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The Puttaswamy Effect:

Exploring the Right to Abortion in India

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Executive Summary

The purpose of this paper is a) to discuss the relevance of the landmark Supreme Court judgement of *Justice K.S. Puttaswamy (Retd.) and Ors. vs. Union of India & Ors.* for women's access to abortion in India and b) to examine the changes brought in by the recent amendment to the law on abortion in India, in terms of their compliance with the right to privacy.

The paper discusses the relevance of a constitutionally guaranteed right to privacy, for accessing abortion in India. What emerges from this exercise is that *Puttaswamy* has offered much needed clarity and nuance to some of the earlier jurisprudence on women's right to bodily autonomy and privacy. However, abortion in India continues to be a State regulated affair, and due to the limitations of privacy recognised even in *Puttaswamy* e.g. 'compelling state interest' this position is unlikely to change. Therefore, the right to abortion in India is available in a limited sense.

Since the intent of this paper is to use a privacy-based framework to justify women's reproductive rights, some limitations of a privacy-based approach have also been discussed. Specifically, the paper looks at feminist arguments regarding privacy's role in maintaining hetero-patriarchal structures that constrain women's choices; and the lack of privacy's ability to cast a positive obligation upon the State to ensure access to abortion-related services.

In 2021, the Parliament of India passed the Medical Termination of Pregnancy (Amendment) Act. This amendment was brought in with the objective of increasing access to safe abortion in India, which would go on to protect the dignity, autonomy, bodily integrity, and confidentiality of women. The paper examines the issues that women in India face while trying to access abortion. Some of these issues are lack of approved health care professionals and facilities; concerns with the rigid timelines under the law, requiring women to approach courts; the practice of insisting on consent from husband/family for an abortion; and a lack of information on safe abortion.

The paper then argues that certain gaps in law and policy remain unaddressed, even after the recent amendment. For instance, the amendment has introduced changes such as setting up of permanent medical boards, changing the requirement from two doctors' consent to one doctor for pregnancies up to 12 weeks, expanding the law to cover unmarried women, and introducing penal provisions in case privacy and confidentiality of women is violated. However, the practical requirement is for more State-run approved facilities to be made available to women seeking an abortion.

Until such challenges are resolved, the paper finds that the law on abortion in India is vulnerable to a constitutional challenge, on the grounds of violation of the right to privacy guaranteed to Indian women under *Puttaswamy*. The paper thus concludes by suggesting some changes to the new law on abortion. These include allowing abortion on request for early-stage pregnancies and ensuring the availability of approved medical practitioners and facilities through changes in policy. Such changes, if made, could bring the law in consonance with the right of privacy as guaranteed in *Puttaswamy*.

1. Introduction

The Indian law on abortion has seen a recent change with the Medical Termination of Pregnancy (Amendment) Act 2021 ('**Amendment**').[1] A progressive change to the law on abortion had long been the demand of the Indian reproductive rights movement. To address this the Medical Termination of Pregnancy Bill 2020 ('**2020 Bill'**),[2] was passed by the Lok Sabha in March 2020.[3] The Bill was brought in with broad objectives, such as increasing access to legal and safe abortion services for women, and providing quality abortion care to reduce maternal morbidity.[4] It had also proposed to achieve '*dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy*.'

Abortion in India is regulated largely by the Medical Termination of Pregnancy Act, 1971 ('**MTP Act'**),[5] and this is not the first time that such changes have been sought to this Act. In 2014, the Ministry of Family and Health Welfare had also proposed similar changes[6] to the MTP Act; however, the 2014 Bill did not become law, and these changes were finally brought in through the recent Amendment (a comparison between the objectives of the 2020 Bill *versus* the actual provisions changed by the 2021 Amendment has been done later in this paper).

1 The Medical Termination of Pregnancy (Amendment) Act, 2021.
2 Dr. Harsh Vardhan, 'The Medical Termination of Pregnancy (Amendment) Bill 2020' (PRS Legislative Research)<https://prsindia.org/files/bills_acts/bills_parliament/2020/The%20Medical%20Termination%20of%20Pregnancy%20(Amendment)%20Bill,%202020.pdf > accessed 10 March 2021.
3 Eventually a slightly different version of the 2020 Bill was passed as the Medical Termination of Pregnancy (Amendment) Act 2021.
4 These objectives are present in the 2020 Bill presented before the Lok Sabha. The objectives are similar to and can be found in the version of the Bill approved by the Cabinet of Ministers in January 2020. *See* 'Cabinet approves The Medical Termination of Pregnancy (Amendment) Bill, 2020' (PM India, 29 January 2020) <https://www.pmindia.gov.in/en/news_updates/cabinet-approves-the-medical-termination-of-pregnancy-amendment-bill-2020/> accessed 15 March 2021.
5 The Medical Termination of Pregnancy Act, 1971 [MTP Act].
6 Department of Health and Family Welfare, 'The Medical Termination of Pregnancy (Amendment) Bill, 2014' (Indian Bar Association) <https://www.indianbarassociation.org/wp-content/uploads/2013/09/Medical-Termination-of-Pregnancy-Amendment-Bill-2014.pdf> accessed 15 March 2021 [Bill 2014].

Abortion and its related rights have always had a close association with the right to privacy. Since 2017, the fundamental rights jurisprudence in India has undergone great changes as far as privacy is concerned. In 2017, in *Justice K.S. Puttaswamy (Retd.) and Ors vs. Union of India & Ors*[7] ('**Puttaswamy**'), the Supreme Court of India ('**SC**') has re-affirmed that the right to privacy, which includes a right to bodily autonomy, is a constitutionally-protected fundamental right under Part III of the Indian Constitution. The elaborate decision by a bench of nine judges was a landmark, among other reasons, for its extensive reliance on Indian and International jurisprudence, as well as its deep analysis of Part III of the Indian Constitution, which ultimately led to an expansive articulation of privacy as a fundamental right in India.[8] Of particular relevance to this paper is the observation made in this judgment that privacy as a right includes the right to make decisions regarding one's body, including whether to carry a pregnancy to term or not.[9]

Puttaswamy, being the first judgement of its kind to articulate a constitutional right to privacy and define its contours, boundaries, and tests for its application, has substantial implications for the reproductive rights of women in India. Although in the *Puttaswamy* decision, the bench was looking at the larger fundamental right to privacy, and not abortion and other reproductive rights *per se*, the decision has nonetheless provided a foundation to theorise upon and analyse reproductive rights issues from the perspective of privacy.

With this background, the purpose of this paper *firstly* is to examine the impact of the principles espoused in the *Puttaswamy* case on the Indian law on abortion. To this end, this paper examines whether *Puttaswamy* paves the way for 'a right to abortion' in India,

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7 *Justice K.S. Puttaswamy (Retd.) and Ors vs. Union of India & Ors* 2017 (10) SCC 1 [Puttaswamy].
8 J. Nariman in his opinion, has said that the right to privacy in India has at least three aspects: i) Privacy that involves the person or such privacy that protects the individual from the State's invasion on her physical body; ii) informational privacy which is related to dissemination of information about a person; and iii) the privacy of choice, which protects an individual's autonomy over fundamental personal choices. *See* ibid. [521]. J. Chandrachud has for example recognised that informational privacy is a facet of the right to privacy. *See* ibid. [264].
9 *Puttaswamy* (n 7) [373].

and the relevance of *Puttaswamy* for women's access to abortion in India. This part will also look at the relevance of a right to privacy for accessing abortion, and discuss the limitations of a privacy-based regime. *Secondly*, this paper will examine changes brought in by the 2021 Amendment *vis a vis* the 2020 Bill, with the stated objectives of ensuring dignity, autonomy and confidentiality of women. These changes will be examined against the problems in accessing abortion in India.

For the purpose of this paper, a 'right to abortion' is to be read in the widest sense, including a right to access safe abortion, and to pre- and post-abortion care, including access to counselling, medical abortion, all provided without unreasonable delay.

2. Is there a Right to Abortion in India?

2.1 What is a Right to Abortion?

Before discussing the jurisprudence around a right to abortion in India, it is relevant to understand the dimensions of the right to abortion, and what is entailed under it. In 2018, the United Nations Human Rights Committee, commenting[10] on the right to life under Article 6 of the International Covenant on Civil and Political Rights ('**ICCPR**'),[11] has said that the availability of safe, legal, and effective access to abortion is a human right and a part of the right to life under the ICCPR. The Committee has discussed the contours of a right to abortion include the following aspects:[12]

- safe, legal and effective access to abortion provided by the State,
- no criminal sanctions against women seeking abortions or medical service providers providing abortions,

10 United Nations Human Rights Committee, 'General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life' (CCPR/C/GC/36, 30 October 2018) <https://www.ohchr.org/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf> accessed 19 March 2021 [General Comment ICCPR].
11 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR].
12 General Comment ICCPR (n 10).

