Equity in Health: What Role for Courts?' (2014) 16 *Health and Human Rights* E1.

administration and implementation of the various benefit schemes, or do they require initiating discussion over issues such as lack of education, lack of access to clean water and sanitation, gender discrimination, caste-based discrimination (and the inability to acquire an eligibility card for someone below the poverty line), domestic violence, and so forth.<sup>1207</sup>

In other words, ‘to what extent do the directives in the court verdict address the *primary causal factors* behind preventable maternal deaths in India?’<sup>1208</sup>

In focusing on the healthcare system factors to the exclusion of the role of group-based disadvantage, the positive duties in *Laxmi Mandal* offer a crucial response—a strong start—but a limited one to redressing preventable maternal mortality and morbidity. Assume that the public healthcare system provided quality and timely healthcare, free of cost. Even then, as long as women continue to suffer from poor health outcomes before approaching the healthcare system—on account of early marriages, lack of reproductive decision-making, malnutrition and anaemia, domestic violence and illiteracy—and women from marginalised groups experience disrespect, abuse and denial of care within the healthcare system, preventable maternal mortality and morbidity will both continue to exist, *and* be concentrated amongst women from marginalised groups.

The only instance where *Laxmi Mandal* paid some attention to group membership was in its reference to socio-economic disadvantage, with the Court identifying the failure of the State to implement schemes ‘meant for the poor’.<sup>1209</sup> The acknowledgment of socio-economic disadvantage could simply be because the ‘central focus’ of the schemes is the ‘economically and socially disadvantaged sections of society’<sup>1210</sup> implying that any petition for their implementation would invariably take socio-economic disadvantage into account. The reference to socio-economic

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<sup>1207</sup> Johnson and Das (n 1077) 132.

<sup>1208</sup> *ibid* 136 (emphasis added).

<sup>1209</sup> *Laxmi Mandal* (n 38) [19].

<sup>1210</sup> *ibid*.

disadvantage could also be a manifestation of a broader trend in socio-economic rights litigation, which often focuses on material inequality<sup>1211</sup> because socio-economic rights are of particular value to members of groups with less access to resources to realise their rights.<sup>1212</sup> However, even in its reference to socio-economic disadvantage, the Court in *Laxmi Mandal* did not identify how disadvantage arising from poor socio-economic status played a role in Shanti's avoidable death during childbirth. The Court also did not, in turn, examine how the State could redress preventable maternal mortality and morbidity by specifically taking into account the socio-economically disadvantaged status of women seeking public sector obstetric care. And, in singularly focusing on socio-economic disadvantage, the Court glossed over the role of other identity grounds, like gender, caste or disability, in intersecting with, and reinforcing, disadvantage experienced on account of material inequality.<sup>1213</sup>

In response, it could be argued that the scope of positive duties under Article 21 in *Laxmi Mandal* was limited to healthcare system deficiencies because the petition before the Court focused solely on these factors as causing Shanti's avoidable death. However, in *Sandesh Bansal*,<sup>1214</sup> the petition highlighted that pregnant women are dying during childbirth because of 'high cost of health care and failure of public health system, lack of qualified medical staff in rural areas, lack of appropriate transport, ***[and] cultural and social reasons that come in way of women for effective and adequate access to health care***'.<sup>1215</sup> In other words, the petition brought attention to both healthcare system factors *and* group-based disadvantage, especially the role of gender norms. The

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<sup>1211</sup> Colm O'Coinneide, 'The Potential and Pitfall of Intersectionality in the Context of Social Rights Adjudication' in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart Publishing 2020) 74.

<sup>1212</sup> Geraldine Van Bueren, 'Class, Intersectionality, the Right to Housing and the Avoidable Tragedy of the Grenfell Tower', in Atrey and Dunn (ed) (n 1211) 119.

<sup>1213</sup> O'Coinneide (n 1211) 74.

<sup>1214</sup> *Sandesh Bansal* (n 282).

<sup>1215</sup> *ibid* [11] (emphasis added).

petition also pointed out that a woman from the richest 20% of the population is 3.6 times more likely to receive antenatal care and 6 times more likely to have an institutional birth, in comparison to women from the poorest 20%,<sup>1216</sup> speaking to the role of socio-economic status as a determinant of preventable maternal mortality and morbidity. Despite this, the positive duties the Madhya Pradesh High Court imposed on the State under Article 21 focused entirely on remedying healthcare system deficiencies, requiring improvements to infrastructure and appointment of skilled personnel.<sup>1217</sup> *Sandesh Mandal* thus confirms that the exclusion of group-based disadvantage is tied to the constitutional right under Article 21, rather than the scope of the petition.

This conclusion is not surprising, in light of my argument in Chapter 2. Chapter 2 shows that the interests Article 21 protects in constitutionally grounding reproductive rights are the interests represented by the individual dimension: the woman's interests in preserving her life, physical and mental health and her interest in making decisions central to her sense of self, including decisions involving her body. In protecting these interests, Article 21 centres an individual as an individual; that is, the interests are protected *because* of the importance attributed to the core personality of the individual. Article 21 does understand the individual 'concretely', by locating her within her broader social context and amongst her web of relationships. Yet, Article 21 fails to protect the interests represented by the social dimension. These interests go beyond the broader social context to narrow in on the role of group membership, both as a factor responsible for the denial of reproductive decision-making (through the death of women during childbirth) and a site of State action to guarantee such decision-making in a 'real and effective' manner (through the redressal of group-based disadvantage in remedying preventable maternal mortality

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<sup>1216</sup> *ibid* [11].

<sup>1217</sup> *ibid* [23]-[26].

and morbidity). Even at its *most* ‘concrete’, Article 21 does not go this far. Can Article 15, then, perform this role? I now turn to this question.

B. Article 15

*i. Tracing the Rights Violation*

Applying the substantive equality reading of Article 15 set out in Chapter 3, the non-discrimination guarantee is violated if women’s historical group disadvantage is perpetuated along Fredman’s four interacting dimensions. As with the restrictions on reproductive decision-making built into India’s law on abortion, State failure to redress preventable maternal mortality and morbidity disadvantages women materially, threatening their lives and eroding their health. It also entrenches women’s socio-economic disadvantage, due to their reduced labour force participation on account of poor physical and mental health during and post pregnancy:

Improved work parity stemming from greater female representation in the national workforce, including in managerial, technical and professional jobs, was... significantly correlated with reduced maternal mortality... a 10% increase in female labour force participation was indicative of 14.6 fewer maternal deaths per 100 000 live births.<sup>1218</sup>

Continuing maternal mortality and morbidity also perpetuates women’s secondary social status, indicating that the State itself does not regard women’s survival and health as a priority. It is important to remember that dying during childbirth is not normal; pregnancy is not a disease.<sup>1219</sup> Instead, it is a socially beneficial physiological process in which women engage.<sup>1220</sup> It is shocking (yet not surprising) that there is no single cause of death and disability for men between the ages

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<sup>1218</sup> Adva Gadoth and Jody Heymann, ‘Gender Parity at Scale: Examining Correlations of Country-Level Female Participation in Education and Work with Measures of Men’s and Women’s Survival’ (2020) 20 *EClinicalMedicine* 5; Katharina Spiess and Annalena Dunkelberg, ‘The Impact of Child and Maternal Health Indicators on Female Labor Force Participation after Childbirth: Evidence for Germany’ (2009) 40(1) 119-38.

<sup>1219</sup> Reginaldo Antônio de Oliveira Freitas-Júnior, ‘Avoidable Maternal Mortality as Social Injustice’ (2020) 20 *Revista Brasileira de Saúde Materno Infantil* 607.

<sup>1220</sup> Rebecca Cook, ‘Human Rights and Maternal Health: Exploring the Effectiveness of the *Ahlyne* Decision’ (2013) 41 *Journal of Law, Medicine & Ethics* 109 (‘Maternal Health’).

of 15 and 44 that is close to the magnitude of maternal mortality.<sup>1221</sup> Women dying during childbirth thus:

reveals the assumption that ‘lives of mothers are expendable and women do not matter’. The preventable rate of maternal mortality is [thus] a tragic symptom of a larger social injustice of discrimination against women—because of their status in society—that societies are unwilling to prevent, remedy and punish.<sup>1222</sup>

The State’s failure to act also maintains the patriarchal institution of motherhood, perpetuating women’s structural disadvantage. As Part II of the Chapter shows, the high rate of maternal mortality and morbidity is partly attributable to women’s structural disadvantage within patriarchy, manifesting in early marriages, female illiteracy, domestic violence, malnutrition amongst women, and the denial of decision-making within the reproductive sphere and outside of it. In other words, maternal mortality and morbidity reflects systemic discrimination against women,<sup>1223</sup> which falls under the radar of Article 15 when read substantively.<sup>1224</sup> Maternal mortality and morbidity is not attributable to an ‘identifiable actor’s isolated state of mind’.<sup>1225</sup> Rather, it is a product of the ‘insidious patriarchal system’,<sup>1226</sup> which ‘encapsulates the patriarchal disadvantage that permeates all aspects of [a woman’s] being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure’.<sup>1227</sup> And, it manifests as ‘unequal power and

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<sup>1221</sup> Cabal and Stoffregen (n 1074) 2.

<sup>1222</sup> Rebecca Cook, ‘Human Rights Law and Safe Motherhood’ (1998) 5 *European Journal of Health Law* 357 (‘Safe Motherhood’); Ebenezer Durojaye, ‘Substantive Equality and Maternal Mortality in Nigeria’ (2012) 44 *The Journal of Legal Pluralism and Unofficial Law* 111; Khanna and Sri, *Maternal Health Policy* (n 1140) 13; Joint Statement (n 1072) 13-14.

<sup>1223</sup> Cabal and Stoffregen (n 1074) 3.

<sup>1224</sup> See Chapter 3, Part V(C).

<sup>1225</sup> *Nitisha* (n 523) [72].

<sup>1226</sup> *ibid* [100].

<sup>1227</sup> *ibid* [77].

consequently as unequal life chances'.<sup>1228</sup> Against this, State failure to redress preventable maternal mortality and morbidity—not only by providing timely, quality, accessible obstetric care but also through eliminating child marriage, ensuring female education, preventing domestic violence and providing adequate nutrition—both maintains these patriarchal 'patterns' of disadvantage<sup>1229</sup> and perpetuates them by subjecting women, once again, to ill health and death. It thus 'generates and maintains social hierarchies' by conditioning health differences between groups.<sup>1230</sup>

Finally, the State's failure to guarantee women's health during and after childbirth compromises their ability to 'participate equally in all aspects of social, economic, and public life'.<sup>1231</sup> Poor health could impair both women's participation within the home, and their participation within the public sphere (like the labour market, as noted above). It could also adversely affect women's political participation, which in turn exacerbates maternal mortality and morbidity, the rates of which show 'sharp sustained reduction' with rising numbers of women in parliaments.<sup>1232</sup>

These dimensions of disadvantage further interact with one another, entrenching their individual effects. The socio-economic implications of maternal mortality and morbidity (first dimension) hamper women's participation in the public and private sphere (fourth dimension). Women's voices are in turn deprioritised in decisions concerning them, increasing the propensity

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<sup>1228</sup> Kia Lilly Caldwell, *Health Equity in Brazil: Intersections of Gender, Race, and Policy* (University of Illinois Press 2017) 206.

