New Beginnings: Indian Rights Jurisprudence After *Puttaswamy*

Shreya Atrey and Gautam Bhatia*

1. Puttaswamy: *Constitutionalism 3.0?* *Editors Note*

In August 2015, during a hearing on the constitutional validity of India's national biometric identification programme (Aadhaar), the Attorney-General of India made an astonishing statement. Responding to the Petitioners' arguments that Aadhaar was an unconstitutional breach of the fundamental right to privacy, the Attorney-General argued that there *was* no fundamental right to privacy under the Indian Constitution, that the Constitution is silent as to privacy. He went on to argue that Supreme Court benches of eight[1] and six[2] judges had, in the past, held that the Constitution did not guarantee it as a right. And even though, for the last forty years, there had been consistent jurisprudence identifying—and applying—a fundamental right to privacy, all those judgments had been passed by smaller benches, and were *per incurium*. Two years later, the Supreme Court established a nine-judge bench to settle the question once and for all. Nine-judge benches do not assemble often at the Indian Supreme Court, and when they do, it is frequently to resolve generational questions: this was only the fifteenth time in the sixty-seven years of the Supreme Court's existence that it was sitting in a bench of nine.

In *Justice KS Puttaswamy v Union of India*[3], the nine-judge bench unanimously decided that the Indian Constitution did, indeed, guarantee a fundamental right to privacy. Six judges wrote separate and concurring opinions in a judgment that spanned more than five hundred pages. A case that had arisen out of the Attorney-General's questioning of the very

* Shreya Atrey is Associate Professor in International Human Rights Law, University of Oxford and Gautam Bhatia is DPhil (Candidate), University of Oxford; Advocate, New Delhi.

[1] *MP Sharma v Satish Chandra,* AIR 1954 SC 300.

[2] *Kharak Singh v State of UP*, AIR 1963 SC 1295.

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

existence of privacy as a right, ended with its emphatic affirmation by the Supreme Court.

The significance of *Puttaswamy*, however, is not limited to its holding. The history of the Supreme Court is often divided into distinct epochs, or periods. In its first thirty years or so the story goes that the Court was characterised by formalistic constitutional analysis, an aggressive conflict with the government on issues of property rights and land reform, and deferential jurisprudence in respect of other civil rights. This first era reached its high-water mark, or *nadir*, with the notorious 1976 judgment in *ADM Jabalpur v Shivakant Shukla*[4] , which essentially affirmed a regime of State impunity during the proclamation of an Emergency. However, the political defeat of the Emergency and the excoriation of the Court for its capitulation ushered in its second era. From 1980s onwards, the Court used the mechanism of Public Interest Litigation to expand the constitutional panoply of rights, introduce socio-economic guarantees into the Constitution, and take an active interest in maladministration and misgovernance. Yet paradoxically, this period was marked by continuing deference on civil rights issues. Dubious "anti-terror" laws were upheld, and some astonishing judgments, such as one that referred to migration as an "external aggression"[5] upon the country, and another that upheld the criminalisation of same-sex relations on the basis that it affected only a "minuscule minority"[6], stained the Court's record with embarrassing frequency.

In the context of this checkered—and often disappointing—history, *Puttaswamy* opens up the possibility of a new era in constitutional jurisprudence: a Constitution 3.0 that places the individual at the centre of the constitutional scheme, and through a rigorously applied "culture of justification", prevents the State *or* social power from overwhelming the individual. The possibility of a Constitution 3.0 is gestured at by the *Puttaswamy* bench in a number of ways. First, in expressly indicating a break with the past. A majority of the Court affirms that two of the most ignominious judgments of Constitution 1.0 (*ADM Jabalpur*, which upheld the State's erasure of the right to life during the period of constitutional emergency) and 2.0 (*Koushal*, which upheld the criminalisation of same-sex relations) were wrongly decided. Second, the Court fleshes out a detailed normative account of the right to privacy that covers a range of issues: freedom from surveillance, informational self-determination, decisional autonomy, and so on. And third, a majority of the Court adopts the four-step proportionality standard to adjudicate violations of privacy

[4] *ADM Jabalpur v Shivkant Shukla*, AIR 1976 SC 1207.
[5] *Sarbananda Sonowal v Union of India*, AIR 2005 SC 2920.
[6] *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.