- no introduction of new barriers to access abortion by any State,
- accurate and evidence-based information on sexual and reproductive health should be provided to all women seeking abortions (including information about and/or access to contraception),
- abortion-related stigma should be countered, and
- reliable pre-natal and post-abortion health care should be offered to women who seek an abortion.

Many countries[13] around the world have, within their respective laws, also guaranteed a right to abortion with similar dimensions. One can also look to the Convention on the Elimination of all Forms of Discrimination Against Women[14] (**'CEDAW'**); while the CEDAW does not explicitly mention a right to abortion, the broader health and equality rights guaranteed under CEDAW[15] have been interpreted by the Committee to include a right to access abortion.[16] The CEDAW Committee in a report on UK and Ireland[17], commenting on the criminalisation of abortion, recommended that as per the commitments under CEDAW's Articles 12(1) and 16(1)(e), all State parties should decriminalise abortion in all circumstances.

13 USA, Canada, Argentina, Russia, Australia, Italy, Germany, and France are some countries which allow abortion on request with varied gestational limits. *See* Rachel B. Vogelstein and Rebecca Turkington, 'Abortion Law: Global Comparisons' (Council on Foreign Relations, 28 October 2019) <https://www.cfr.org/article/abortion-law-global-comparisons> accessed 19 April 2021.

14 The 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].

15 *See* ibid. Article 12.1, Article 14.2(a)(b), and Article 16.1(e). Eg. Article 16 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.

16 *See* United Nations Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations' (CEDAW/C/GC/30, 18 October 2013) < https://www.ohchr.org/documents/hrbodies/cedaw/gcomments/cedaw.c.cg.30.pdf> accessed 22 August 2021. In this recommendation, which was on women in conflict and post conflict situations, the Committee recommended that all state parties guarantee safe abortion access and postabortion care.

17 *See also* United Nations Committee for the Elimination of All Forms of Discrimination against Women, 'Report of the Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the CEDAW' (CEDAW/C/OP.8/GBR/1, 23 February 2018) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf> accessed 24 August 2021.

Under the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**'), the right to sexual and reproductive health is an integral part of the right to health found under Article 12. The Committee under the ICESCR in its general comments[18] has observed that a right to health includes safe abortions and post-abortion care,[19] as well as removal of barriers to abortion, such as liberalising restrictive laws on abortion, ensuring availability of trained health care service providers, and overall prevention of unsafe abortions.[20]

2.2 Abortion under Indian Law

Abortion in India is currently regulated under the MTP Act read along with the Indian Penal Code, 1860[21] ('**IPC**'). Under the IPC, any voluntary[22] or involuntary[23] acts that lead to a miscarriage,[24] which include a woman causing a miscarriage to herself, are a punishable offence. To liberalise abortion as a part of a population control measure, the MTP Act came into being and the IPC sections became subservient to this Act.[25]

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18 *See* United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 22, The Right to Sexual and Reproductive Health' (E/C.12/GC/22, 2 May 2016) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab00XTdImnsJZZVQfQejF41Tob4CvIjeTiAP6sGFQktiae1vlbbOAekmaOwDOWsUe7N8TLm%2BP3HJPzxjHySkUoHMavD%2Fpyfcp3Ylzg> accessed 24 August 2021. *See also* United Nations Committee on Economic, Social and Cultural Rights 'General Comment No. 14, The Right to the Highest Attainable Standard of Health' (E/C.12/2000/4, 11 August 2000) para. 12 [CESCR Comment 14].

19 ibid. [7].

20 ibid [10].

21 Indian Penal Code, 1860 [IPC].

22 ibid. s 312.

23 ibid. s 313.

24 ibid. s 312, which reads as follows: "*Section 312 - Causing miscarriage: Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

Explanation -- A woman who causes herself to miscarry, is within the meaning of section.".

25 *Jacob George vs. State of Kerala* (1994) 3 SCC 430. *See also* MTP Act (n 5) s 3(1).

The Statement of Objects and Reasons of the MTP Act additionally recognise that the criminalisation of abortion results in women using unsafe methods to abort, causing risks to health and even death. Therefore, the MTP Act recognises the following broad objectives: i) health of the concerned woman; ii) humanitarian reasons, such as pregnancy resulting from rape; and iii) eugenic grounds, that the child so born shall suffer from deformities. The Preamble of the MTP Act provides that it is an act to provide for the termination of 'certain pregnancies' by 'registered medical practitioners'.

Post the Amendment, under the scheme of the MTP Act, an abortion can only be procured by a woman if i) the length of the pregnancy is within the specified time limits[26]; and ii) the required number of registered medical practitioners opine that a termination can take place, for the reasons that are clearly specified under the Act[27].

These reasons are listed as: i) there is a risk to the life of the pregnant woman or of grave injury to her physical or mental health[28] or ii) there is a substantial risk that if the child were born, it would suffer from serious physical or mental abnormalities.[29] In case of pregnancy caused by rape of any woman or a failure of a contraceptive device by a woman or her partner,[30] the MTP Act presumes grave mental anguish to the pregnant woman.[31] To determine physical or mental injury, what is taken into account is the pregnant woman's actual or reasonably foreseeable environment.[32]

26 ibid s 3(2). Post the Amendment, the new time limits are: i) for pregnancies 20 weeks and less, one registered medical practitioner's approval is required ii) for pregnancies exceeding 20 weeks, but less than 24 weeks, approval of two registered medical practitioners is required and iii) for pregnancies exceeding 24 weeks, an abortion is allowed only when substantial foetal abnormalities are diagnosed by a Medical Board. These time limits are also subject to other conditions specified under the MTP Act e.g. risk to the life of the pregnant woman.
27 ibid.
28 ibid s 3(2)(i).
29 ibid s 3(2)(ii). Prior to the Amendment this read as "there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped".
30 Erstwhile only limited to married women.
31 MTP Act (n 5) s 3(2).
32 ibid s 3(3).

The two exceptions to the time limit prescribed under the MTP Act are that i) a substantial foetal abnormality is diagnosed by a Medical Board under the Act and ii) an abortion is immediately necessary to save the life of a pregnant woman, in the opinion of a registered medical practitioner.[33] Violation of these conditions will invite penal consequences under the Act.[34] Further, abortions can only take place in government hospitals or places approved by the government[35] and an abortion that is not carried out by a registered medical practitioner under the Act is a punishable offence.[36]

The MTP Act has been previously amended on two occasions, both times relaxing the criteria for becoming a registered medical service provider under the Act. In 2014, the amendment of Medical Termination of Pregnancy (Amendment) Bill, 2014 [37] was proposed by the then Ministry of Health which made two important recommendations: i) to provide termination of pregnancy at the request of the pregnant woman upto 12 weeks and ii) to raise the outer limit of permissible terminations upto 24 weeks. This Bill lapsed and failed to become law.

From the scheme of the MTP Act and the relevant sections of the Indian Penal Code, it becomes clear that abortion is regulated by the Indian State closely by placing the decision of the abortion with the medical practitioner. A pregnant woman cannot, as a matter of right, ask for an abortion. Further, the grounds under which an abortion can be performed are all related to health-based reasons; even in its consideration of rape, the Act permits abortion on the presumption of mental anguish. There is little room for a decision of simply not wanting a child, for example, for economic and/or social reasons. Pregnancies arising out of intimate partner violence and reproductive coercion are also clearly not contemplated by the MTP Act.

33 ibid s 5(1).
34 ibid ss 3 and 4. Post 2002, punishment for abortion by anyone other than a registered medical practitioner came to be enhanced with rigorous imprisonment for a term which shall not be less than two years.
35 ibid s 4.
36 ibid s 5(2).
37 Bill 2014 (n 6).

How does this regulation fare as against Indian women's rights to reproductive choices, autonomy and dignity under the Indian Constitution? This question has been discussed in cases decided by Indian courts even prior to *Puttaswamy*.

2.3 Abortion and Indian Courts: Prior to Puttaswamy

In theory, a right to abortion can be linked to the fundamental rights of life and liberty under Article 21 of the Indian Constitution, which provides that no person shall be deprived of his life or personal liberty, except according to a procedure established by law. Due to Article 21's wide ambit, prior to *Puttaswamy*, there has been some jurisprudence in India on the interaction between privacy and the related rights of dignity, autonomy, and bodily integrity under the Constitution and the MTP Act. In a way, these cases set up the stage for the detailed analysis that followed in Puttaswamy.

For instance, in 2006, the constitutional validity of the MTP Act was challenged in the *Nand Kishore case*[38] before the Rajasthan High Court, where the petitioner argued that section 3(2) of the MTP Act wherein the time limits of the pregnancy and the requirement of opinion from registered medical practitioners are provided, is violative of Article 21. Unfortunately, despite the challenge to the MTP Act being under Article 21, the judgement offers little reasoning on the rights to privacy and autonomy of pregnant women. The High Court ('**HC**') in a summary fashion observed that since the dominant objective of the MTP Act is to save the life of the pregnant woman or relieve any injury to her physical or mental health[39], the MTP Act is in consonance with Article 21 of the Indian Constitution.