<sup>1229</sup> *Nitisha* (n 523) [44].

<sup>1230</sup> Hamal et al (n 277) 2; Sanneving et al (n 277) 2.

<sup>1231</sup> 'Bringing Rights to Bear: Preventing Maternal Mortality and Ensuring Safe Pregnancy' (Center for Reproductive Rights) 9  
<[https://www.reproductiverights.org/sites/crr.civactions.net/files/documents/BRB\\_Maternal%20Mortality\\_10\\_08.pdf](https://www.reproductiverights.org/sites/crr.civactions.net/files/documents/BRB_Maternal%20Mortality_10_08.pdf)> accessed 4 May 2022.

<sup>1232</sup> Sonia Bhalotra et al, 'Maternal Mortality and Women's Political Power' (Warwick Economics Research Papers No 1353 2021) 1 <[https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2021/twerp\\_1353\\_-\\_bhalotra.pdf](https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2021/twerp_1353_-_bhalotra.pdf)> accessed 4 May 2022.

of child marriages, reducing their access to education and neglecting their health within the family. This contributes to women's structural disadvantage (third dimension), and maintains women's secondary social status (second dimension), which in turn drives State deprioritisation of preventable maternal mortality and morbidity.

Moreover, the interaction across these dimensions highlights the intersectional nature of group-based disadvantage lying at the root of preventable maternal mortality and morbidity. Part II of the Chapter demonstrates that socio-economically disadvantaged, lower caste, Muslim women living in rural areas experience the highest rates of preventable maternal mortality and morbidity. As the Allahabad High Court identified in *Snehalatha Singh*,<sup>1233</sup> it is primarily 'poor and needy'<sup>1234</sup> women—who have 'no voice'<sup>1235</sup>—who rely on public sector obstetric care, with economically advantaged groups using private services: 'Medical Health Services maintained by State provides bitterest experience to needy ones,<sup>1236</sup> who are left at the mercy of inadequately and poorly maintained State run Medical Services, and '[lose] their lives like guinea pigs'.<sup>1237</sup> This 'twin class service',<sup>1238</sup> the Court observed, is a form of 'class discrimination': 'at the highest level of State nobody is sensitive enough to look into the plight of poor, needy, infirm and sick people for whose benefit State medical services are run and that is why such a large number of vacancies have been allowed to continue...It is class discrimination which is not allowing the system to improve.'<sup>1239</sup> While I do not endorse the Allahabad High Court's portrayal of pregnant women as 'needy',

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<sup>1233</sup> *Snehalatha Singh* (n 292).

<sup>1234</sup> *ibid* [36]

<sup>1235</sup> *ibid* [142].

<sup>1236</sup> *ibid* [100].

<sup>1237</sup> *ibid* [138].

<sup>1238</sup> *ibid* [139].

<sup>1239</sup> *ibid* [39], [137].

‘voiceless’, ‘guinea pigs’,<sup>1240</sup> *Snehalatha Singh* remains helpful in drawing attention to the intersectional impact of the State’s failure to maintain timely and quality obstetric care.

In the doctrinal language of Article 15’s substantive equality avatar, State inaction in redressing preventable maternal mortality and morbidity thus amounts to direct discrimination on ground of sex because it perpetuates women’s group-based disadvantage along the four interacting dimensions. And, it amounts to indirect intersectional discrimination on ground of sex in intersection with other listed (caste, religion) and analogous (socio-economic status, geographical location) grounds, as it has a disproportionate adverse impact on women from these marginalised groups.

In response, one might argue that Article 15 typically targets only forms of State action and not State inaction, as is the case at hand. That is, Article 15 can only be used to resist forms of State intervention; it cannot be used to ask the State *to intervene*, through positive duties. In the next section, I respond to this claim by laying out two routes through which State inaction in redressing preventable maternal mortality and morbidity can be constitutionally challenged using Article 15, to direct State action.

## *ii. Positive Duties*

Article 15(3) presents the first route to positive duties, allowing the State to enact ‘special provisions’ for women. The substantive equality reading of Article 15(3), set out in Chapter 3, does not treat gender difference as irrelevant and guarantee women only identical treatment with men, therein requiring women to be like men to claim equality. Instead gender difference is recognised and respected, and differential treatment is permitted (or even required) to the extent necessary to redress disadvantage associated with such difference. This reading thus espouses an asymmetric

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<sup>1240</sup> This portrayal is inconsistent with the substantive equality reading of Article 15 (set out in Chapter 3). This reading refuses to essentialise disadvantage as innate to women as a group, which the Allahabad High Court is at the risk of doing with the language it uses.

understanding of discrimination, identifying as discrimination only those forms of differential treatment which entrench women's disadvantage. At the same time, in allowing differential treatment to redress disadvantage associated with women's difference, this reading does not essentialise either the difference or the disadvantage as innate or inevitable to women as a class. Instead, it distinguishes between pregnancy and parenthood; women are thus not treated as reproductive beings. And, it recognises the role of historic inequality in creating and perpetuating such disadvantage; women are thus not viewed as passive, disadvantaged victims of unfortunate circumstances.<sup>1241</sup>

Now, apply this reading to preventable maternal mortality and morbidity. Women's ability to become pregnant constitutes a relevant form of gender difference. Women experience disadvantage—here, maternal mortality and morbidity—on account of this difference. Such disadvantage is neither innate to women as a group, nor 'mere misfortunes and unavoidable natural disadvantages of pregnancy'.<sup>1242</sup> Rather, it is an 'active process of exclusion and marginalization'<sup>1243</sup> for which the State is responsible.<sup>1244</sup> The fact that women can become pregnant and give birth to children should not increase their chance of death, disability, or illness.<sup>1245</sup> Article 15(3) thus allows the State to introduce 'special provisions' to redress maternal mortality and morbidity. These measures would respect women's difference—their needs during pregnancy—while remedying preventable disadvantage—risk to life and health—associated with such difference. Crucially, these measures would not amount to sex discrimination under the

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<sup>1241</sup> See Chapter 3, Part V(B).

<sup>1242</sup> Cook, *Safe Motherhood* (n 1222) 357; Dunn, Lesyna and Zaret (n 1201) 367, 380.

<sup>1243</sup> Alicia Ely Yamin, 'Shades of Dignity: Exploring the Demands of Equality in Applying Human Rights Frameworks to Health' (2009) 11(2) *Health and Human Rights Journal* 2 ('Shades of Dignity').

<sup>1244</sup> Cook, *Maternal Health* (n 1220) 132; Caldwell (n 1228) 132.

<sup>1245</sup> *Dinanath Waghmare* (n 295); *Trinath Swain* (n 288); *Rupasingh Majhi* (n 288); *Alin* (n 288).

asymmetric definition of discrimination: their effect is not to perpetuate women's group-based disadvantage, but rather to redress it.

At the same time, Article 15(4) allows the State to enact 'any special provision' for 'the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'. Similarly, the Directive Principles of State Policy, in Article 46, requires the State to protect from 'social injustice and all forms of exploitation' the 'weaker sections' of people, in particular the Scheduled Castes and Tribes. Articles 15(3) and (4), when read together, allows the State to adopt special provisions for the advancement of women from certain marginalised groups. This reading is only strengthened when Article 46 is seen as providing 'structuring values' within which the concrete conception of rights, and their corresponding obligations, are determined.<sup>1246</sup> Moreover, under the substantive equality reading of Article 15, Articles 15(3) and (4) are not exceptions to the non-discrimination guarantee but rather a 'part and parcel' of it.<sup>1247</sup> This means that Articles 15(3) and (4) do not exhaustively cover the whole range of permissible special provisions. Special measures which do not fall within the scope of these provisions can be introduced under Article 15(1), and they too would not constitute discrimination. As a result, even though Article 15(4) explicitly mentions only certain marginalised groups, special provisions for women from other marginalised groups—say, socio-economically disadvantaged, Muslim or rural women—would be permissible under Article 15(1). In enacting these measures, the State would be allowed to pay special attention to the needs of women from

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<sup>1246</sup> The Directive Principles of State Policy are not binding (unlike the Fundamental Rights), per Constitution of India 1950, art 37. For a historical typology of their use, culminating in their use as 'structuring values', see Bhatia, *Directive Principles* (n 1051) 654-61.

<sup>1247</sup> *NM Thomas* (n 715); See Chapter 3, Part V(C).

these groups,<sup>1248</sup> through taking additional steps.<sup>1249</sup> For instance, the State can put in place provisions to ensure that medical professionals do not abuse women from these groups or institute programmes to guarantee adequate nutrition amongst pregnant women from these groups. The State can also, arguably, prioritise women from these groups in redressing maternal mortality and morbidity, as they are at the highest risk of death or illness.<sup>1250</sup>

However, Articles 15(3) and (4) are not mandatory provisions; they are only permissive in nature,<sup>1251</sup> and have also been so interpreted by courts.<sup>1252</sup> Thus, Articles 15(3) and (4), as of now, do not vest in women a *right* to positive duties from the State through special provisions to meet their needs during pregnancy and reproduction.

Yet, as Chapter 3 shows through a textual, historical and structural reading, the Indian Constitution endorses a substantive conception of equality, which identifies differential treatment to redress group-based disadvantage as consistent with the guarantees of equality and non-discrimination. Interpreting Articles 15(3) and (4) to simply allow such differential treatment, rather than require it, is at odds with this substantive conception of equality.<sup>1253</sup> Recent decisions from the Supreme Court on disability discrimination have begun to endorse this interpretation:

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<sup>1248</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General Recommendation No 24: Women and Health’ (1999) UN Doc. A/54/38/Rev.1 [6], [28]; UNHRC, Technical Guidance (n 1147) [15].

<sup>1249</sup> UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (11 August 2000) UN Doc. E/C.12/2000/4 [18]-[19] (‘GC 14’).

<sup>1250</sup> Durojaye (n 1222) 125; Murray Wesson, ‘Discrimination Law and Social Rights: Intersections and Possibilities’ XII *Juridica International* 74-6.

<sup>1251</sup> Constitution of India 1950, arts 15(3) (‘Nothing in this article shall prevent the State from making any special provision for women and children’) and 15(4) (‘Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes’).

<sup>1252</sup> *C.A. Rajendran vs Union of India* (1968) 1 SCR 271 [6]; *Indra Sambney* (n 371) [628] (Sahai J.).

