Intersectional Inequalities and Reproductive Rights: An India-Nepal Comparison

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Severyna Magill's insightful piece on the right to privacy and access to abortion offers a powerful critique of the current state of reproductive rights in India following the 2017 landmark Supreme Court decision in *Puttaswamy*.[1] This article provides a brief response to Magill's analysis by comparing the Indian developments in this area of law with neighbouring Nepal, another South Asian country that has recently made major strides in matters of reproductive rights. Three main observations emerge from this comparison. First, both South Asian apex courts have become incredibly sensitive to the highly diverse and profoundly unequal socio-economic context in which reproductive rights operate within their jurisdictions. While grounding their reasoning in comparative jurisprudence, the Supreme Courts of India and Nepal have emphasised the crucial importance of focusing on domestic intersectional inequalities in terms of class, caste, ethnicity, religion, and, of course, gender. More specifically, recent judgments from India and Nepal have moved beyond the *Roe v Wade* approach that privileges autonomy over equality; instead, both South Asian courts have adopted the notion of dignity combined with freedom and autonomy—and steeped in an intersectional understanding of inequality—as a necessary approach to realise substantive equality for women.

Second, both India and Nepal have undertaken extensive statutory reforms in the area of reproductive rights, but both countries' legislative frameworks remain incomplete and most importantly, they also retain an array of problematic features (especially in criminal matters) that will require further revisions if true gender equality is to be achieved. In this respect, the politicised and contested nature of reproductive rights is particularly visible in debates over statutory reforms where questions of public morality, social hierarchy, and even national identity are played out over women's bodies in a dehumanising manner. The net effect of these

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[1] *KS Puttaswamy v Union of India* (2017) 10 SCC 1.

measures is to deprive women of their personhood, reduce their agency, and discipline their conduct in more or less draconian ways.

Finally, this South Asian comparison brings into sharper focus the newly acquired role of the state vis-à-vis the realisation of reproductive rights. In the *Lakshmi* decision, the Supreme Court of Nepal has clearly emphasised the crucial importance of placing positive obligations on the state in order to implement reproductive rights and remove the barriers that women face in seeking and obtaining such services, especially for women from marginalised backgrounds.[2] This ideological shift means that the state is no longer conceptualised as a neutral actor that has to step aside to respect women's autonomy, but it must now fulfil an active role in the actualisation of women's rights. In constitutional terms, this shift translates into a greater role for the courts in overseeing executive actions to fulfil women's reproductive rights. Thus, the distinction between supervisory jurisdiction and policy intervention becomes ever more contested. It remains to be seen how courts will now conceptualise and interpret the meaning and extent of reproductive rights, especially in the Nepali context where they are constitutionally entrenched cases concerning the criminalisation of abortion. It seems likely that renewed tensions between the judiciary and the legislature will emerge in this area of law.

1. The Importance of a Contextual Approach

Both the *Puttaswamy* and *Lakshmi* judgments emphasise the importance of acknowledging the economic, socio-cultural, political, and geographic barriers that women face in accessing their reproductive rights in both India and Nepal. In the *Lakshmi* case, a poor rural woman from Far Western Nepal became pregnant for the sixth time. In agreement with her husband, she decided to terminate the pregnancy due to her ill health and the financial burden that another child would place on her family. She then approached a government hospital to obtain an abortion but could not afford the fee of NPR 1130 (roughly USD 14.50) for the procedure. As a result, Lakshmi was forced to continue with her unwanted pregnancy. In 2007, a coalition of Nepali and international non-governmental organisations joined hands with human rights lawyers and filed a public interest litigation petition on behalf of Lakshmi in the Supreme Court of Nepal. In 2009, the Court rendered one of the world's most comprehensive, thoughtful, and ground-breaking judgments on reproductive rights to date.

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[2] *Lakshmi v Office of the Prime Minister* 2067, 52(9) NKP 1551 (2010).