A slightly more detailed reasoning is found in the 2009 SC case of *Suchita Shrivastava*,[40] where the SC through a full bench had to consider a petition for termination of an

38 *Nand Kishore Sharma & Ors. vs. Union of India & Anr* AIR 2006 Raj. 166.
39 ibid [7].
40 Suchita Srivastava vs. Chandigarh Administration AIR 2010 SC 235 [Suchita Shrivastava]. *See also* Centre for Communication Governance, 'Suchita Srivastava vs. Chandigarh Administration' (Privacy Law

advanced pregnancy of a woman with a mental disability. The SC, in this case held that the right of a woman to make reproductive choices, which includes a choice to abstain from procreating, is a dimension of personal liberty under Article 21 of the Indian Constitution. While making specific observations that there should be no restriction on the exercise of reproductive choices of women such as accessing contraception, the SC went on to take a more conservative view saying that there was always a "*compelling state interest in protecting the life of the foetus*". Therefore, as per the SC in *Suchita Shrivastava*, an abortion can only take place under the provisions of the MTP Act, which must be seen as comprising of 'reasonable restrictions' on Indian women's exercise of reproductive choices.[41] The Court in this case also reasoned that the rationale for a 20 weeks' limit on termination is that an abortion performed during the later stages of pregnancy is very likely to cause harm to the physical health of the woman.[42]

In 2015, the Gujarat HC in the *Ashaben Case*,[43] deciding a writ petition for an abortion in the 27th week of pregnancy by a rape survivor, observed that it is a task before the legislating bodies to ensure that in matters of termination of pregnancy "*the constitutional mandate of equality and liberty are adhered to and the constitutional spirit is kept alive*." However, the court went on to say that although it was cognisant of the trauma it may cause the rape survivor,[44] the mandate of the timelines under the MTP Act cannot be ignored even if the court does not like the result that flows from it.[45] Despite such comments on equality and liberty, the court thus rejected the petition to allow a termination, since a strict reading of the MTP Act only allowed termination beyond 20 weeks if the pregnant woman's life was in danger.

From the case law that emerged right before *Puttaswamy*, it is seen that the *Suchita Shrivastava* case has often been cited by courts to allow termination beyond the

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Library) <https://privacylibrary.ccgnlud.org/case/suchita-srivastava-vs-chandigarh-administration?searchuniqueid=462366> accessed 24 August 2021.
41 ibid [22].
42 ibid [23].
43 *Ashaben vs. State of Gujarat* 2015 (4) Crimes 1 (Guj.) [Ashaben].
44 ibid [11.5].
45 ibid [11].

stipulated timelines under the MTP Act. Right before *Puttaswamy* in 2017, the SC relying on *Suchita Shrivastava*, held in the case of *Mrs X*[46] that a woman, 24th week into her pregnancy, carrying a foetus with severe anomalies can be allowed termination as "*the right of bodily integrity calls for a permission to allow her to terminate her pregnancy*." In the same year, the SC in *Meera Santosh Pal*'s case[47] allowed termination of 24 weeks' pregnancy of a woman carrying a foetus with anencephaly, and remarked that given the circumstances of the danger to her life, the choice of termination is within "*the limits of reproductive autonomy*".[48]

Similarly, the Bombay HC in a *suo motu PIL*[49] on women prisoners, observed that forcing a woman to undergo an unwanted pregnancy is a violation of a woman's bodily integrity, protected under Article 21, albeit with reasonable restrictions and regulations as contemplated under the MTP Act.[50] As per the court, the rights of the pregnant woman have to be placed on a higher pedestal than the unborn foetus as per Article 21.[51]

In the case of *Z vs. State of Bihar*,[52] where the termination of pregnancy of a destitute HIV positive woman was delayed by the State authorities, the Supreme Court said that India, under the Convention on the Elimination of All Forms of Discrimination Against Women[53], is under an international obligation to ensure that a woman's reproductive choices are protected.[54] The Court went on to say that a woman's "*bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect*".[55]

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46 *Mrs. X & Ors. vs. Union of India & Ors.*, Supreme Court Writ Petition (Civil) No. 81 of 2017 [Mrs X].
47 *Meera Santosh Pal & Ors vs. UOI & Ors.*, Supreme Court Writ Petition (Civil) No. 17 of 2017 <https://main.sci.gov.in/jonew/judis/44484.pdf> accessed 23 March 2021 [Meera].
48 ibid [6].
49 *HC on its own motion vs. State of Maharashtra*, Bombay High Court Suo Motu Public Interest Litigation No. 1 Of 2016 [PIL].
50 ibid [15] & [19].
51 ibid [20].
52 *Z vs. State of Bihar* (2018) 11 SCC 572.
53 United Nations Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 19' in Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (HRI/GEN/1/Rev.1, 29 July 1994).
54 *Puttaswamy* (n 7) [72].
55 *Z vs. State of Bihar* [58].

Therefore, even prior to *Puttaswamy*, there is some discussion on women's reproductive autonomy, dignity, bodily integrity, choice and liberty that can be found across cases, all of which have been later recognised to be aspects of a fundamental right to privacy in *Puttaswamy*. However, *Suchita Shrivastava* has clearly held that the MTP Act and its provisions comprise of reasonable restrictions on women's abortion rights, and that there is a compelling State interest in protecting women's health by keeping these restrictions in place. This rationale was reconsidered by the Supreme Court in *Puttaswamy,* which is discussed below.

2.4 Puttaswamy's Relevance to a Right to Abortion

Specific observations with respect to abortion and fundamental rights are made in *Puttaswamy* itself. J. Chandrachud, citing *Suchita Shrivastava*, has observed[56] in *Puttaswamy* that the statutory right to termination of a pregnancy under the MTP Act, can be related to the constitutional right to make reproductive choices, which is an ingredient of personal liberty under Article 21. As per J. Chandrachud, the right to make reproductive choices is therefore deduced from a woman's right to privacy, dignity and bodily integrity.[57] Further, *Suchita Shrivastava* has been recognised as a case in which a right to privacy has been elaborated upon.[58] J. Chelameswar has also observed that a woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.[59]

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56 J. Chandrachud observes that: '*The decision in Suchita Srivastava dwells on the statutory right of a woman under the MTP Act to decide whether or not to consent to a termination of pregnancy and to have that right respected where she does not consent to termination. The statutory recognition of the right is relatable to the constitutional right to make reproductive choices which has been held to be an ingredient of personal liberty Under Article 21. **The Court deduced the existence of such a right from a woman's right to privacy, dignity and bodily integrity***" [emphasis supplied]. *See Puttaswamy* (n 7) [72].

57 ibid [72].

58 ibid [72] & [91]. Eg. J. Chandrachud has observed that: "*..the content of the right to privacy has found elaboration in these diverse contexts. These would include...medical termination of pregnancy (Suchita Srivastava)".*

59 ibid [38].

Apart from these two direct observations, the judgement in several places[60] has discussed that rights related to procreation are a part and parcel of an overall right to privacy, and even enhance the nature of privacy from being just a right to be left alone, to protecting an individual's interests in making vital personal choices.[61] Therefore, post *Puttaswamy*, a right to make reproductive choices, which includes a right to abortion, has been expressly recognised to be a part of personal liberty protected under Article 21 and is protected as a part of women's right to privacy.

The most important contribution of *Puttaswamy* has been its jurisprudential analysis of various constitutional values such as bodily integrity, liberty and dignity – which have been used in cases such as *Suchita Shrivastava* and are important to an Indian reproductive rights framework. These values are discussed in detail, offering important clarifications on their relationship with the right to privacy. Further, *Puttaswamy* has squarely located and linked the fundamental right to privacy to specific rights under Part III of the Indian Constitution, where fundamental rights reside.

J. Bobde has held that the first and natural home for a right of privacy is in Article 21 at the very heart of *"personal liberty"* and life itself.[62] J. Chandrachud held that intersecting rights under the Constitution recognise the right to privacy. Though primarily, it is in the guarantee of life and personal liberty under Article 21 that a constitutional right to privacy dwells, it is enriched by the values incorporated in other rights which are enumerated in Part III of the Constitution.[63] J. Nariman held that physical privacy or privacy relating to the body can be located in Articles 19(1)(d) and (e) read with Article 21, and privacy related to choice can be found in Articles 19(1)(a) to (c), 20(3), 21 and 25.[64] Therefore, there is no longer any ambiguity on how a fundamental right to privacy can be argued for.

60 ibid [357], [497], [169] and [187].
61 ibid [329].
62 ibid [264].
63 ibid [84].
64 ibid [364].

Even prior to *Puttaswamy*, cases such as *Suchita Shrivastava*[65] and *a suo motu PIL* before the Bombay HC[66] have discussed that the restrictions under the MTP Act form '*reasonable restrictions*' to a right to abortion for reasons such as '*compelling state interest*' in the health of the woman and the foetus. *Puttaswamy* has, thrown light on the limitations of a right to privacy, and therefore abortion, and provided clarity on the necessary tests to determine whether there is an infringement of privacy in a given case. The restrictions on access to abortion through the MTP Act have found clarity and a detailed analysis under *Puttaswamy*.