<sup>1253</sup> Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (University of California Press 1984) 244; Bhatia, *Transformative Constitution* (n 78) 105-6.

Equality not only implies preventing discrimination...but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. *In concrete terms, it means embracing the notion of positive rights.*<sup>1254</sup>

The principle of reasonable accommodation captures the *positive obligation* of the State and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society...for a person with disability, *the constitutionally guaranteed fundamental right to equality...will ring hollow if they are not given this additional support that helps make these rights real and meaningful for them.*<sup>1255</sup>

Applying this reading to sex discrimination, the Supreme Court in *Nitisha*<sup>1256</sup> began by defining the goal of substantive equality:<sup>1257</sup> the achievement of ‘factual equality’,<sup>1258</sup> beyond equality merely in form. As a result, the Court held, substantive equality requires that barriers which prevent members of disadvantaged groups from enjoying ‘full and equal citizenship’ ought to be dismantled, rather than being cited to ‘validate unjust status quo’.<sup>1259</sup> In other words, substantive equality mandates that the State not just refrain from certain forms of action—namely, direct or indirect discrimination—but also positively act to redress systemic forms of discrimination:

a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for *not just unjust action but also inaction*. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-to-day interaction and decision-making. The duty of constitutional courts, when confronted with such *a scheme of things*, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; *but also structure adequate reliefs and remedies that facilitate social re-distribution by providing for positive entitlements that aim to negate the scope of future harm.*<sup>1260</sup>

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<sup>1254</sup> *Jeeja Ghosh v Union of India* (2016) 7 SCC 761 [40] (Sikri J) (emphasis added).

<sup>1255</sup> *Vikash Kumar v UPSC* 2021 (1) SCT 647 [35] (emphasis added).

<sup>1256</sup> *Nitisha* (n 523).

<sup>1257</sup> *ibid* [42].

<sup>1258</sup> *ibid* [44]

<sup>1259</sup> *ibid* [45]

<sup>1260</sup> *ibid* [73].

The Court however arrived at this conclusion under Article 15 more generally, rather than relying on Articles 15(3) and (4). These provisions, thus, continue to be restricted to their permissive avatar, and remain an area for future development by courts. Even so, the Court's observations in *Nitisha* are enormously significant. As I argue in Part III(B)(i) of the Chapter, State failure in redressing preventable maternal mortality and morbidity is reflective of systemic discrimination against women. Applying the *Nitisha* reading, faced by this 'scheme of things', courts now can, under Article 15, not just strike down discriminatory State intervention but direct State action, through creating 'positive entitlements' that aim to 'negate' future harm to women, here risk of threat to life and health from pregnancy and childbirth. However, jurisprudentially, the *Nitisha* reading of Article 15 remains nascent, even though it has always been a necessary implication of the constitutional conception of substantive equality. Acknowledging this, I now offer an alternative route to positive duties using the non-discrimination guarantee.

Under this route, positive duties are sourced from Article 21, which, as Part III(A)(iii) of the Chapter shows, imposes a systemic duty on the State to act to preserve life and health. Article 15(1), acting in synthesis with Article 21, then requires that this duty be performed without discrimination, whether on ground of sex, or sex in intersection with other identities.<sup>1261</sup> Existing maternal mortality and morbidity, and its concentration amongst women from marginalised groups, points to discrimination in the State's performance of its duty under Article 21. Take the specific example of State expenditure on obstetric care. The State's lack of regard for women leaves their survival during reproduction of 'insufficient importance' to compel the allocation of resources.<sup>1262</sup> In *NAMHR*,<sup>1263</sup> the petition highlighted that the State of Chhattisgarh allotted 0%

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<sup>1261</sup> A similar interpretation of European Convention on Human Rights has been noted, with the equality right having a 'ratchet effect', in 'Economic and Social Rights in the Courtroom' (Equal Rights Trust 2014) <[https://www.equalrightstrust.org/ertdocumentbank/ESR\\_Guide.pdf](https://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf)> 19 accessed 4 May 2022; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 178.

<sup>1262</sup> Cook, Safe Motherhood (n 1222) 359.

<sup>1263</sup> *NAMHR* Petition (n 1165) [8.27].

of its budget for healthcare services for abortion during 2011-12. Similarly, in *Promotion and Advance of Justice*,<sup>1264</sup> the petitioners argued: ‘the State has defaulted year after year ignoring its responsibility to provide women with equal access to health. In so doing, the Assam government has forsaken the lives of thousands women’. In underspending on timely and quality public obstetric care, a form of healthcare than only women require and women from marginalised groups rely on, the State discriminates against women, both as a group and intersectionally. To avoid such discrimination, and to ensure ‘substantively equal access’ to a benefit that the law has already recognised<sup>1265</sup>—here, positive duties to promote the right to life and health under Article 21—Article 15(1) mandates that the State take measures to redress preventable maternal mortality and morbidity.

### *iii. Scope of Positive Duties*

Having set out the two routes to positive duties under Article 15, I now examine their scope. Recall that positive duties under Article 21 to redress preventable maternal mortality and morbidity focus predominantly on healthcare system factors. This scope is a product of the interests Article 21 protects both constitutionally and in grounding reproductive rights, which, in turn, reflects the interests represented by the individual dimension, centring the (‘concrete’) individual as an individual. In contrast, Article 15, as the constitutional home for reproductive rights, protects the interests represented by the social dimension. In protecting these interests, it centres the individual as a member of a group(s). Article 15 thus identifies that preventable maternal mortality and morbidity is a *product of*—or occurs *because of*—disadvantage on account of group membership, based on sex (historical component), and sex in intersection with other identities (intersectional

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<sup>1264</sup> *Promotion and Advance of Justice v State of Assam* (Supreme Court) <<https://hrln.org/supreme-court-of-india-issues-notice-to-the-state-union-of-india-after-hrln-files-special-leave-petition-slp-on-maternal-mortality-on-assams-tea-estates/>> accessed 4 May 2022.

<sup>1265</sup> Yamin, *Shades of Dignity* (n 1243) 7.

component). State failure to redress preventable maternal mortality and morbidity perpetuates such disadvantage, amounting to discrimination.

Some authors, including those writing within India's constitutional context, see equality's contribution in framing reproductive rights as converting liberty (or privacy) from a 'narrow focus on individual choice, free from state interference, to a wider understanding of the manner in which reproductive autonomy might be positive, contextual and relational'.<sup>1266</sup> That is, substantive equality locates liberty (or privacy) in context.<sup>1267</sup> When so located, liberty (or privacy) places positive duties on the State to dismantle structural barriers to reproductive decision-making. This makes choice 'meaningful' for all women, but especially women from marginalised groups.<sup>1268</sup> However, the Thesis' arguments in Chapter 2 show that Article 21 (at its best, or most 'concrete') is already positive, contextual and relational. If so, Article 15's role within the constitutional home on reproductive rights in India is not to function as a *general* contextual tool, but rather to acknowledge the effects of group membership, and emphasise the need to redress group-based disadvantage.

That is, Article 15 makes two crucial contributions. *First*, it explicitly draws out the role of group membership in causing preventable maternal mortality and morbidity. *Second*, it identifies the redressal of group-based disadvantage as an important step in remedying preventable maternal mortality and morbidity. Through these advances, Article 15 moves beyond healthcare system deficiencies alone to diagnose the 'root causes',<sup>1269</sup> the 'causal complexities',<sup>1270</sup> or the 'causal

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<sup>1266</sup> Albertyn (n 74) 97.

<sup>1267</sup> *ibid* 101-3; Joanna Birenbaum, 'Contextualising Choice: Abortion, Equality and the Right to Make Decisions Concerning Reproduction' (1996) 12 South African Journal on Human Rights 486; Jain and Shah (n 77) 34.

<sup>1268</sup> Albertyn (n 74) 103; Birenbaum (n 1267) 486; Jain and Shah (n 77) 28-36.

<sup>1269</sup> Durojaye (n 1222) 105.

<sup>1270</sup> Shreya Atrey, 'Introduction' in Atrey and Dunn (ed) (n 1211) 4.

priority<sup>1271</sup> of factors lying behind maternal death and illness, and the ‘dynamics of its reproduction’.<sup>1272</sup> It also identifies that healthcare system deficiencies are themselves often attributable to these root causes, with the State deprioritising a form of public healthcare that only women need, and which women from marginalised groups especially rely on. Recognising these factors is the ‘first step to begin addressing the reasons underlying maternal deaths’.<sup>1273</sup>

In this role, Article 15 thus provides an ‘interpretative filter’ for the Article 21 right to life and health. The duties emerging from the latter are interpreted through the lens of the non-discrimination guarantee to ensure that the law ‘responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of [the guarantee]’.<sup>1274</sup> When passed through this filter, the positive duties to redress maternal mortality and morbidity ‘reflect the specificities of gender’ to redress women’s disadvantage, here their poor health outcomes. They also take into account ‘existing power structures’ on ground not only of gender, but also other identities (and their intersection), and require the State to redress them to guarantee women’s life and health during pregnancy. That is, Article 15, when read in synthesis with Article 21, ‘engenders’<sup>1275</sup> the duties emerging from Article 21’s guarantee of life and health, and infuses them with intersectional content. To understand how Article 15 achieves this in concrete terms, I now revisit *Laxmi Mandal* through the lens of the synthesis.

In *Laxmi Mandal*, the Delhi High Court found a violation of Article 21 emerging from Shanti’s death during childbirth, and imposed duties on the State prevent maternal deaths by

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<sup>1271</sup> Hamal et al (n 277) 3.

<sup>1272</sup> Sheppard (n 1205) 73.

<sup>1273</sup> Khanna and Sri, Social Determinants (n 1085) 189.

<sup>1274</sup> Brodsky and Day (n 85) 213.

<sup>1275</sup> Sandra Fredman, ‘Engendering Socio-Economic Rights’ (2009) 25(3) South African Journal of Human Rights 410-23 (‘Engendering’).

remedying the healthcare system factors causing preventable maternal mortality and morbidity. Article 15, in contrast, would look closely at the groups to which Shanti belonged, and how intersecting group-based disadvantage caused Shanti's death during her sixth pregnancy. Specifically, it would identify how group membership resulted in her already poor health, her difficulties in accessing the healthcare system, and her experiences within the system, lowering her chances of surviving childbirth. A discrimination analysis would thus maintain the focus on Shanti as the individual rights-bearer, while also connecting her individual experiences to 'larger group-based realities'<sup>1276</sup> of disadvantaged populations. Through this, it would address not just 'individual stories' but also 'institutional relations, systemic practices, and larger structural and societal patterns of inequality and exclusion'.<sup>1277</sup> It would enable pregnant women like Shanti to move beyond a 'fatalistic acceptance of maternal death'.<sup>1278</sup> And crucially, it would open up the possibility of developing more effective ways to recognise, monitor, and redress maternal mortality and morbidity.<sup>1279</sup>

Preventing maternal mortality and morbidity amongst women like Shanti, thereby 'negating'<sup>1280</sup> future harm to women, would involve, more broadly, challenging 'conventional practices and value systems'<sup>1281</sup> through restructuring the 'social and cultural patterns of conduct', to eliminate prejudicial practices based on ideas of 'the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.<sup>1282</sup> More specifically, it would require taking

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<sup>1276</sup> Sheppard (n 1205) 66.