Building on the explicit recognition of reproductive rights in the text of the 2007 Interim Constitution, the Supreme Court interpreted these constitutional provisions broadly and found for the petitioners. The Court placed a clear obligation on the government to provide access to safe and affordable abortion services. Upreti has convincingly argued that the *Lakshmi* decision represents a powerful instance of transformative equality

> *It recognizes women as moral agents with full decision-making authority, rejects traditional patriarchal norms based on women's inferiority to men, and holds the government responsible for ensuring the practical realization of women's right to abortion by recognizing and addressing the unequal power dynamics and inequalities that prevent women from enjoying this right.*[3]

More specifically, the Supreme Court held that a constitutional right or a benefit provided by law must not be limited to a certain group of people or a particular class. In fact, gender interlocks not only with class, but also with other identity-based forms of social differentiation. In Nepal, these are caste, ethnicity, language, religion, region, sexuality, age, and disability. The combination of these forms of "ranking systems" has created in Nepal over the centuries a dominant social order, historically entrenched hierarchies, and path-dependent patterns of social exclusion and disempowerment,[4] that are steeped in a nationalist view of a Hindu polity.[5] These forms of marginalisation have also come to the fore in constitutional adjudication, giving the courts a unique opportunity to either unhinge or reinforce such hierarchies and construe an intersectional meaning of constitutional equality. In *Lakshmi,* the Supreme Court moved towards an inclusive, intersectional and substantive notion of gender equality.

By way of background, the decision of the Supreme Court of Nepal in the *Lakshmi* case was not arrived at in a vacuum but was built on dozens of previous decisions on gender equality since the early 1990s. In this respect, the Supreme Court has played a pivotal role in advancing the rights of Nepali women by crafting—in an incremental way—a nuanced, contextually sensitive, constitutional meaning of gender equality. As a result, the Court became a catalyst for debates on the meaning and remit

[3] Melissa Upreti, 'Towards Transformative Equality in Nepal: The *Lakshmi Dhikta* Decision' in Rebecca Cook, Joanna Erdman and Bernard Dickens (eds), *Abortion Law in Transnational Perspective* (Penn 2014), 287.

[4] UK Department for International Development and World Bank, Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal (2006).

[5] Mara Malagodi, *Constitutional Nationalism and Legal Exclusion in Nepal* (OUP 2013).

of gender equality in the country.[6] Historically, the multidimensional nature of gender as a form social classification has led to limited successes in advancing women's rights at Supreme Court level. However, over the last decade, cases like the *Lakshmi* decision started to emerge and the Court began to challenge the traditional construction of women's identities as dependent on their familial relationships and to recognise the intersectional nature of gender-based inequalities, centring their decisions around the concept of dignity. As highlighted by Magill, it remains to be seen whether the increasing sensitisation of Indian and Nepali courts to intersectional considerations in matters of gender equality will contribute to increasing access for marginalised women to reproductive health services, which remains abysmal.

2. Scope for Further Statutory Reforms

Incredible legislative progress has been made in Nepal with respect to reproductive rights, but just like in India, there remains great scope for improvement. Until 2002, Nepal featured as one of the world's most repressive legal regimes surrounding abortion. Abortion was entirely banned and criminalised without virtually any exceptions. Significantly, the criminalisation of abortion featured in the Chapter on Crimes against Human Life (Chapter 10, Section 28).[7] It has been estimated that by 2000, twenty percent of women inmates in Nepal had been incarcerated due to abortion and infanticide offences, while these offences attracted a seventy percent conviction rate.[8] The 11th Amendment of the *Muluki Ain* was of paramount importance as it created Section 28(b), which provided for a number of statutory exceptions to the criminalisation of abortion, such as abortions within twelve weeks of gestation with the consent of the pregnant woman, and where the life or the physical and mental health of the pregnant woman is at risk.[9] In 2006, the Gender Equality Act further amended the section to include the exception to the criminalisation for abortion up to eighteen weeks of gestation in cases of rape and incest.[10]

Most importantly, since 2007 the text of Nepal's new constitution started to recognise and protect reproductive rights explicitly—in stark difference from the Indian position in which the Supreme Court had to

[6] Mara Malagodi, 'Challenges and Opportunities of Gender Equality Litigation' (2018) 16(2) International Journal of Constitutional Law 527.
[7] *Muluki Ain* (General Code) (1963) Chapter 28.
[8] Upreti (n 3) 284.
[9] *Muluki Ain* (11th Amendment) Act 2002.
[10] Gender Equality Act 2006.

render an expansive interpretation of the right to life to encompass the right to privacy. In Nepal, for the first time in 2007 the Interim Constitution explicitly recognised every woman's right to reproductive health and rights relating to reproduction under Article 20(2). Similarly, Nepal's current constitution promulgated in 2015 enshrines the right to safe motherhood and reproductive health under Article 38(2). The entrenchment of women's reproductive rights is a significant development that gives Nepali courts an explicit mandate to enforce such rights and protects them, to a certain extent, from executive and legislative interference.