The SC has clearly held in *Puttaswamy* that the limitations which operate on the right to life and personal liberty under Article 21 would operate on the right to privacy.[67] Any interference with privacy by an entity covered by Article 12's description of the 'State' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference effects.[68] Js. Chandrachud and Kaul have both suggested a three-pronged test, for any interference with a right to privacy. The three-pronged test calls for showing - i) existence of a law; ii) that must serve a legitimate State aim; iii) the means which the State adopts to pursue such aim ought to be proportional to the object of the law; with the existence of procedural guarantees against the abuse of such means. J. Chelameswar using a higher standard for restriction on privacy has called the restriction of compelling State interest, which has been so far used in abortion cases in India widely[69], deserving the highest amount of scrutiny.[70]

Puttaswamy has therefore become an aid to understanding the arguments that intertwine abortion and privacy related rights in India. The benefits of using a privacy-based framework for a discussion on abortion rights have been discussed in the second part of this paper.

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65 *Suchita Shrivastava* (n 40).
66 *PIL* (n 49).
67 *Puttaswamy* (n 7) [183].
68 ibid [283].
69 *See Suchita Shrivastav*a (n 40), *PIL* (n 49), *Mrs X* (n 46), *Meera* (n 47).
70 *Puttaswamy* (n 7) [379].

2.5 Has Puttaswamy Changed How Indian Courts Interpret a Right to Abortion?

Despite the remarks and relevance of the *Puttaswamy* decision on the abortion rights of Indian women, one is hard pressed to find reliance on the *Puttaswamy* decision in subsequent case-law under the MTP Act.[71] The *Suchita Shrivastava* case is still widely cited[72] along with the *Meera Santosh Pal* case,[73] even post-*Puttaswamy*, in allowing termination of pregnancy. At the time of publishing this paper, there are only a few judgments that have used *Puttaswamy* under the MTP Act.

For instance, the petitioner in the case of *Surekha Gautam*[74] relied on the *Puttaswamy* case[75] while praying for allowing termination of a 26-week pregnancy of a minor girl; the Delhi HC allowed termination of the pregnancy in this case. In another case,[76] the petitioner relied on *Puttaswamy* to seek termination of a 25-week pregnancy citing domestic violence and abuse. Unfortunately, the SC refused the abortion. Similarly, in

71 This statement is true as of the date of the publication of this paper.

72 *See A & Ors vs. State of Chhatisgarh & Ors*., Chhattisgarh High Court Writ Petition Criminal No. 3486 of 2019*; X vs. State of Chhattisgarh & Ors*., Chhattisgarh High Court Writ Petition Criminal No. 4337 of 2019; *Manju vs. State of Madhya Pradesh & Ors*., Madhya Pradesh High Court Writ Petition No.7328 of 2019 [Manju*]; Nidhi Singh vs. State of Chattisgarh & Ors* 2020 (206) AIC 523 [Nidhi]; *Ram Avatar vs. State of Chhattisgarh* AIR 2020 Chh 159.

73 *Rama Soni vs. State of MP & Ors*., Madhya Pradesh High Court (Gwalior Bench) Writ Petition No. 25126 of 2018; *Manju* (n 72); *X vs. State of Madhya Pradesh & Ors*., Madhya Pradesh High Court (Indore Bench) Writ Petition No. 4883 of 2020; *Gopal Pattnaik vs. State of Orissa*, Orissa High Court Writ Petition Criminal No. 68 of 2020 [Pattnaik]; *Nidhi* (n 72); *X vs. Home Department & Ors*., Madhya Pradesh High Court (Indore Bench) Writ Petition No. 1891 of 2020.

74 *Surekha Gautam Khobragade vs. State of NCT of Delhi,* Delhi High Court Writ Petition (Criminal) No. 69 of 2021.

75 ibid. In Surekha Gautam, the petitioner argued that : "*it is the woman's freedom of choice whether to bear a child or to abort her pregnancy which falls thus within the realm of privacy, and that the integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop and that privacy is a postulate of human dignity itself which thus enables an individual to retain the anatomy of the body and the mind and to retain the ability to make decisions on vital matters of concern to life and that the privacy of the individual recognizes an inviolable right to determine how the freedom shall be exercised*".

76 Ritika Jain, 'SC says abortion amounts to murder, rejects 20-year-old Mumbai woman's plea' (The Print, 16 July 2018) <https://theprint.in/india/governance/sc-says-abortion-amounts-to-murder-rejects-20-year-old-mumbai-womans-plea/83524/ > accessed 2 April 2021.

Suparna Debnath's case,[77] the Calcutta HC did not allow termination of pregnancy at the 26th week of a foetus with Down syndrome, saying the right of a foetus to live outweighs the mental trauma of the mother. In this case too, the petitioner had relied on the arguments of privacy made in *Puttaswamy*.

In addition, post-*Puttaswamy,* there have been several cases[78] where courts rely on arguments of privacy, autonomy and dignity to allow abortions, without any explicit reference to *Puttaswamy*. In the case of *State vs. S.*, wherein the pregnant minor was a rape survivor, [79] the Rajasthan HC commented on the reproductive choices of a rape survivor[80] and held that *"the right of a child rape victim to make the reproductive choice of terminating the foetus heavily outweighs the right of the child in womb to be born even where the pregnancy is at an advanced stage"*.[81] In *Thakore Kinjalben*'s case[82] and *Gopal Pattnaik's* case,[83] the right to privacy of the pregnant woman was one of the factors in allowing her petition for termination. Such cases show a reliance on *Puttaswamy*-like reasoning, with or without relying on *Puttaswamy*, to explore women's reproductive rights and freedoms.

It is still early to predict how *Puttaswamy* will be used by HCs to allow access to abortion in India and if there are any emerging trends from existing case law. The number of cases available at the time of writing this paper are not sufficient to draw any conclusions on the impact of *Puttaswamy* on abortion law in India. Going forward, it will be interesting to note how the post-Amendment case law under the MTP Act uses *Puttaswamy* too.

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77 *In Re: Suparna Debnath vs. State of West Bengal* (2019)1CAL LT 349.
78 *Nidhi* (n 72); *Pallavi Bhoi vs. State of Chhattisgarh & Ors* 2019 (III) MPJR(SC) 81.
79 *State of Rajasthan vs. S*, Rajasthan High Court (Jodhpur Bench) Division Bench Special Appeal Writ No. 1344 of 2019.
80 ibid. Unfortunately in this particular case, the rape survivor's pregnancy reached full term before the decision of the Division Bench. The Court in its judgement remarked how systemic delays in process also impair reproductive rights of women. In examining the decision in appeal, the bench said that the decision was in violation of the rape survivor's statutory right to terminate her pregnancy.
81 ibid [13].
82 *Thakor Kinjalben Ragnathbhai vs. State of Gujarat*, Gujarat High Court Special Criminal Application No. 2437 of 2020.
83 *Pattnaik* (n 73)

3. Importance of a Right to Privacy for the Right to Access Abortion in India

Privacy as a right provides for autonomous decision-making about one's body, that preserves bodily dignity and integrity. Therefore, it plays a very important role in facilitating women's reproductive decision making, such as contraception, childbirth, and abortion, and is an important right for the liberal strand of feminism, which places choice at the centre of women's lives. Reproductive decision-making affects women's health, which can further have an impact on their social lives and other material conditions, such as their ability to participate in the labour market.

Conversely, if women are not allowed to make decisions about their own body and reproductive options, this perpetuates two contentious ideas: that women's natural role in society is to become mothers; and that women's bodily decisions ought to be controlled, thereby reinforcing the notion of viewing women's bodies as property. These ideas also preclude women from participating in society as equal citizens or at least as well as men. As noted above, the central role of privacy in women's reproductive rights and decision making has been recognised across several instruments of international law[84] as well.

Catherine Schmidt[85] argues that when a decision to have or not have children is coerced, it is a denial of women's right to act as free moral agents. It forces a decision on the woman: to go through both childbirth and childrearing[86], or to seek an unsafe and illegal

84 *See* United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (E/C.12/GC/22, 2 May 2016) para 28; United Nations Human Rights Committee, 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988); United Nations Human Rights Committee, 'CCPR General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)' (CCPR/C/21/Rev.1/Add.10, 29 March 2000) para 20; United Nations Committee on the Elimination of Discrimination Against Women 'CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations' (A/49/38, 1994) paras 21-22.

85 Catherine Grevers Schmidt, 'Where Privacy Fails: Equal Protection and the Abortion Rights of Minors' (1993) 68 NYU L Rev 622.

86 ibid.

abortion, and therefore impinges on reproductive freedom. As J. Nariman has held in *Puttaswamy*, a right to privacy has components of informational privacy, decisional privacy, and privacy from interference by the State.[87] All of these factors are extremely relevant to women's actual reproductive decision-making. For example, decisional privacy would keep a woman's decision to get an abortion confidential with her medical service provider, and would not insist on anyone else's consent. This right is important to women who try to access abortion in a conservative social setting, where abortion-related stigma is high, and women's consent is deemed insufficient.