<sup>1277</sup> *ibid*; See also Cook, *Maternal Health* (n 1220) 110.

<sup>1278</sup> Cook, *Maternal Health* (n 1220) 117.

<sup>1279</sup> Caldwell (n 1228) 131.

<sup>1280</sup> *Nitisha* (n 523) [73].

<sup>1281</sup> Cook, *Safe Motherhood* (n 1222) 358.

<sup>1282</sup> 'Maternal Mortality in India: Using International and Constitutional Law to Promote Accountability and Change' (Center for Reproductive Rights 2008) 31 <[https://reproductiverights.org/wp-content/uploads/2020/12/MM\\_report\\_FINAL.pdf](https://reproductiverights.org/wp-content/uploads/2020/12/MM_report_FINAL.pdf)> accessed 5 May 2022 drawing on the CEDAW (n 48) art 5(a).

measures to effectively reduce, and ultimately eliminate, gender-based violence and child marriages,<sup>1283</sup> drawing explicit links between reproductive health and the State's education and nutrition policy<sup>1284</sup> and ensuring effective access to contraception.<sup>1285</sup> At the same time, it would also oblige the State to pay particular attention to the specific needs of women from marginalised groups, by according them preference within the State's efforts to reduce maternal mortality and morbidity, and allocating additional resources for this purpose.<sup>1286</sup> In Shanti's particular context, positive duties under Article 15 would thus extend beyond remedying healthcare system factors to ensuring appropriate nutrition for pregnant women, providing financial support for socio-economically disadvantaged women to access the healthcare system, removing documentary requirements in place mediating such access, providing contraception and contraceptive counselling to prevent rapid repeat pregnancies, and directing medical professionals to treat women from marginalised groups with respect: duties the Delhi High Court did not identify in *Laxmi Mandal*.

These duties are, without doubt, a piecemeal response to prevalent maternal mortality and morbidity in India, as they are structured based on Shanti's particular situation. This is an inherent limitation of judicial intervention, which occurs in response to the claims of a specific petitioner before the court. The court might choose to go beyond the individual petitioner, and explore the issue as a whole through a constitutional lens; Indian courts have previously adopted this model of intervention.<sup>1287</sup> I do not address here whether this approach is justified or not, though some

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<sup>1283</sup> 'Preventable Maternal Mortality and Morbidity and Human Rights' (United Nations Office of the High Commission for Human Rights) [18] <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/Health/ReportMaternalMortality.pdf>> accessed 5 May 2022.

<sup>1284</sup> Technical Guidance (n 1147) [27].

<sup>1285</sup> *ibid* [33].

<sup>1286</sup> Equal Rights Trust (n 1261) 17; Yamin, *Shades of Dignity* (n 1243) 8.

<sup>1287</sup> *PUCL* (n 28).

argue that it is not because it raises concerns of separation of powers.<sup>1288</sup> In any case, the bounded deliberative model, discussed in Part IV(B) of the Chapter, provides guidance to courts, *if* they choose this approach, on how they can intervene to protect constitutional rights while also paying heed to concerns about their democratic illegitimacy and institutional incompetence.

However, going back to the otherwise piecemeal nature of judicial remedies. At the very least, introducing Article 15 within the constitutional home for reproductive rights ensures that the scope of duties on the State to redress preventable maternal mortality and morbidity is widened, even if in a piecemeal sense, to go beyond healthcare system factors alone. At the same time, in widening this scope, Article 15 does not simply extend—or add-on—to women the Article 21 right to life and health. This would be the case if Article 15’s reach was limited just to pregnancy-specific forms of *healthcare* interventions, including ante-natal and post-natal care, and skilled attendance at childbirth. Instead, Article 15 acts in synthesis with Article 21 to move beyond healthcare to see ill-health as partly caused by group-based disadvantage, with such disadvantage both resulting in poor health outcomes before approaching the healthcare system, and shaping one’s access to, and experiences within, the system. In narrowing in on the remedying of group-based disadvantage as a site for State action in guaranteeing better health, the synthesis thus radically transforms the scope of positive duties on the State to remedy preventable maternal mortality and morbidity.

At this stage, it is helpful to draw the contributions of the synthesis together. *First*, and mirroring arguments made in Chapter 4, the synthesis identifies the whole range of rights violated by State failure to redress preventable mortality and morbidity. State inaction causes death and ill-health amongst women, thus violating their right to life. At the same time, and independently, State inaction also perpetuates women’s historical disadvantage as a group, affecting most

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<sup>1288</sup> See (n 1330).

adversely women from marginalised groups, thus discriminating against them. The two rights represent two distinct constitutional bases to target State failure, each playing a central role, such that one without the other is partial, deficient and lacking.

*Second*, the synthesis identifies full extent of the rights violation emerging from the interaction between the two individual rights. That it is it *women* who die or are injured when the State fails to act, a historically disadvantaged group whose disadvantage is perpetuated through State inaction, heightens the harm from the threat to their life and health. It shows that there is something especially wrong (note, not more wrong) in these cases of death and injury: Article 15 thus magnifies the Article 21 claim. Similarly, that women are denied their *life* and *health* through State failure to act, depriving them of a state of being fundamental to human existence, heightens the harm from discrimination against them. It reveals the especially pernicious effects of *this* specific form of sex and intersectional discrimination: Article 21 thus magnifies the Article 15 claim. Acting in concert, the two provisions therefore hone in on the full extent of rights violation caused by State inaction, shining light on what is truly at stake, from a constitutional perspective, when women die during pregnancy and childbirth.

*Third*, the synthesis transforms the scope of positive duties on the State to prevent such harm to women's life and health. It does not simply extend the State's positive duty to preserve life and health to women, but rather restructures it to target the gendered and intersectional disadvantage lying at the root of preventable maternal mortality and morbidity.

#### **IV. Role of Courts**

When faced with the altered scope of duties under the synthesis, the State might respond in two ways. *First*, the State might argue that while there is always scope for improvement with respect to its performance of positive duties, the steps it has currently taken—for instance, through schemes like the JSY and JSSK—are sufficient to meet its constitutional obligations. In other words, the focus on healthcare system factors to the exclusion of the role of group-based disadvantage, while

not perfect, is constitutionally adequate to meet the State's obligation to redress preventable maternal mortality and morbidity. This is especially so because positive duties 'entail a number of choices...which must be evaluated and ranked', require ongoing monitoring, and have budgetary implications,<sup>1289</sup> implying that courts ought to be deferent to the State in adjudicating on its performance of its positive duties. *Second*, and relatedly, the State might argue that courts have neither the democratic legitimacy nor the institutional competence to impose on the State duties under the synthesis to redress preventable maternal mortality and morbidity through eliminating group-based disadvantage.

Below, I respond to both these claims by exploring the appropriate role for courts in this context. *First*, I examine the applicable standard of review under the synthesis, and how courts can evaluate whether State action is constitutionally sufficient, or not, in fulfilling the State's positive obligations under the synthesis (**Part A**). *Second*, I point to the 'bounded deliberative' model of adjudication, recently adopted by the Supreme Court of India,<sup>1290</sup> as an example of how courts can intervene under the synthesis while respecting the State's democratic legitimacy and institutional competence (**Part B**).

#### A. Standard of Review

Chapter 4 argues that the proportionality test is now the accepted standard of review applicable to a breach of the State's negative duties under Articles 21 and 15. The parallel standard for positive duties is less clear.<sup>1291</sup> Some argue that the proportionality test ought not apply to positive duties

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<sup>1289</sup> Fredman, *Human Rights Transformed* (n 1261) 92.

<sup>1290</sup> *In Re: Distribution of Essential Supplies and Services During Pandemic Suo Motto* W.P.(C) No. 3/2021 (Supreme Court of India, 30 April 2021) ('*Vaccinations Order*').

<sup>1291</sup> Khosla (n 1183) 743-46; Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy' (2014) 39(1) *Brooklyn Journal of International Law* 53; Uday Shankar and Divya Tyagi, 'Socio-Economic Rights in India: Democracy Taking Roots' (2009) 42(4) *VERFASSUNG UND RECHT IN ÜBERSEE* 547.

as it is too stringent.<sup>1292</sup> Tellingly, the use of proportionality in India has so far been in the context of the State's negative duties. Whether proportionality ought to apply to positive duties or not is beyond the scope of this Thesis. Instead, I focus here on drawing out, from a close reading of the right to health cases, the standard that does apply currently to positive duties under Article 21, even if not expressly mentioned. It is important to reiterate here that the culling out of this standard is a reconstructive exercise, and offers a *possible* reading of the case law. As the literature aptly points out, the absence of a clear standard remains a significant shortcoming, and requires sustained judicial attention.

In *Paramanand Katra*,<sup>1293</sup> the Supreme Court assessed whether a State-run medical facility bore an immediate constitutional obligation to provide emergency medical care—a positive duty—to preserve human life. Answering in the affirmative, the Court held that such obligation is 'total, **absolute** and paramount',<sup>1294</sup> because the preservation of human life is of paramount importance; once it is lost, it cannot be regained.<sup>1295</sup> Echoing this holding, in *Paschim Banga*,<sup>1296</sup> the Supreme Court held that the obligation on the State to provide emergency medical care to preserve an individual's life is not subject to available resources:

In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that ***the State cannot avoid its constitutional obligation in that regard on account of financial constraints...*** The said observations would apply with ***equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life.***<sup>1297</sup>

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<sup>1292</sup> Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality* (CUP 2017) 221-47; X Contiades and A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 *International Journal of Constitutional Law* 660; Cf Barak (n 931) 422-34.

<sup>1293</sup> *Paramanand Katra v Union of India* (1989) AIR SC 2039.

<sup>1294</sup> *ibid* [8] (emphasis added).

<sup>1295</sup> *ibid* [7], [8].

<sup>1296</sup> *Paschim Banga* (n 30).

<sup>1297</sup> *ibid* [16] (emphasis added).