In 2018, in line with the Supreme Court's recommendation in *Lakshmi*, Nepal's Parliament enacted the Safe Motherhood and Reproductive Health Rights Act to implement the constitutionally protected rights surrounding reproduction.[11] The statute is an important piece of legislation that places extensive obligations on the State to provide education, information, counselling, and services relating to sexual and reproductive health under Section 3(1), obstetric service and care under Sections 5 and 6, new-born care under Sections 7 and 8, family planning and contraception under Sections 11 and 12, safe abortion under Sections 15 and 16, and morbidity care under Section 20.

Regrettably, however, Nepal's Parliament did not follow the recommendations of the Supreme Court in the case of *Lakshmi* to decriminalise abortion entirely, just like in India. Abortion outside the scope of Section 15 of the Safe Motherhood and Reproductive Health Rights Act 2018 remains a criminal offence under Section 188 of Nepal's new Penal Code in Chapter 13, Offences against the Protection of Pregnancy.[12] Moreover, Nepal criminalises sex selective abortion under Section 17 of the Safe Motherhood and Reproductive Health Rights Act 2018. Significantly, this new piece of legislation goes against the Supreme Court's decision in *Lakshmi*, in which the Court clearly stated that the criminalisation of abortion disproportionally impacts women and should be entirely decriminalised. More specifically, the Court held that it was entirely inappropriate to criminalise abortion, and especially to do so under the *Muluki Ain*'s Chapter on Crimes against Human Life since under Nepali law the foetus is not classified as human life. Unlike the judiciary in India, Nepal's Supreme Court clearly stated that a foetus does not constitute human life. As such, it cannot be granted more importance than the protection of the physical and mental health of the mother, such

[11] Safe Motherhood and Reproductive Health Rights Act 2018.
[12] Country Penal (Code) Act 2017.

that a forced pregnancy and a forced continuation of pregnancy constitute violence against women.[13]

These arguments fit squarely within Magill's critique of sex-selective abortion in India, which problematises the notion of women's autonomy in matters of reproductive rights. By understanding women's agency within the context of patriarchal societal values and structures, what emerges is a much more complex picture in which women are devalued and subordinated to men. Therefore, it is clear that while courts in pro-women decisions like *Lakshmi* emphasise the importance of protecting and fostering women's autonomy in matters of reproductive choices, in reality women may not be the primary decision-makers. In this respect, the ongoing criminalisation of abortion continues to offset the scales of justice against women, placing a further legal obstacle to realising gender equality and empowering women to have full control over their bodies.

3. The Case for Substantive Equality

Both Indian and Nepali courts have veered towards a much more substantive conceptualisation of gender equality over the past few years. Cognisant of the structural inequalities and intersectional barriers that women face in India and Nepal, the courts have started to place more stringent and positive obligations on the state to remove barriers for women to enjoy their reproductive rights fully. This is a marked shift in attitude and approach to justice by the top courts of India and Nepal. As inequalities deepen, the praxis of constitutional adjudication has sought to respond to this widening gap by emphasising the importance of fulfilling constitutional rights and making them accessible across different strata of society, especially in societies as diverse and unequal as in India and Nepal. While of course this opens the courts to the charge of judicial overreach and a violation of the doctrine of the separation of powers, this novel approach by the courts allows for ideas of redistributive justice and redress to anti-democratic injury to enter the constitutional domain. In this respect, Magill's proposal to adopt Martha Nussbaum's capability approach and Sandra Fredman's transformative framework to break the cycle of disadvantage is to be welcomed. This is perhaps one of the greatest contribution that law can make in advancing the cause of gender equality: changing the parameters of the discourse about women's rights while continuing to incrementally remove the barriers to their fulfilment, one

[13] *Lakshmi* (n 2).

step at the time. It is slow painstaking labour, but recent successes, with all the necessary caveats, chart the route for future action and efforts.