Privacy also promotes and fosters values that feminists have held to be important, such as self-determination and equality.[88] In *Puttaswamy* too, the bench in several places has said that other rights such as dignity[89], the exercise of freedoms guaranteed by Part III,[90] as well as core constitutional values such as democracy in the Preamble[91] are reinforced by the right to privacy. Privacy is an enabler of other fundamental rights and freedoms.[92] Values derived from a right to privacy – such as confidentiality of medical records, doctor-patient confidentiality, non-insistence on spousal consent – can all potentially contribute to more effective access to abortion.

Like the jurisprudence on the substantial right to privacy and its importance for reproductive freedom, the limitations on a right to privacy will also similarly be applicable to reproductive decision-making. Limitations to the right to privacy and therefore choice have been very succinctly discussed in the *Suchita Shrivastava* case above, where the SC has laid down that the limitation of 20 weeks on abortion has a rationale i) that an abortion in an advanced stage of the pregnancy is very likely to cause physical harm to the

87 *Puttaswamy* (n 7) [521].
88 Anita L. Allen, 'Taking Liberties: Privacy, Private Choice, and Social Contract Theory' (1987) Faculty Scholarship at Penn Law 1337.
89 *Puttaswamy* (n 7) [266]; *see also* paras 51, 106, 113, 264.
90 ibid. [51], [113], [264] and [267]-[270]. J. Bobde has written that: "*Privacy is thus one of those rights "instrumentally required if one is to enjoy" rights specified and enumerated in the constitutional text*".
91 *Puttaswamy* (n 7) [365].
92 *Puttaswamy* (n 7) [265].

health of the woman; and ii) that there begins to be some '*compelling state interest*' in protecting potential life.

Clarifying the latter, in *XYZ*, the Bombay HC has held that the idea of '*compelling state interest*' cannot be stretched to such an extent that there would be compelling state interest even in cases of no potential human life or where the child to be born would suffer from extreme physical or mental abnormalities.[93] Further, compelling State interest prioritises the mother's life over that of the foetus, and there can be no compelling State interest in insisting that pregnancy be continued beyond 20 weeks when it would cause grave physical and mental health issues for the woman.[94]

3.1 Critiques of Privacy and Limitations

While as seen above, privacy is relevant for accessing abortion, there exist critiques to this approach. Pro-abortion activists and feminists argue that locating abortion reforms within the realm of privacy rights is not perfect. For one, privacy does not contemplate a 'positive' duty on the State to help increase access to abortion by funding, infrastructure, and other similar policies. In absence of this duty, for women with socio-economic disadvantages, the 'choice' of getting an abortion remains an ideological choice only.

Another argument against privacy-centric decision-making is that even in a private realm such as families, it is men who make important socio-economic decisions, including the decision to have a child. Privacy, therefore, does not take into account women's lived experience and their realities. In *Puttaswamy*, J. Chandrachud has discussed the above feminist critique of privacy in detail.[95] He mentions that privacy is often used as a curtain for shielding issues of gender-based domestic violence, by calling such an issue 'private', and is therefore used to perpetuate hetero-patriarchal oppressive structures.

93 *XYZ vs. Union of India & Ors.*, Bombay High Court Writ Petition (Civil) No. 10835 of 2018, p 47.
94 ibid.
95 *Puttaswamy* (n 7) [107].

Some feminist scholars such as Jain and Shah[96] have sought to address this limitation of a privacy-based regime by offering an alternative analysis for abortion and other reproductive rights, such as one based on equality,[97] that takes into account meaningful choices and social, political and economic barriers in accessing such choices.[98] This argument has initially been used in the USA, where a right to abortion was based on a right to privacy in the case of *Roe vs. Wade*.[99] However, through various later rulings, State laws that restrict abortion services through funding, consent requirements etc. have been upheld by the US SC[100] on the ground that these do not violate a private decision to undergo an abortion. Many academicians and activists[101] have therefore criticised the ruling in *Roe*, and argued that a better site for arguing for abortion access could have been under 'equal protection' requirements. However, such an analysis in the abortion context has not come forth from Indian jurisprudence, whether in terms of statute or precedent.

It remains to be seen if the jurisprudence offered by *Puttaswamy* leads to such an analysis in India in the future.

Equal protection, which is a form of a right to equality, requires similar persons to be treated similarly. This approach however also has its limitations. E.g. if men and women are not 'equal' groups, then a law especially targeting women will not violate equal protection. This may in some cases even legitimise gender-based stereotypes, by arguing on the inherent differences between men and women. Scholars[102] such as Catherine

96 Dipika Jain and Payal K Shah, 'Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India' (2020) 39 Colum J Gender & L Page 6 [Jain and Shah].
97 ibid. p 6.
98 ibid. p 7.
99 *Roe vs. Wade* 410 US 113 (1973).
100 *See e.g., Webster vs. Reproductive Health Services* 492 U.S. 490 (1989); *Harris vs. Mcrae* 448 U.S. 297, 302, 326 (1980), *Gonzales vs. Carhart* 550 U.S. 124, 141 (2007).
101 Catherine Grevers Schmidt, 'Where Privacy Fails: Equal Protection and the Abortion Rights of Minors', 68 N.Y.U. L. REV. 597 (1993) 598.
102 Ann C. Scales, 'The Emergence of Feminist Jurisprudence: An Essay', 95 Yale L.J. 1373, 1394 (1986). Ann Scales in her piece also relies on the MacKinnon model of equal protection.

MacKinnon[103] have criticised the interpretation of the equal protection approach and proposed a third approach. MacKinnon, for instance, advocates for the following test to tackle gender-based discrimination: does the law in question perpetuate a systematic social deprivation of one sex, because of sex?[104] Therefore, any law that fosters oppression and subordination of women violates equal protection.[105]

The focus of such an approach is therefore not on the content of the law itself, but rather its impact. Under such an approach, issues such as lack of abortion clinics, qualified medical professionals, as well as post- and pre-abortion care, which all affect a woman's right to choose, will be seen as a violation of an equal protection guarantee. This kind of approach, in turn, lacks an intersectional analysis — one that considers gender co-existing with vulnerabilities such as caste, class, race and disability.

A second critique offered for arguing for abortion-based rights within a privacy regime is that privacy as a concept is too 'vague', and therefore prone to interpretations that may ultimately harm women's autonomy. Feminists point out that since most judges who interpret rights, including the right to privacy, tend to be men, privacy carries within itself room for several interpretations from men's perspective. Another aspect to this is that privacy that is defined by the State is then negotiated only on the State's terms, compromising women's agency throughout. This critique, however, is now addressed by the decision in *Puttaswamy* itself. In the decision, one finds a clearer delineation of types of privacy that are now protected as fundamental rights under the Indian Constitution, as well as a clearer articulation of the concepts of dignity[106] and autonomy[107] and their relationship with privacy. Both decisional privacy, as well as freedom from intrusion by

103 Catharine A. MacKinnon, *The Sexual Harassment of Working Women* 110 (Yale University Press, 1978).
104 ibid. p 117.
105 ibid.
106 "What Privacy does it that it assures dignity to the individual, and it is only with dignity that liberty has a true meaning". *See Puttaswamy* (n 7) [107].
107 Autonomy is the vital ability of an individual to make decisions on vital matters that concern life. *See Puttaswamy* (n 7) [169].

the State, have been defined and accepted as prongs of a right to privacy. The tests for judicial review of any encroachment on such a right have also been clearly laid down.

4. Problems with Accessing Abortion in India: What Does the Amendment Do?

Despite more than fifty years of a liberalised abortion regime, access to abortion in India remains an issue from both a public health and a gender-based rights perspective. Unsafe abortions[108] remain high[109] and are one of the leading causes of maternal deaths.[110] Women from vulnerable socio-economic backgrounds are the worst affected, with poverty being a major risk factor.[111] When seen from an intersectional perspective of caste, religion, and disability, the situation is even more bleak. The COVID pandemic has also exacerbated the disadvantages and vulnerabilities of women by significantly impacting non-COVID healthcare services; in addition, the administrative lockdowns and curbs on travel and transport also affect access.[112] Against this backdrop, the changes brought in by the Amendment, when compared with the problems women face in accessing abortion in India, reveal several gaps that remain unaddressed. Some of these have been discussed below.

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108 Defined by the WHO as "the termination of an unintended pregnancy either by persons lacking the necessary skills or in an environment lacking the minimum medical standards or both". *See* World Health Organization 'Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008' (2011) <https://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241501118/en/> accessed 21 June 2021.

109 *See* R Yokoe et al, 'Unsafe abortion and abortion-related death among 1.8 million women in India' (2019) BMJ Global Health e001491 4; Nomita Bedi et al, 'Maternal Deaths in India – Preventable Tragedies (An ICMR Task force study)' (2001) Journal of Obst. And Gyn. Of India, Vol.51 No.2 86-92; Melissa Stillman et al, 'Abortion in India: A literature review' (Guttmacher Institute, December 2014) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.680.7684&rep=rep1&type=pdf> accessed 09 July 2021.