Thus, courts seem to apply a stringent standard of review with respect to emergency healthcare. They are less deferent to the State, and often require the immediate provision of medical aid, irrespective of financial considerations. However, courts treat non-emergency forms of healthcare differently. In *Ram Lubhaya Bhatta*,<sup>1298</sup> a State policy offering employees of public sector institutions reimbursement for healthcare expenses—even expenses incurred at private facilities but capped at a certain amount—was under challenge. The employees claimed that the positive action undertaken by the State was constitutionally insufficient in guaranteeing their right to health under Article 21 due to the cap on reimbursements at private facilities. The State, in response, argued that the right to health was not absolute, and could be subject to ‘reasonable’ restrictions in light of financial constraints of the State.<sup>1299</sup> The Supreme Court held that the State’s policy in capping reimbursement was constitutionally justifiable.<sup>1300</sup>

When Government forms its policy, it is based on number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion, it would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive.<sup>1301</sup>

No... fundamental right under Part III of the Constitution is... absolute and it is to be within permissible reasonable restriction. This principle equally applies when there is any constraint on the health budget on account of financial stringencies.<sup>1302</sup>

As a result, the Court observed, the ‘provision of [health] facilities cannot be unlimited. It has to be to the extent finance permit’.<sup>1303</sup> Thus, courts adopt a more deferential standard of review with

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<sup>1298</sup> *Ram Lubhaya Bhatta* (n 1168).

<sup>1299</sup> *ibid* [6], [7].

<sup>1300</sup> *ibid* [26], [21].

<sup>1301</sup> *ibid* [22].

<sup>1302</sup> *ibid* [32].

<sup>1303</sup> *ibid* [26], [29].

respect to non-emergency forms of healthcare, bowing to the State's democratic and institutional expertise, and limiting the State's positive obligations to the extent finances permit.

At the outset, this raises the question as to what constitutes emergency healthcare in the context of pregnancy and childbirth. In *Deepika D'Souza*,<sup>1304</sup> the petitioner, who had already lost two children during childbirth, was denied admission by the many public sector hospitals she approached at an advanced stage of pregnancy. She was forced to give birth in a railway station, and the child died due to exposure to infections. The State, in response argued that 'women in labour is not a *medical emergency*, as the time lag from the conception to delivery is nine months'.<sup>1305</sup> While the case is still pending, it illustrates the risks of the focus on emergency care within the Article 21 standard of review.

Moreover, this standard, in its application, can show excessive deference to the State when claims for non-emergency healthcare are made. In 2014, the petitioner in *NAMHR*<sup>1306</sup> highlighted the State's failure to set up healthcare centres offering abortion services in Chhattisgarh, particularly in rural districts, compelling women from marginalised groups, especially tribal women living in remote areas, to travel long distances to access abortions. The petition also drew attention to the fact that the State of Chhattisgarh had allotted 0% of its budget for abortion services during 2011-12. While acknowledging a violation of rights under Article 21, the Chhattisgarh High Court however cautioned that such centres could not be set up 'at the drop of a hat', as the requisite infrastructure has to be constructed, and staff appointed. The Court ordered that they be set up 'as early as possible'. In response, the State asked for a two year time period which the Court sanctioned. This is despite the fact that, as the petition points out, the majority of the expenditure

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<sup>1304</sup> *Deepika D'Souza v Municipal Corporation of Greater Mumbai* (Bombay High Court) <<https://hrln.org/wp-content/uploads/2017/12/Bombay-HC-order.pdf>> accessed 5 May 2022.

<sup>1305</sup> *ibid.*

<sup>1306</sup> *National Alliance for Maternal Health and Human Rights v State of Chhattisgarh* W.P. (PIL) No\_\_\_/2014 (Chhattisgarh High Court, 4 January 2017) <<https://www.slic.org.in/litigation/12685-2>> accessed 5 May 2022.

required for capacity building, creating physical infrastructure, instituting accountability mechanisms and providing of drugs had already been released by Central Government.<sup>1307</sup> Moreover, it is important to note that the petition was filed 43 years after the introduction of the MTPA legalising conditional abortion, and 9 years after the initiation of the National Rural Health Mission guaranteeing safe public sector access to legal abortions. Despite this, the Court *still* granted the State a significant amount of time to undertake necessary obligations. Crucially, the Court made no reference to the impact such delay in providing abortion care would have on women, especially women from marginalised groups, which the petition repeatedly highlighted. Similarly, in *Alin Mahanta*,<sup>1308</sup> where the petitioner challenged the poor condition of obstetric care in Assam, the Guwahati High Court simply held that the State has been making ‘reasonable and sufficient endeavour’ to provide basic facilities by implementing the schemes ‘as far as possible’: ‘We hope and expect that the respondent authorities shall make every endeavour to increase the same adequately’.

Both these examples illustrate the deference built into Article 21’s applicable standard of review, rendering it a right without much bite. The State can easily claim, under this standard, that the full spectrum of obstetric care—ante-natal care, skilled attendance at childbirth and post-natal care—falls outside the scope of emergency care, such that State provision of obstetric care should be treated with deference. Group-based disadvantage causing preventable maternal mortality and morbidity, in any case, does not fall under Article 21’s radar. And even if it did, it would similarly be considered beyond the scope of emergency care, with the State’s inadequate attempts to take such disadvantage into account in redressing maternal mortality and morbidity being shown deference.

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<sup>1307</sup> *NAMHR* Petition (n 1165) [8.10].

<sup>1308</sup> *Alin* (n 288).

Can Article 15 make a difference here? Writing in a South African context, Liebenberg and Goldblatt<sup>1309</sup> observe that a substantive equality perspective would add robustness to the ‘reasonableness’ assessment, the deferential standard of judicial review<sup>1310</sup> which applies to positive duties emerging from the right to health (and other socio-economic rights more broadly) in South Africa.<sup>1311</sup> A reasonableness assessment integrating a substantive equality perspective, they point out, would incorporate the following three inquiries: *first*, the nature of the resource or service to which access is sought; *second*, the historical and current social context in which the claimant group is situated; and *third*, the impact of denial of access to the relevant resource or service on this group, or more specifically, whether the denial of access has the effect of entrenching and perpetuating systemic patterns of racial, gender and other forms of discrimination and subordination.<sup>1312</sup> When State inaction ‘creates or reinforces patterns of inequality and marginalisation’, they claim, courts ought to demand ‘particularly stringent justifications from the state’,<sup>1313</sup> with such State inaction ‘unlikely to be found reasonable’.<sup>1314</sup> Similarly, writing in the context of the European Convention on Human Rights, O’Cinneide notes:

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<sup>1309</sup> Sandra Liebenberg and Beth Goldblatt, ‘The Interrelation Ship Between Equality and Socio-Economic Rights Und Er South Africa’s Transformative Constitution’ (2007) 23 South African Journal on Human Rights 335.

<sup>1310</sup> *ibid* 335; Fredman, *Human Rights Transformed* (n 1261) 115; DM Davis, ‘The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 South African Journal on Human Rights 477.

<sup>1311</sup> *Minister of Health and Others v Treatment Action Campaign* [2002] ZACC 15; *Government of Republic of South Africa v Grootboom* [2001] ZACC 19.

<sup>1312</sup> Liebenberg and Goldblatt (n 1309) 357; O’Cinneide (n 1211) 66.

<sup>1313</sup> Liebenberg and Goldblatt (n 1309) 359; Brodsky and Day (n 85) 219 (‘given the gravity of the harms caused by cuts to social assistance, the significance of the interests affected, and the vulnerability of women who live in conditions of poverty, the standard for justifying these cuts as a reasonable limit on the right to equality must be a high one’).

<sup>1314</sup> Pierre de Vos, ‘*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17 South African Journal on Human Rights 270.

Particular limitations on the enjoyment of social rights might be defensible in terms of their general impact, *but not as regards their disproportionate impact upon a specific subgroup delineated by two or more characteristics.*<sup>1315</sup>

These observations indicate that the incorporation of a non-discrimination perspective could add more ‘depth and substance’<sup>1316</sup> to the traditional deferential review applicable to positive duties, guarding against it ‘degenerating into an unprincipled and unduly deferential standard’.<sup>1317</sup> International law also supports this conclusion. Under international law, State failure to fulfil the right to health is typically subject to ‘progressive realisation’ in light of the limits on available resources.<sup>1318</sup> As a result, positive obligations on the State are not immediately enforceable. Rather, the State is required ‘to move as expeditiously and effectively as possible’ towards their full realisation, offering a degree of flexibility to the State.<sup>1319</sup> However, if the State’s failure to act amounts to discrimination, then the State bears an immediate obligation to act,<sup>1320</sup> with resource-based justifications holding lesser purchase: ‘even in times of severe resource constraints, the vulnerable members of society *must* be protected by the adoption of relatively low-cost targeted programmes’.<sup>1321</sup>

These sources are not directly binding on Indian courts,<sup>1322</sup> nor do I use them that way. However, their internal logic is persuasive, especially seen in light of Article 15’s constitutional role

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<sup>1315</sup> O’Cinneide (n 1211) 70 (emphasis added).

<sup>1316</sup> *ibid* 77.

<sup>1317</sup> Liebenberg and Goldblatt (n 1309) 359.

<sup>1318</sup> GC 14 (n 1249) [30].

<sup>1319</sup> *ibid* [31]; United Nations Committee on Economic, Social and Cultural Rights, ‘CESCR General Comment No 3 The Nature of States Parties Obligations’ (14 December 1990) UN Doc E/1991/23 [9] (‘GC 3’).

<sup>1320</sup> GC 14 (n 1249) [30]; GC 3 (n 1319) [30]; Fredman, *Engendering* (n 1275) 428.

<sup>1321</sup> GC 14 (n 1249) [18]; GC (n 1319) [12] (emphasis added).

<sup>1322</sup> On the use of international and comparative law by Indian courts, see: Rajamani (n 113) 144-58; Sujit Choudhry, ‘How to Do Comparative Constitutional Law in India’ in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (OUP 2012) 45-85.

set out in Chapter 3. Article 15 aims to eliminate disadvantage experienced by certain classes of ‘citizens who [have] suffered historical disadvantage, whether it be of a political, social, or economic nature’.<sup>1323</sup> State inaction in redressing preventable maternal mortality and morbidity perpetuates women’s historical disadvantage as a group, with such disadvantage concentrating amongst women from marginalised groups. Allowing the State to justify such inaction by simply pointing to its democratic and institutional expertise, or the shortage of financial resources, is likely to be inconsistent with Article 15’s constitutional role, and the underlying substantive conception of equality. Illustratively, the Delhi High Court in *Neetu Bala*<sup>1324</sup> held that financial reasons could not be cited to avoid the State’s responsibility under Article 15(3) to provide maternity leave. Substantive equality, thus, identifies that the relevant question is not *what* the cost to be borne is, but rather, *who* ought to bear such cost. It reveals that if the State refuses to bear the cost, it falls on women, particularly women from marginalised groups, who are least able to bear the cost. Substantive equality therefore aims to ‘redistribute these costs in ways which are fairer to all’,<sup>1325</sup> presenting courts with a more potent tool to respond to State claims of resource shortage:

A claim which demands that state resources be dedicated to achieving the right may be more likely to be successful if accompanied by a claim that a failure by the state to do this would constitute a state failure to refrain from unlawfully discriminating against a particular group. Judicial bodies seem far more comfortable making orders requiring expenditure in response to a finding of inequality.<sup>1326</sup>

That is, Article 15, in its substantive avatar, has the *potential* to demand that courts seek ‘particularly stringent justifications from the state’,<sup>1327</sup> to constitutionally legitimise the State’s failure to act. Through this, Article 15 diminishes the extent of deference granted to the State by Article 21 in

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<sup>1323</sup> *Navej Johar* (n 32) [15] (Malhotra J.).

<sup>1324</sup> *Neetu Bala* (n 615).

<sup>1325</sup> Fredman, *Substantive Equality Revisited* (n 515) 733.

<sup>1326</sup> *Equal Rights Trust* (n 1261) 20.

<sup>1327</sup> *Liebenberg and Goldblatt* (n 1309) 359.

choosing the means it adopts to fulfil its positive duties. Article 15's role here mirrors its contribution in Chapter 4, where it similarly limited the deference offered to the State under Article 21's proportionality test by functioning as a constitutional safeguard against means entrenching suspect stereotypes about women, even if they pursue a legitimate aim.

Courts have not, however, used Article 15 in this way so far. The precise nature of 'stringent justifications' acceptable, and the party who bears the burden of proof, will thus have to be developed judicially. The justification could, for example, include the rights of other persons. Where preventing discrimination through providing a specific form of healthcare requires the allocation of a 'disproportionately vast amount of resources...in turn...[depriving] most others of the ability to live an existence beyond the minimal', then the State's inaction may be justified,<sup>1328</sup> if supported by evidence. This, however, remains a potent area for future judicial development.

#### B. Bounded Deliberation

So far, I have argued that the synthesis allows courts to impose on the State positive duties to redress preventable maternal mortality and morbidity, transforms the scope of those duties, and potentially subjects State justifications in failing to perform those duties to a higher standard of scrutiny. The State might, at this stage, raise concerns of separation of powers, arguing that in imposing positive duties, especially those to redress group-based disadvantage, judges, rather than the democratically elected State, dictate redistributive decisions, usurping democracy. This is especially concerning, the State might argue, because courts do not have the institutional competence to either make these decisions or monitor the performance of positive duties.<sup>1329</sup>

These critiques have been especially prominent with respect to Indian courts, which have been

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<sup>1328</sup> David Bilchitz, *Poverty and Fundamental Rights* (OUP 2008) 225-64, adopting this line of argument with respect to the minimum core of socio-economic rights.

<sup>1329</sup>FI Michelman, 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 1 *International Journal of Constitutional Law* 22-3.; Fredman, *Human Rights Transformed* (n 1261) 92; DM Davis, 'Socio-Economic Rights' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1024-25 ('Socio-Economic Rights').

identified as ‘transgressing’ into policy-making through ‘judicial activism’, thus weakening the separation of powers.<sup>1330</sup>

At the outset, it is important to recognise that the role of the synthesis in shaping the State’s response to preventable maternal mortality and morbidity is directed not only at courts but also offers guidance for legislative and executive policy making, to ensure their compliance with the Constitution. At the same time, in as much as the synthesis speaks to courts, the critiques are relevant. However, the *extent* of their relevance turns on the model of judicial intervention adopted by courts. Drawing on Fredman,<sup>1331</sup> the Indian Supreme Court recently endorsed the ‘bounded deliberative’ model,<sup>1332</sup> which ‘moves away from a polarization between judges and legislatures, and instead attempts to work out ways in which both can contribute to a democratic resolution of human rights disputes’.<sup>1333</sup> The Court’s role under this model is to seek from the State a justification for the policy approach it adopts. Such justification is ‘bound by’—or has to be consistent with—the relevant human rights framework. Through bounded deliberation, judicial intervention seeks to ‘facilitate dialogue’ between the relevant stakeholders without ‘usurp[ing]’ the executive or legislative role,<sup>1334</sup> thus responding to the critics’ (and the State’s) concerns.

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<sup>1330</sup> Shankar and Tyagi (n 1291) 547-8; Abeyratne (n 1291) 50-55; Pratap Bhanu Mehta, ‘The Rise of Judicial Sovereignty’ (2007) 18 *Journal of Democracy* 70; Raju Ramachandran, ‘The Supreme Court and the Basic Structure Doctrine’ in BN Kirpal et al (ed), *Supreme but not Infallible* (OUP 2000) 107. In contrast, see Colin Gonsalves, ‘Reflections on the Indian Experience’ in John Squires et al (ed), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press 2005) 182 (arguing such judicial role might be necessary in light of the corruption within the executive branch, which often ignores the interest of the poor); Similarly, see Kothari, *Social Rights* (n 1181) 192.

<sup>1331</sup> Fredman, *Human Rights Transformed* (n 1261) 93-123.

<sup>1332</sup> *Vaccinations Order* (n 1290).

<sup>1333</sup> Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 110 (‘Accountability’).

<sup>1334</sup> *Vaccinations Order* (n 1290) [5]; A similar model of intervention has been adopted by the State High Courts as well, as noted in Gautam Bhatia, ‘Dialogic Judicial Review in the Gujarat and Karnataka High Courts’ (*Indian Constitutional Law and Philosophy*, 24 May 2020) <<https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/>> accessed 5 May 2022.

Fredman's bounded deliberation rests on two crucial components: the form of deliberation and the bounds within which deliberation occurs. The deliberative prong of the model distinguishes between 'interest-governed' and 'value-oriented' co-ordination. Under interest-governed coordination, each party approaches the bargaining table with fixed interests, aiming to induce the other party to accept their claim using 'factual power' rather than the power of reasons. The outcome is victory, surrender or compromise, without a change in the initial preferences of the parties. In contrast, under value-oriented coordination, the aim is not to simply win or reach a compromise. Instead, parties attempt to justify their position through reasons which participants 'sincerely expect to be persuasive to others', while also being open to persuasion.<sup>1335</sup>

Fredman identifies that courts can, in practice, achieve value-oriented deliberation through the use of two tools: accountability and equal participation. By requiring the State to justify its policy choices on the basis of arguments acceptable to all, courts strengthen accountability.<sup>1336</sup> In the context of positive duties, courts do not substitute the State in choosing an option to fulfil its duties. Rather, they simply require the State to give an open account of why a duty has not been fulfilled or has been fulfilled through one option rather than another.<sup>1337</sup> Courts thus do not function as 'points of closure',<sup>1338</sup> but instead reopen the political debate, rejuvenate it with the

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<sup>1335</sup> Fredman, *Accountability* (n 1333) 44, 114.

<sup>1336</sup> Fredman, *Human Rights Transformed* (n 1261) 103.

<sup>1337</sup> *ibid*; Davis, *Socio-Economic Rights* (n 1329) 1026.

<sup>1338</sup> Fredman, *Human Rights Transformed* (n 1261) 102.

insights generated through adjudication,<sup>1339</sup> augment the power of the electorate to hold elected representatives to account<sup>1340</sup> and enhance, rather than undermine, democracy.<sup>1341</sup>

The second deliberative route open to courts is through redressing inequalities in influence and voice in representative democracy by ensuring equal participation within the courtroom and outside of it.<sup>1342</sup> Majoritarian decision-making is skewed towards groups with power. It bears the risk of silencing minorities by excluding them from the political process and overriding their interests.<sup>1343</sup> Against this, value-oriented deliberation within the courtroom allows parties to ‘transcend inequalities in bargaining power’,<sup>1344</sup> enabling even the ‘weakest voice’ to be heard and giving ‘equal persuasive power’ to all.<sup>1345</sup> In coming to a deliberative resolution based on the ‘power to convince rather than the power to overwhelm’, minority arguments are taken as seriously as majority perspectives.<sup>1346</sup>

At the same time, the value-oriented deliberation is not free-wheeling; instead, it occurs within bounds set by human rights. In other words, it is not sufficient for the State to simply provide reasons for its decisions and demonstrate that they followed a deliberative process, thus meeting the criteria of accountability and equal participation. The justifications also have to comply

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<sup>1339</sup> *ibid* 101-3; Daniel M Brinks and Varun Gauri, ‘A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World’ in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice* (CUP 2008) 303-52.

<sup>1340</sup> KG Young, ‘A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review’ (2010) 8 *International Journal of Constitutional Law* 411; Fredman, *Accountability* (n 1333) 105.

<sup>1341</sup> Fredman, *Human Rights Transformed* (n 1261) 102.

<sup>1342</sup> Fredman, *Accountability* (n 1333) 118.

<sup>1343</sup> *ibid* 106, 118.

<sup>1344</sup> Fredman, *Human Rights Transformed* (n 1261) 105.

<sup>1345</sup> *ibid* 112.

<sup>1346</sup> *ibid* 113.

with the ‘essence of the right’,<sup>1347</sup> with the reasons cited by the State falling into ‘pre-determined grooves’<sup>1348</sup> which are constitutionally adequate. In practice, courts can achieve this by testing the justifications offered by the State against the standard of review applicable under the synthesis, including by assessing whether the reasons put forward by the State are ‘particularly stringent’.

Moreover, bounded deliberation assists courts in designing remedies for enforcing the State’s positive duties. Under this model, courts may require the State to formulate a plan through a deliberative process. The plan is then submitted to the court, which assesses it against human rights bounds by applying the relevant standard of review. In ensuring that all parties have an equal voice and that deliberation takes place within the bounds of the rights, judicial intervention avoids interest bargaining with the State exercising overwhelming power.<sup>1349</sup> This approach to remedies also side-steps the binary between a mandatory judicial remedy which imposes specific steps on the State and usurps democracy, and a deferent judicial remedy which fails to protect constitutional rights.<sup>1350</sup> Under bounded deliberation, courts instead strengthen democracy, both by functioning as forums for deliberation themselves—through demanding accountability from the State and ensuring equal participation—and by pushing deliberation outside the courtroom. At the same time, they infuse legislative decision-making with human rights values. The bounded deliberative model thus negates concerns about courts’ democratic illegitimacy and institutional incompetence, while ensuring that courts do not abdicate their anti-majoritarian role. Further, it enhances the accountability of courts themselves by requiring that judges also justify their decisions against

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<sup>1347</sup> *ibid* 122.

<sup>1348</sup> *ibid* 104.

<sup>1349</sup> *ibid* 120-22.