110 ibid.

111 ibid.

112 See Centre for Justice Law and Society, Jindal Global Law School 'Legal Barriers to Abortion Access During the Covid-19 Pandemic in India' (2021) <https://jgu.edu.in/cjls/legal-barriers-to-abortion-access-during-the-covid-19-pandemic-in-india/> accessed 29 June 2021 [CJLS Report]; *See also* '1.3 million women in India lost access to contraceptives, abortions during the COVID-19 pandemic: report' (The Firstpost, 20 August 2020) https://www.firstpost.com/health/1-3-million-women-in-india-lost-access-to-contraceptives-abortions-during-the-covid-19-pandemic-report-8732021.html.

A key change brought in by the Amendment is that pregnancies under 20 weeks (as compared to under 12 weeks earlier) require the permission of one medical practitioner (earlier the permission of two medical practitioners was required for the termination of pregnancies between 12 and 20 weeks). Only pregnancies between 20 to 24 weeks now need the permission of two medical practitioners. *Prima facie*, this seems to be an improvement, as it somewhat eases the burden on women to access abortion between 12 to 20 weeks of pregnancy. However, from an implementation and policy perspective, this does not address several concerns that existed prior to the Amendment. For example, the requirement under the MTP Act, that only a registered and certified 'medical practitioner' (and not any health care service provider) can carry out an abortion at an 'authorised location' creates access-related issues.

A general medicine practitioner, or an undergraduate with an MBBS degree, cannot provide abortion services, even for early-stage pregnancies.[113] The qualification to act as a registered medical practitioner are even more stringent for advanced pregnancies beyond 12 weeks.[114] All these legal requirements, when taken together, create a shortage of qualified persons who can offer abortion services in all parts of the country. In the past, suggestions[115] have been made to the Indian government to relax the criteria for providing

113 *See* Rules 4 (b), (c) and (d) of the Medical Termination of Pregnancy Rules, 2003 [MTP Rules]. Eg. Rule 4(c) requires a doctor to have assisted in at least 25 cases of abortion, at least 5 of which have to be independently performed at an approved institution. *See also Surendra Chauhan vs. State of MP* AIR 2000 SC 1436 where a doctor with a homeopathic degree but not the requisite experience as per the rules was convicted under the MTP Act.

114 ibid. For example, Rules 4(b) and (d) require six months' house surgency in gynaecology and obstetrics or holding a PG degree/diploma in gynaecology and obstetrics. Although the Amendment Act, which liberalises the abortion law in India to some extent, came into effect on the 24th of September, 2021 <https://www.livelaw.in/top-stories/medical-termination-of-pregnancy-amendment-comes-into-foce-182479> accessed on 29 September 2021, the corresponding Rules for this liberalisation were not notified at the time of publication of this paper.

115 Eg. the World Health Organization recommends using a wider range of health care service providers as a public health strategy to ensure wider availability of abortion services. *See* World Health Organization, 'Health worker roles in providing safe abortion care and post-abortion contraception, A Guideline prepared by the World Health Organization' (2015) <https://apps.who.int/iris/bitstream/handle/10665/181041/9789241549264_eng.pdf;jsessionid=A1E6670FC581F745292F0773AC5153C6?sequence=1> accessed 1 July 2021; *See also* Coalition of Civil Society Organizations, 'Civil Society Recommendations on making the Medical Termination of Pregnancy (Amendment) Bill 2020 a Rights Based Legislation'<https://pratigyacampaign.org/wp-content/uploads/2020/04/civil-society-

abortion services by expanding it to general medicine practitioners, MBBS holders, and even suitably trained midwives and community healthcare workers. Post the Amendment, norms for the registered 'medical practitioner' whose opinion is required for termination of pregnancy at different stages of the pregnancy are to be prescribed under the rules for the Act.[116] At the time of writing this article, the rules under the Amendment had not been notified. However, since the enabling provision under the Amendment has not changed the criteria for medical practitioners, it can be expected that any prospective rules would not bring about a significant change to the status quo.

The Amendment has not addressed yet another policy concern, that is of the place of abortion. The location where abortion can be provided needs to be pre-authorised; to qualify for such authorisation, it is required to perform a certain minimum number of procedures in a year and has certain prescribed equipment[117] – both criteria which are absent in most community and primary health centres in India.[118] The absence of adequate certified public health facilities forces most women to turn to private facilities,[119] which are expensive[120] and therefore prohibitive for the most marginalised. It also

recommendations-on-making-the-mtp-amendment-bill-2020-a-rights-based-legislation.pdf> accessed 09 July 2021 [Civil Society Recommendations].

116 MTP Act (n 5) s 3(2A).

117 *See* MTP Rules (n 113) rule 5. For termination upto 12 weeks facilities are required to have a gynaecology examination/labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation. For termination beyond 20 weeks, facilities are required to have an operation table, instruments for performing abdominal or gynaecological surgery, anaesthetic equipment, resuscitation equipment and sterilization equipment and drugs and parental fluids for emergency use.

118 Eg. as per the Government's own data, rural areas of Southern India including the states of Kerala, Karnataka, Goa, Tamil Nadu and Telangana recorded a 57.2% shortfall in gynaecologists and obstetricians, a 61.4% shortfall in paediatricians and a 68% shortfall in radiologists. See Centre for Justice Law and Society, Jindal Global Law School 'Medical Boards for access to abortion untenable: Evidence from the Ground' (2020) p 14-35 <https://jgu.s3.ap-south-1.amazonaws.com/cjls/CJLS_Medical_Boards_Report_Final.pdf> accessed 09 June 2021 [CJLS Report 1].

119 Sushanta K. Banerjee et al, 'Situation Analysis of MTP Services in Jharkhand: February-May 2011' (IPAS, 2011) <https://www.ipasdevelopmentfoundation.org/resourceFiles/26201511305032.pdf> accessed 09 June 2021; *See* CJLS Report 1 (n 118) p 14-35. The report shows that the private sector is the leading abortion provider in all States; *See also* Ravi Duggal and Sandhya Barge, 'Abortion Services in India Report of a Multicentric Enquiry' (Abortion Assessment Project India) p 5 <http://www.cehat.org/cehat/uploads/files/national.pdf> accessed 09 June 2021 [Abortion Assessment Project].

120 Abortion Assessment Project (n 119) p 5-6.

increases the chances of abortions being performed at home,[121] which are considerably riskier and associated with more post-abortion complications.[122] Although the amendment to the MTP Act in 2002 sought to improve this by streamlining the process for registration of approved facilities for abortion, existing data[123] shows its impact seems to have been limited so far.

Secondly, abortion beyond 24 weeks is now permissible, but only if a medical board diagnoses a substantial fetal abnormality, and in no other case. There may be other reasons for women to seek abortion in a late stage of pregnancy such as intimate partner violence, or late discovery of pregnancy in case of minors or the mentally disabled, all of which are valid grounds for abortion. Precluding these while retaining only fetal abnormalities as the sole ground for abortion appears arbitrary and lacks any nexus to the object of the Amendment.

Prior to the Amendment, the MTP Act did not itself provide for a permanent medical board / a panel of doctors with some specified qualifications, and these boards were convened on a case-to-case basis.[124] It is seen that as a matter of practice, especially in cases of advanced pregnancies beyond 20 weeks, courts have directed hospitals to form a medical board whose report 'may' have some bearing on the decision of the court.[125] This

121 CJLS Report 1 (n 118). Other research done in this area with smaller samples shows similar results. Eg *see* Danish Ahmad et al, 'Induced Abortion Incidence and Safety in Rajasthan, India: Evidence that Expansion of Services is Needed' (2020) Studies in Family Planning 00(0) p 10-11; Overall, 200 women (53%) presenting with post-abortion complications first attempted pregnancy termination at home in a study conducted in Madhya Pradesh. *See* Sushanta K. Banerjee & Kathryn Andersen, 'Exploring the pathways of unsafe abortion in Madhya Pradesh, India' (2012) Global Public Health, 7:8, 882 at 887-889 [Banerjee & Andersen].

122 *See* Shritanu Bhattacharya and Pallab Mistri, 'Safe abortion – Still a neglected scenario: A study of septic abortions in a tertiary hospital of Rural India' (April 2010) Online Journal of Health and Allied Sciences 9(2):7 p 3; Banerjee & Andersen (n 121) 889.

123 See CJLS Report 1 (n 118)

124 In 2017, the Supreme Court of India recommended setting up permanent medical boards by State governments, since constituting boards on a case-to-case basis caused delay hindering abortion access. Following this the centre issued directives to States to set up permanent boards. *See* Bhadra Sinha, 'Set up permanent medical boards for abortion cases: Centre to states' (Hindustan Times, 31 August 2017) <https://www.hindustantimes.com/india-news/set-up-permanent-medical-boards-for-abortion-cases-centre-to-states/story-iL7yctIHtEUqP0DPyrLaZN.html > accessed 10 June 2021.

125 Eg. *See X vs. Union of India*, Supreme Court Writ Petition (Civil) No. 593 of 2016; *Meera* (n 47).

practice has been criticised in the past by civil society organisations[126] on the grounds that it is violative of a right to privacy, dignity, and decisional autonomy, and further that referring a case to a medical board involves procedural issues as well. In a time-sensitive matter of termination of pregnancy, referring a case to a medical board can cause delays.[127] The decision making by medical boards in the past has also not been found to be consistent, and research shows they rely on factors extraneous to the MTP Act.[128]

Post the Amendment, the composition of a medical board has been clarified to necessarily include a gynaecologist, a paediatrician, a radiologist, and any other member as prescribed by the government.[129] This mandatory composition of a medical board can create hurdles to abortion access further. Existing research[130] shows that there have been issues of shortage of experts that may constitute a medical board even prior to the Amendment.[131] How this problem will get resolved by a mandatory composition, unless adequate appointments are made at a policy level, remains unclear. Further, even after the Amendment, the MTP Act does not authorise a medical board to allow an abortion beyond the 24 weeks' limit as per its own discretion, except in cases of substantial foetal abnormalities (for an abortion beyond the 24 weeks' limit, in all other conditions beyond foetal abnormalities, the party would need to approach the court for granting abortion). There is also no provision under which an aggrieved woman can directly approach a medical board and seek their report, without having to wait for a court order, thereby saving precious time.

126 Civil Society Recommendations (n 115).
127 Eg *see Z vs. State of Bihar* (2018) 11 SCC 572.
128 Pratigya Campaign, 'Assessing the Judiciary's Role in Access to Safe Abortion - An Analysis of Supreme Court and High Court Judgements in India from June 2016-April 2019' (2019) p 22-23 <https://pratigyacampaign.org/wp-content/uploads/2019/09/assessing-the-judiciarys-role-in-access-to-safe-abortion.pdf> accessed 09 June 2021 [Pratigya report].
129 MTP Act (n 5) s 3(2D).
130 The report by the Centre for Justice, Law and Society, Jindal Global Law School, shows that most Indian States have a shortage of obstetricians and gynaecologists as much as upto 80% at most centres. *See* CJLS Report 1 (n 118) p 14-15, 17-18.
131 *See* Jagriti Chandra, 'Medical board on abortion 'unfeasible', says study' (The Hindu, 31 January 2021) <https://www.thehindu.com/news/national/medical-board-on-abortion-unfeasible-says-study/article33711124.ece> accessed 4 June 2021.

The timelines under the MTP Act have always been a cause for creating access-based issues. Although the MTP Act does not explicitly provide for this, procedurally speaking, women seeking an abortion beyond the permissible time limits under the MTP Act have to file a writ petition before the relevant High Court, seeking a court order directing a practitioner/hospital to provide abortion.[132] Existing research[133] done under the unamended MTP Act has shown that there are several problems with approaching courts to seek a termination beyond the prescribed threshold. Currently, there is no decision by any Indian Court providing clear criteria for allowing a termination of pregnancy, which makes each case very subjective and adds to the uncertainty of getting relief.[134] Cases can take time, which is a crucial consideration in cases of pregnancy; there have been cases where termination is not allowed after much time was wasted before a case was finally decided.[135] The legal process itself is not always accessible, considering women may not always be able to afford legal representation, or may need to travel a long way to be able to go to the relevant court.

Apart from the above, the Amendment has introduced some principled and welcome changes as well. Unmarried women who are pregnant and want to seek an abortion on the grounds of failure of contraception can do so now.[136] Earlier this was only available to married women. This can be viewed as a recognition that women are having sex outside of marriage. Additionally, there is now an explicit onus on medical practitioners to maintain the confidentiality of a woman 'whose pregnancy has been terminated', violation of which has penal consequences.[137] While confidentiality of woman's medical records

132 *See* Jagriti Chandra, 'Despite MTP Act, women forced to seek legal nod for abortion' (The Hindu, 28 September 2020) <https://www.thehindu.com/news/national/despite-mtp-act-women-forced-to-seek-legal-nod-for-abortion/article32710296.ece> accessed 7 June 2021.
133 *See* Pratigya Report (n 128). The Pratigya Campaign, which is a network of 110 organizations and persons, released a report on the role of the judiciary in accessing abortion in India. The report examined cases before the HCs and the Supreme Court seeking an order for termination of pregnancy under the MTP Act. The analysis found that valuable time is wasted in cases such as these due to factors such as appointment of a medical board.
134 ibid p 22-23.
135 ibid. Pratigya reports points that for 2016-19, the SC took an average of 12 days to decide a petition for relief under the MTP Act.
136 MTP Act (n 5) s 3(2) Explanation 1.
137 MTP Act (n 5) s 5A.

was always a requirement under the MTP Act,[138] this was an opportunity to ensure that doctors do not insist on consent of any other party other than the pregnant woman, which is discussed in more detail below.

The Amendment was an opportunity to address other policy-based challenges with accessing abortion in India. Existing studies[139] have shown that one of the reasons for unsafe abortions in India is the belief that abortion is illegal at any stage of the pregnancy, and lack of information on how to legally pursue abortion. A 2009 study[140] that examined 811 women, 403 men and 87 pharmacies from Gujarat and Jharkhand showed that approximately two-thirds of women and 85% of men thought that abortion in India was illegal. Only 15% of all people examined thought that abortion was legal.[141] Similar studies have reported this trend where a high percentage of men, women and even pharmacists[142] believe that any abortion is illegal.[143]

The lack of knowledge acts as a deterrent for accessing 'safe' abortion services and can make women more inclined to visit quacks and seek nonregulated ways of an abortion.[144] Lack of information about the law manifests in other ways as well. Despite the express observations of the SC[145] that spousal consent is not required for a termination of

138 *See* Medical Termination of Pregnancy Regulations, 2003.
139 The Health and Family Welfare Statistics 2019-20 report shows 5,91,112 spontaneous abortions in India in 2019-20 as against 5,87,110 spontaneous abortions in 2017-18. In 2016-17 there were a total of 9,73,701 abortions in India, including spontaneous and induced. *See* Ministry of Health and Family Welfare Statistics division Government of India 'Health and Family Welfare Statistics in India 2019-20' (October 2020) p 172, 189. Existing research from private studies in this area shows that State numbers show a severe underreporting of instances of abortion. Eg *see* Susheela Singh et al, 'Abortion and Unintended Pregnancy in Six Indian States: Findings and Implications for Policies and Programs' (Guttmacher Institute, November 2018); Abortion Assessment Project (n 119).
140 T. Boler etc al 'Medical Abortion in India: A model for the rest of the world?' (2009) Marie Stopes International, London <https://www.msichoices.org/media/2131/medical-abortion-in-india.pdf> accessed 10 June 2021.
141 ibid. p 22.
142 Two thirds (68.5%) of 187 pharmacists stated that abortion was illegal in India. T. Powell -Jackson et al, 'Delivering Medical Abortion at Scale: A Study of the Retail Market for Medical Abortion in Madhya Pradesh, India' (2015) PLOS One 10(3): e0120637.
143 *See* Banerjee & Andersen (n 121) p 883.
144 ibid.
145 *Anil Kumar Malhotra vs. Mangla Dogra and Ors.,* Supreme Court Review Petition (Civil) No.2941 Of 2017.

pregnancy, insistence on consent from the spouse, partner, or even family remains a widespread practice in India. This partially arises from misinformed views or lack of information, where even pregnant women[146] or the doctor[147] wrongly believe that the husband's consent is required as per the law. There are however doctors who insist on the husband's consent as a matter of practice too,[148] owing to patriarchal notions of what women can and cannot do with their bodies, and to avoid any social disputes later. This is especially problematic for women who are in violent and/or abusive intimate partner relationships, and who were made pregnant without their consent.