<sup>1350</sup> *ibid* 115.

human rights bounds,<sup>1351</sup> responding to concerns about Indian courts collapsing into a ‘judiciary with no accountability’.<sup>1352</sup>

While bounded deliberation was explicitly adopted only recently by the Supreme Court, the constituent elements of the framework can be traced within the obstetric care cases. The first step in ensuring accountability is requiring information from the State, with courts repeatedly asking the State to file affidavits clarifying the extent to which obstetric care has been provided.<sup>1353</sup> At the same time, courts do not simply accept State affidavits as true; rather, they are verified either by using data provided by the petitioners,<sup>1354</sup> or by appointing Commissioners to conduct an independent assessment.<sup>1355</sup> Such verification sometimes lead courts to the conclusion that existing services provided by the State do not adequately respond to the situation in ‘ground reality’.<sup>1356</sup> The State is then required to explain why adequate services have not been provided.<sup>1357</sup> For instance, in *Snehalatha Singh*,<sup>1358</sup> the Allahabad High Court chastised the State for failing to justify decreasing funds allotted for the JSY despite the increasing population and the poor healthcare outcomes amongst socio-economically disadvantaged groups. Moreover, courts do not simply accept the State’s claim that it is performing its responsibilities within the ‘available economic resources’;<sup>1359</sup> instead they actively scrutinise State claims of resource shortage. In *Centre for Health*

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<sup>1351</sup> *ibid* 94.

<sup>1352</sup> Anuj Bhuvania, *Courting the People: Public Interest Litigation in Post-Emergency India* (1st edn, CUP 2016) 7.

<sup>1353</sup> *Rinzing* (n 1190); *Sandesh Bansal* (n 282); *Snehalatha Singh* (n 292).

<sup>1354</sup> *Rinzing* (n 1190).

<sup>1355</sup> *Sandesh Bansal* (n 282); *Snehalatha Singh* (n 292).

<sup>1356</sup> *Court v UoI* (n 286).

<sup>1357</sup> *Bilkis v NCT Delhi* W.P.(C) No. 4200/2015 (Delhi High Court, 28 April 2015).

<sup>1358</sup> *Snehalatha Singh* (n 292) [28], [39].

<sup>1359</sup> As claimed by the State in *Sandesh Bansal* (n 282) [16].

*and Resource Management*,<sup>1360</sup> the Patna High Court ordered the State to account for ‘every single Rupee released by the Central Government under NRHM to combat maternal mortality’ in Bihar. Perusing the State response, the Court came to the conclusion that misappropriation of funds—rather than resource shortage—was a ‘key factor’ in Bihar’s stagnant maternal mortality rate.<sup>1361</sup> Similarly, in *Snehalatha Singh*,<sup>1362</sup> after surveying State affidavits, the Allahabad High Court asked the State to provide a ‘justified reason’ for why 25% of funds lay unspent,<sup>1363</sup> observing that ‘there is a complete lack of...accountability and answerability’.<sup>1364</sup>

Beyond ensuring accountability, participation is sought by courts through commissioning, and relying on, fact-finding reports detailing the experiences of women in seeking obstetric care.<sup>1365</sup> Through this, voices of marginalised women, typically excluded from deliberation, are drawn in (to some extent). Courts also emphasise the importance of deliberative solutions in formulating remedies—‘a road map/Action Plan should be prepared *in consultation with all stake holders*<sup>1366</sup>—and accept their institutional limitations in this regard: ‘No doubt that we have no power to issue directions to the State as to in what manner it shall utilize its funds’.<sup>1367</sup> At the same time, courts recognise that such deliberative solutions ought to lie within the bounds of rights. For instance, in *Court on its Own Motion*,<sup>1368</sup> in response to the pregnant petitioner’s death after giving birth to her child on the street, the State submitted that it would investigate the availability of funds

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<sup>1360</sup> *Centre for Health and Resource Management v Union of India* CWJC No. 10724/2011 (Patna High Court, 4 July 2012).

<sup>1361</sup> See also *Kalyani Meena v Union of India* W.P. No. 5511/2008 (Jharkhand High Court, 21 February 2008).

<sup>1362</sup> *Snehalatha Singh* (n 292).

<sup>1363</sup> *ibid* [31], [44], [50].

<sup>1364</sup> *ibid* [79].

<sup>1365</sup> For instance, *Rinzing* (n 1190).

<sup>1366</sup> *Snehalatha Singh* (n 292) [146(v)] (emphasis added).

<sup>1367</sup> *Dinanath Waghmare* (n 295) [8].

<sup>1368</sup> *Court v UoI* (n 286).

to set up shelter homes for destitute women. The Delhi High Court held that Article 21 did not allow courts to be silent spectators ‘waiting for the Government to move like a tortoise and allow destitute pregnant women and lactating women to die on the streets’. Instead, the Court required the State to act—by filing affidavits and demarcating shelter homes—within a specific time period. In other words, the constitutional right set the outer bounds of the deliberation, such that *any* deliberative solution was not acceptable to the Court.

To clarify, through these examples I do not argue that bounded deliberation is *the* standard response of courts in India when adjudicating on the State’s performance of its positive duties. To the contrary, critiques of Indian courts as taking over policy-making<sup>1369</sup> and excluding rights-bearers from judicial deliberation with the State<sup>1370</sup> suggest otherwise. However, these examples indicate that elements of bounded deliberation are present in courts’ enforcement of the State’s positive duties, with this model of judicial intervention gaining added legitimacy through the Supreme Court’s recent endorsement. Against this, the State’s concern that the positive duties required by the synthesis to redress preventable maternal mortality and morbidity would be inconsistent with the institutional role of courts loses force.

## V. Conclusion

Chapter 5 reaffirms the conclusion in Chapter 4: the synthesis, undoubtedly, strengthens the constitutional protection granted to reproductive rights in India. It identifies the whole range and full extent of rights violation caused by the State’s failure to redress preventable maternal mortality and morbidity, highlighting the harms to women’s *life and health* and *women’s* life and health, on account of State inaction. From this vantage point, it radically transforms the scope of positive duties on the State to respond to group-based disadvantage as a causal factor behind preventable

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<sup>1369</sup> See (n 1291).

<sup>1370</sup> Bhuwania (n 1352).

maternal mortality and morbidity. And, it potentially holds the State to a higher standard of review, preventing the State from simply falling back upon resource shortage or separation of powers as the means to evade its constitutional obligations.

Turning now to the final question, does the interaction between Articles 21 and 15 within the synthesis capture the interrelationship between the individual and social dimension, as identified in Chapter 1? The dimensions, Chapter 1 argues, interrelate in two senses. In the first sense, they reinforce the value that ought to be attributed to reproductive decision-making by women. Using the example of abortion, Chapter 4 showed how the synthesis performs this role in a constitutional context. In the second sense, the interrelationship between the dimensions points to how reproductive decision-making can be guaranteed in a ‘real and effective’ sense only by (first) acknowledging and (second) redressing group-based disadvantage which denies women such decision-making. Chapter 5 illustrates this claim through the lens of the synthesis.

Redressing preventable maternal mortality and morbidity guarantees women ‘real and effective’ reproductive decision-making by eliminating preventable threats to their life and health during pregnancy and childbirth. Article 21 assists in this goal by offering timely and quality obstetric care. However, while important, the provision of obstetric care *alone* cannot prevent maternal mortality and morbidity, which also requires a response to broader group-based disadvantage. Article 21, in isolation, is unable to perform this role, despite seeing women (and other rights-bearers) in their social context, and as relational beings. In contrast, Article 15, in its role within the synthesis, specifically acknowledges the role of group membership in denying women reproductive decision-making, here by causing death and ill health during childbirth. In turn, Article 15 argues that redressing group-based disadvantage is necessary to remove risk to women’s life and health during pregnancy and childbirth, therein guaranteeing them ‘real and effective’ reproductive decision-making. It then imposes positive duties on the State to redress such disadvantage. And, it potentially requires the State to provide ‘particularly stringent’

justifications for failing to perform these duties, thus offering a more robust constitutional safeguard against State inaction.

The synthesis thus demonstrates the centrality of acknowledging and redressing group-based disadvantage in guaranteeing women 'real and effective' reproductive decision-making. And, crucially, it provides constitutional tools for the purpose. It thus captures the interrelationship between the individual and social dimension in the second sense. This, then, confirms the place of the synthesis as the 'new' constitutional home for reproductive rights in India.

## CONCLUSION

The Thesis began as an exercise in chasing an intuition. While reading on India's law on abortion for a different project, I noticed a complete absence of discrimination law from the constitutional analysis on reproductive rights. Yet, very intuitively, discrimination law seemed like a relevant frame: when women are denied reproductive decision-making, are they not being discriminated against? This simple question brought the Thesis to life. It also spawned several sub-themes of inquiry. Is there something inherently antagonistic between ideas of discrimination (and equality) and reproduction? Why has a discrimination lens so far not been applied in India? And most importantly, what changes if we constitutionally ground reproductive rights within discrimination law?

Searching for an answer to these questions led me to reject the simplistic approach of either applying or not applying discrimination law to reproductive rights. Instead, I interrogated notions of discrimination (and equality), especially within India's constitutional context, to understand how they respond to reproductive rights differently. I concluded that the antagonism between discrimination and reproduction is a product of the conception of discrimination employed, rather than an inherent limitation of discrimination law itself. Locating a favourable conception—substantive equality—within India's jurisprudence, I then moved to questioning why this conception has not been applied to reproductive rights in India. I noted that while the constitutional conception of equality has always remained substantive, the jurisprudence has vigorously caught up only recently (though seeds of substantive equality can be traced within early jurisprudence as well). The failure to use discrimination law thus has a temporal explanation. At the same time, I observed that discrimination law's absence could also be a product of how unenumerated rights are *typically* read into the Indian Constitution: by employing Article 21 as the standard repository for all unenumerated rights. This led me to interrogating Article 21 as the default constitutional home for reproductive rights in India. In testing Article 21's contributions

against the normative foundation developed by the Thesis, I concluded that it plays an important yet incomplete role in constitutionally grounding reproductive rights. This, then, opened up the space for Article 15, in its substantive avatar. From this position, I began the challenging task of carefully drawing out, in concrete terms, the changes made possible when Article 15 is introduced within the constitutional home for reproductive rights. Instead of replacing Article 21 with Article 15, treating the two rights in isolation, or simply adding Article 15 to Article 21, I looked at the two in synthesis, in the context of abortion and maternal mortality and morbidity. This analysis formed the argumentative core of the Thesis. And, from it emerges the Thesis' significant original contributions.

In Chapter 1, the Thesis built a normative framework on why reproductive decision-making ought to be valued. The Thesis developed this framework by triangulating, through an 'iterative process of reflective scrutiny',<sup>1371</sup> theoretical literature, women's reproductive experiences in India, and judicial doctrine on Articles 21 and 15. To this extent, the framework is 'Indian', and offers a powerful normative account which could inform subsequent work on reproductive rights in India within legal and socio-legal spaces. At the same time, the Thesis also provides a method that can be employed to develop similar frameworks outside India. And, it points to tentative conclusions of principle which can be revised through the iterative process in a specific jurisdiction.