Another access-related issue is that of the control over drug-induced abortion. Although, the Amendment, for the first time, has clarified that abortion in India now means and includes both drug-based and surgical abortions,[149] there remains a need to improve the law. Medicated abortion has emerged worldwide as a safe and convenient way to terminate pregnancies, especially those in the early stages.[150] It appeals to women for its discreetness and better availability as compared to surgical abortions. A 2002 amendment to the MTP Act and the Rules therein[151] allowed for prescribing Mifepristone plus Misoprostol for termination of pregnancies up to seven weeks, provided the registered medical practitioner has access to an approved facility under the MTP Act.[152] Further, the combination is a Schedule H Drug, required to be sold only on a prescription,

146 Manisha Gupte et al, 'Abortion needs of women in India: A case study of rural Maharashtra '(1997) Reproductive Health Matters, 5:9, 77-86 p 81.
147 Susanne Sjostrom et al, 'Medical students' attitudes and perceptions on abortion: a cross-sectional survey among medical interns in Maharastra, India' (2014) Contraception Volume 90 Issue 1 p 42-46.
148 Siddhivinayak S Hirve, 'Abortion Law, Policy and Services in India: A Critical Review' (2004) Reproductive Health Matters, 12:sup24, p 114-121; Siddhivinayak S Hirve, 'Abortion Policy in India: Lacunae and Future challenges' (Abortion Assessment Project India, 2004) <http://www.cehat.org/go/uploads/AapIndia/hirve.pdf> accessed on 19 June 2021.
149 MTP Act (n 5) s 2(e).
150 Justin Chu et al, 'Mifepristone and misoprostol versus misoprostol alone for the management of missed miscarriage (MifeMiso): a randomised, double-blind, placebo-controlled trial' (2020) Lancet Vol 396 Issue 10253, 770-778.
151 The Medical Termination of Pregnancy Amendment Act, 2002 read with the Medical Termination of Pregnancy Regulations, 2003.
152 *See* MTP Rules (n 113) Explanation to Rule 5. Approved facilities need to meet criteria already discussed above.

and a record of the sale must be maintained by the pharmacist.[153] Creating the stringent requirements for merely prescribing an abortion-inducing drug might seem counterintuitive, especially since the medicine is taken at home and not in a clinic and needs minimal supervision.

The changes brought in by the Amendment and its policy implications are far from ideal, and can have major implications for women's access to abortion. Issues such as the lack of qualified practitioners and permitted centres for carrying out abortions, which existed prior to the Amendment, remain unaddressed. To complicate matters, an advanced pregnancy beyond 24 weeks can now only be terminated on grounds of a foetal anomaly, leaving no scope for any other reason or even judicial interference. Asking women to approach medical boards, when overall there is a severe lack of qualified specialists who can be part of such boards, also seems to be a miscalculated step. The pre-existing policy issues of lack of accessible information on abortion, drug-based abortion, and social practices of insisting on spousal consent are all unaddressed under the Amendment.

These issues show that the stated objectives of the Amendment, of achieving dignity, autonomy, confidentiality, and justice for women, seem difficult to achieve through the changes brought about by this Amendment alone. In fact, the problems stated above come together and make overall access to abortion difficult, which can be seen as hindering the statutory right to an abortion under the MTP Act, and which — as *Puttaswamy* notes — can be related to the constitutional right to make reproductive choices.[154] Herein lies the potential to challenge the Amendment and its provisions, and lack thereof, on the ground that they hinder women's right to effectively choose an abortion, which forms a part of a woman's right to privacy, dignity and bodily integrity, residing under Article 21 of the Indian Constitution. What may aid such a challenge would be the positive content of a right to privacy envisaged under *Puttaswamy*,[155] which creates an obligation on the State to not hinder the right to privacy. Of course, any constitutional challenge to the

153 *See* Drugs and Cosmetics Act 1940, ss18B and 28A.
154 *Puttaswamy* (n 7) [81-83].
155 *Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors.,* (2019) 1 SCC 1 [83]; *Puttaswamy* (n 7) [180].

Amendment on the ground of violation of the right to privacy would have to satisfy the tests envisaged under *Puttaswamy*.

5. Conclusion

Legal protection to women's private decisions, in addition to empowerment by the State through affirmative policies, is an ideal scenario for women's reproductive rights to be exercised freely. Before *Puttaswamy*, a doctrinal articulation to a right to privacy as a constitutional and fundamental right was required in the context of abortion law in India. Privacy is reaffirmed to be no longer just an aspect of other rights under the Constitution, but a fundamental right in itself; further, within its wide ambit, it contains reproductive rights. *Puttaswamy* has therefore done much to shed the 'vagueness' around privacy, by explicitly recognising and defining autonomy, dignity, and bodily integrity, as core facets of privacy. Compared to the U.S.A, the Indian privacy jurisprudence is newer, and it remains to be seen how this jurisprudence is utilised in other decisions and by lower courts, especially in cases under the MTP Act.

The answer to some critiques of privacy, to an extent, can be partially found in *Puttaswamy* itself. J. Chandrachud in *Puttaswamy* addressing the critiques to a privacy regime has said that the balance to be struck is to address the violation of the dignity of women, while at the same time protecting women's privacy interests that are grounded in liberty *vis-a-vis* gender.[156] Additionally, with its emphasis on individualistic forms of privacy, rather than the kind that can be protected within institutions such as families, *Puttaswamy* has avoided the pitfall of privacy catering to hetero-patriarchal institutions. Further, as Aparna Chandra argues,[157] in recognising individual privacy also extending to public spaces, *Puttaswamy* empowers women to question structures that limit their abilities of autonomous decision making in public. This has important implications for abortion rights since it recognises women's right to exercise decisional and informational

156 *Puttaswamy* (n 7) [81-83].
157 Aparna Chandra, 'Privacy and Women's rights' (2017) Economic and Political Weekly Volume III No. 51 p 47.

privacy in accessing abortion and related care. Further, this has the potential to address issues of insisting on consent from a woman's partner/family and the stigma, anxiety, and guilt that women face when making decisions about their own bodies. As discussed in the section above, a potential constitutional challenge to some provisions of the Amendment and the unaddressed policy issues is possible as per Puttaswamy.

The critique of privacy, that it does little to create '*meaningful choices*' for most women, however, remains to be addressed. *Puttaswamy* addresses this partially by stating that it is incumbent upon the Indian State as a part of a right to privacy to create conditions that enable individuals to enjoy such rights.[158] Also, a glimpse of the use of *Puttaswamy* to address social, economic, and political inequalities is seen in the case of *Navtej Singh Johar* where J. Chandrachud discussed the relevance of an intersectional analysis under Article 15 of the Indian Constitution.[159] Similarly in *Joseph Shine*, the SC has at length discussed how the erstwhile criminal offence of adultery violates the dignity of women, which is an aspect of privacy and how the latter cannot be used to shelter patriarchal practices.[160]

Despite *Puttaswamy* and a host of important decisions on gender equality that followed, such as those on adultery[161] or de-criminalisation of homosexuality,[162] abortion — via criminalisation under the IPC and restrictions under the MTP Act — remains a conditional right. There is *per se* no concept of an '*abortion on request*' in India, even though medical consensus suggests that extending the upper limit of abortion up to 24 weeks can cause no threat to the pregnant woman.[163] Jain and Shah[164] relying on *Joseph Shine* and *Navtej Johar*, argue this to be problematic for two reasons: i) That

158 *Puttaswamy* (n 7) [232].
159 *Navtej Singh Johar vs. Union of India* (2018) 10 SCC 1 p 36 [Navtej].
160 *Joseph Shine vs. Union of India*, Supreme Court Writ Petition (Criminal) No. 194 of 2017, para 26 of J. Nariman's opinion, paras 50, 54 of J. Chandrachud's opinion.
161 ibid.
162 *Navtej* (n 159).
163 Neha Madhiwalla, 'The Niketa Mehta case: Does the right to abortion threaten disability rights' (2008) Indian Journal of Medical Ethics 5(4), 152–153. < https://ijme.in/articles/the-niketa-mehta-case-does-the-right-to-abortion-threaten-disability-rights/?galley=html> accessed 19 June 2021.
164 Jain and Shah (n 96) p 4-5.

criminalisation makes reproductive care such as abortion inaccessible and ii) that it renders inappropriate any sexual contact that is done for non-procreative purpose or purely only for sexual desire.

Post the Amendment, it remains to be seen how issues pertaining to access to abortion, as discussed above, are addressed. *Puttaswamy* has guaranteed within privacy — dignity, autonomy, and liberty to women. The issues with accessing abortion all directly affect these guarantees, as they hinder abortion and therefore the exercise of reproductive autonomy which in turn affects dignity. Therefore, looking at the ambit of privacy offered in *Puttaswamy* versus what is offered to women via the Amendment, the latter may be vulnerable to a constitutional challenge as violative of the mandate of *Puttaswamy*.

Reproductive autonomy being central to a fundamental right to privacy, the following issues, that have been discussed in detail earlier, are now pertinent to be addressed at both legislative and policy levels: i) access to abortion on request, especially for early-stage pregnancies; ii) availability of adequate abortion facilities and trained health care service providers to women, especially those with socio-economic vulnerabilities; iii) evolving a standard of care to avoid practices such as insisting on consent from parties other than the woman, making her medical records available without her consent, and influencing a woman's decision on abortion with non-medical advice; and iv) maintaining the confidentiality of abortion decisions by prompt enforcement of the Amendment. It remains to be seen how these issues are addressed in the future, which may bring the law on abortion in harmony with the *Puttaswamy* judgement.

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The Centre for Communication Governance at National Law University Delhi (CCG) is a research centre within NLU Delhi and is meant to ensure that the Indian legal education establishment engages more meaningfully with communication law and policy, and offers academic contribution to communication policy making. We believe that there is a dearth of material and ability required to help law and policy stay abreast of technological advancement, which enhances citizens' rights and diverse public discourse. Our work aims to fill these gaps.

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