In Chapter 2, the Thesis constructed a generalist and a specialist account of Article 21. The former identified, through textual, historical and structural interpretation, the constitutional role of Article 21. The latter made sense of Article 21's contributions in constitutionally grounding reproductive rights by locating it against its constitutional role. Both these accounts narrowed in on the normative core of Article 21, responding to critiques which point to the provision's all-

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<sup>1371</sup> Brandstedt and Brännmark (n 104) 357.

encompassing nature to argue that it is devoid of ‘normative coherence’.<sup>1372</sup> Simultaneously, the accounts set in place the outer boundaries of Article 21, resisting the trend of an ever-expanding right to clearly demarcate its scope. Drawing on these accounts, the Chapter identified Article 21’s strengths in constitutionally grounding reproductive rights, tied closely to its normative core. At the same time, the Chapter showed how, even when understood as distinct from traditional liberal reproductive choice, Article 21 falls short in its role as the sole constitutional home for reproductive rights. Through this, the Chapter provided a response, from within Indian constitutional law, to the critiques of liberty (or privacy) as the constitutional frame for reproductive rights.

In Chapter 3, the Thesis centrally built a response to pregnancy and reproduction under Article 15 using substantive equality. As reproductive rights have typically not been treated as an issue of discrimination law in India, Indian jurisprudence gives little indication as to how Article 15 can be read to embrace these rights. Academic literature on discrimination law in India is also similarly silent on the issue, with some nascent accounts emerging only recently. The Thesis thus constitutes the first comprehensive academic work constructing an Article 15 approach to reproductive rights. The approach was built through harnessing the constitutional conception of substantive equality, jurisprudence translating substantive equality into doctrine and cases of pregnancy and employment. Chapter 3 thus provided a blueprint of arguments to future courts considering the issue. The Chapter also clearly illustrated how the conception of discrimination (and equality) applicable determines the utility of a discrimination law approach to reproductive rights. And, in anchoring the reading of Article 15 capable of grounding reproductive rights back to the constitutional conception of provision, the Chapter put in place constitutional safeguards against a formal interpretation of the provision detrimental to reproductive rights (and beyond).

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<sup>1372</sup> Surendranath (n 22) 756.

Applying Chapter 3's substantive equality approach to Article 15, and reading it in synthesis with Chapter 2's account of Article 21, Chapter 4 scrutinised India's law on abortion. The Chapter made several significant strides in conducting a critical constitutional review of the law. Asking the 'woman question', the Chapter revealed assumptions about women built into the law on abortion, and unveiled how the law excludes women's experiences of pregnancy and parenting. In identifying the law on abortion as discriminatory on ground of sex, and sex in intersection with other identities, the Chapter built a strong discrimination law case against the law. It also located these arguments amongst the spectrum of existing gender equality arguments for abortion, and responded to critiques of the equality lens. As the next step, the Chapter identified common justifications offered for restricting the right to abortion. Through careful analysis using the synthesis—especially Article 15—the Chapter revealed the biases built into the aims proposed, and the means adopted to pursue the aims. Through this, the Chapter provided a hard-hitting retort to the growing prominence of the women protective justification and the foetal potentiality justification, within India and globally. Finally, the Chapter showcased a creative use of constitutional rights as tools for statutory interpretation. Overall, while the Chapter acknowledged that compared to its counterparts India's law on abortion deserves some commendation, it proved that the Constitution (and the synthesis) does not require women to just settle for what is 'good enough'. Instead, it provides a robust basis for women to demand that the law go further.

Chapter 5 carried this theme forward, and built on it through examining positive duties on the State to redress preventable maternal mortality and morbidity. Positive duties remain a grey area within constitutional law in India. On the one hand, Indian courts have not shied away from placing positive duties on the State, as Chapter 5 illustrated through the example of obstetric care. On the other hand, courts have left several questions unaddressed: the explicit scope of positive duties in each context, the standard of review applicable to them, and the role of courts in adjudicating on them. In the absence of answers to these questions, existing jurisprudence has

rightfully been critiqued for being unprincipled, incoherent and haphazard. Through the example of preventable maternal mortality and morbidity, Chapter 5 attempted to provide an initial response to these pressing questions. It showed how the scope of positive duties varies depending on the right (or rights involved), with the synthesis demanding a wider network of State duties than those Article 21 currently requires. Similarly, it illustrated how the standard of review applicable might change when the synthesis lies at the basis of constitutional reproductive rights, compared to Article 21 alone. Finally, the Chapter pointed to a role for courts in the adjudication of positive duties. Drawing on the Supreme Court's recent endorsement of 'bounded deliberation', the Chapter traced elements of this approach within courts' existing response to demands for timely and quality public obstetric care. Most importantly, Chapters 4 and 5 together resisted the trend of collapsing reproductive rights into either equality or liberty (and privacy). Instead they proposed a synthesis between the rights, retaining their independent contributions while simultaneously drawing attention to their interrelationship in strengthening the constitutional protection granted to reproductive rights.

Overall, the Thesis also advanced a methodological approach—note, it proposes an approach; it does not prescribe a specific combination of rights applicable universally—to reading unenumerated rights into constitutions. This is a valuable enterprise in light of some courts' recent inclination to treat constitutional silences as determinative.<sup>1373</sup> The Thesis, in contrast, hopes to inspire arguments for locating reproductive rights, and other unenumerated rights, within existing rights, when faced with silences in the constitutional text. At the same time, the Thesis sounded a note of caution: *where* the right is located is central in shaping its application. It thus urges judicial decision-makers to pause, and ponder, the appropriate constitutional home for a given right. This has special relevance to India, where the use of Article 21 is ubiquitous, and remains unquestioned

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<sup>1373</sup> For instance, see *Dobbs* (n 15).

by courts. Yet, these insights are equally relevant to other constitutional contexts where decision-makers grapple with a similar exercise.

The Thesis' proposal of the synthesis between Articles 21 and 15 as the 'new' constitutional home for reproductive rights in India has far-reaching implications for future research. Population control has always been a significant underlying State interest in regulating reproduction in India.<sup>1374</sup> While India's emphasis on the demographic repercussions of reproductive rights took a backseat post the ICPD in 1994,<sup>1375</sup> it has witnessed a recent resurgence with the State aggressively pushing a two-child policy through various legal avenues.<sup>1376</sup> The rights implications of these policies,<sup>1377</sup> especially their discriminatory impact, has been pointed out.<sup>1378</sup> Yet, the Supreme Court has continually upheld these policies as constitutional, dismissing discrimination claims after a cursory analysis.<sup>1379</sup> In a different context, India is attempting to regulate surrogacy, with the recently proposed regulations being critiqued for their paternalism.<sup>1380</sup> These are just two examples

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<sup>1374</sup> Nivedita Menon, 'Abortion and the Law: Questions for Feminism' (1993) 6 Canadian Journal of Women and the Law 103; Mytheli Sreenivas, *Reproductive Politics and the Making of Modern India* (University of Washington Press 2021).

<sup>1375</sup> Srivastava et al (n 1132); Cf Harini Narayanan, 'Women's Health, Population Control and Collective Action' (2011) 46(8) Economic and Political Weekly 39-40.

<sup>1376</sup> Bilal Kuchay, 'Why Two-Child Plan in India's Most Populous State Is "Coercive"' *Aljazeera* (16 July 2021) <<https://www.aljazeera.com/news/2021/7/16/why-two-child-policy-in-indias-most-populous-state-is-coercive>> accessed 21 May 2022; Utkarsh Anand, 'The Past and Present of Two-Child Policies in India' *Hindustan Times* (15 July 2021) <<https://www.hindustantimes.com/india-news/the-past-and-present-of-two-child-policies-in-india-101626304115798.html>> accessed 21 May 2022; 'Govt: No Need for Law on Population Control' *The Times of India* (2 April 2022) <<https://timesofindia.indiatimes.com/india/govt-no-need-for-law-on-population-control/articleshow/90602081.cms>> accessed 21 May 2022.

<sup>1377</sup> Alok Prasanna Kumar, 'Demography, Democracy and Population Policies' (2021) LVI(30) Economic and Political Weekly 10.

<sup>1378</sup> Alaka Basu, 'Make No Mistake, a Population Control Policy Will Target the Marginalised' *The Wire* (13 February 2020) <<https://thewire.in/rights/india-population-control-policy>> accessed 21 May 2022; Vasudha Venugopal, 'Flagging Concerns over Two-Child Policy Push: Will Endanger Health of Women, Say Experts' *The Economic Times* (15 October 2021) <<https://economictimes.indiatimes.com/news/india/flagging-concerns-over-two-child-policy-push-will-endanger-health-of-women-say-experts/articleshow/87047214.cms?from=mdr>> accessed 21 May 2022.

<sup>1379</sup> For instance, see *Javed v State of Haryana* AIR 2003 SC 3057.

<sup>1380</sup> S Mishra, 'Ban on Commercial Surrogacy' (2020) 55 Economic and Political Weekly; Shonottra Kumar, 'India's Proposed Commercial Surrogacy Ban Is an Assault on Women's Rights' *The Wire* (9 November 2019) <<https://thewire.in/law/surrogacy-ban-assault>> accessed 6 May 2021.

of the range of reproductive rights concerns prominent in India today. Against these, the Thesis provides a compelling normative and doctrinal framework for analysis. It builds a robust constitutional basis to both challenge State policies, and design a constitutionally compliant response. Moving beyond reproductive rights, the Thesis also sets the agenda and prepares the ground doctrinally for several constitutional issues live in India at present. This includes the legalisation of same-sex marriage,<sup>1381</sup> the abolition of the marital rape exception,<sup>1382</sup> and the calls for a post-pandemic reimagination of healthcare, responding to the entrenched, complex fault lines of inequality unveiled during the pandemic.<sup>1383</sup>

Moreover, the Thesis holds global significance, especially at a moment where the legal protection for reproductive rights is fragile and women's lived reality of reproduction is worsening. Constitutions, and the law more broadly, may not be *the* response to women's struggle for reproductive decision-making. The Thesis is under no illusion that they are. However, they are *a* response amongst the range of responses available, and a powerful response at that. Most importantly, interpreting them appropriately ensures that the legal environment supports rather than hinders, or delays, women's claims within the reproductive sphere, and outside it. Using India as an example, the Thesis, then, sends a clear message on *how* to interpret constitutions to harness their potential. It employs, and urges others to consider employing, the domestic constitution as a platform for introducing, and amplifying, women's voices and experiences within the global debate on reproductive rights and constitutionalism. And once we do, we keenly listen.

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<sup>1381</sup> *Abhijit Iyer v Union of India* WP(C) No \_\_\_/2020 (Delhi High Court, 8 September 2020) <<http://orinam.net/content/wp-content/uploads/2021/08/mitra-et-al.pdf>> accessed 2 June 2022.

<sup>1382</sup> *RIT Foundation v Union of India* WP(C) No 284/2015 (Delhi High Court, 11 May 2022).

<sup>1383</sup> Vikram Patel et al, 'Reimagining India's Health System: A Lancet Citizens' Commission' (2021) 397 *The Lancet* 1427.

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