(and, by extension, violations of other rights located in Articles 19 and 21 of the Constitution). This test, which requires, among other things, the State to demonstrate that it has selected the "least restrictive alternative" in advancing its policy goals, provides a potentially strong constitutional standard for holding the State to account in the judicial forum, in a manner that the previous tests of "rationality" or "reasonableness" have so far been unable to do.

Puttaswamy, then, creates a range of possibilities for Indian constitutional law, as it moves towards the eighth decade of existence. Of course, the case itself was about an abstract constitutional question, and the six separate opinions are (unavoidably) framed in abstract terms. The task of making *Puttaswamy's* vision a reality would depend upon future citizen-litigants, lawyers, judges, and legal scholars. And, almost three years after *Puttaswamy*, we believe the time is right to look back on what has been done—or not done—and also, to look forward. That is the task of this Special Issue of the University of Oxford Human Rights Hub Journal.

From the vantage point of May 2020, an observer of the Supreme Court probably cannot help feeling despondent. An honest appraisal of the Supreme Court's record over the last two years reveals a litany of defeats in civil rights cases, and serious doubts about the relationship between the executive and the judiciary. The most glaring example of this dates back to September 2019, when—after altering the constitutional status of the state of Jammu & Kashmir—the central government simultaneously shut down the internet across the State, and placed a large number of people under executive detention. *Habeas corpus* petitions filed before the Supreme Court were dealt with in a bizarre manner, with the Court refusing to rule on the petitions themselves, but granting the petitioners "permission" to "visit" the detainees, as long as they did not engage in "political activities."[7] Not only was this an unconscionable perversion of the writ of *habeas corpus*, and not only was the Supreme Court acting beyond the constitution by placing "conditions" upon the free movement of Indian citizens within the territory of India, but the Court also demonstrated that at least some of its judges held these rights in contempt: the-then Chief Justice of India notoriously asked a *habeas corpus* petitioner why anyone wanted to "move around" in Kashmir because of how cold it was.[8] Meanwhile, petitions for restoration of the internet were kept pending for months, with a hearing and a judgment

[7] See AG Noorani, 'Habeas Corpus Law: A Sorry Decline' (Frontline Magazine, 25 October 2019) <https://frontline.thehindu.com/cover-story/article29604480.ece> accessed 30 April 2020.

[8] Legal Correspondent, 'Supreme Court Asks: Srinagar is Cold, Why Move Around?' (The Telegraph, 6 September 2019) <https://www.telegraphindia.com/india/supreme-court-asks-srinagar-is-cold-why-move-around/cid/1702937> accessed 24 April 2020.

finally delivered after the turn of the year.[9] The judgment, while reiterating the proportionality standard, did not grant the petitioners any relief. Subsequently, 2G internet was provided to Kashmir, and a petition for 4G internet access because of the ongoing Covid-19 pandemic remains pending.

The Supreme Court's handling of the Kashmir cases is only the most glaring example of a more general malaise. After prevaricating for six years, the Court finally delivered its judgment on the constitutionality of the new nationwide biometric identification scheme—Aadhaar, upholding it in part and striking it down in part.[10] A significant portion of its reasoning was based on a power-point presentation by a government official, that had not been subjected to cross-examination, and whose evidentiary value was suspect at best. In those areas where the Court did limit Aadhaar, its reasoning was so vague that much of it was undone soon after by the government through a fresh legislation, while other directions remain unimplemented.[11]

The Court's reception of other sensitive cases has been marked by, for example, repeated reliance on "sealed cover" evidence, a rather dubious departure from evidentiary standards; gross mishandling of an allegation of sexual harassment against the-then Chief Justice; and repeated deferral of crucial cases involving, for example, secret unaccountable electoral funding.[12]

However, this is not the only story. At the same time, five-judge benches of the Court also decriminalised same-sex relations, atoning for the Court's earlier mistake in *Koushal*.[13] The regressive criminalisation of adultery was struck down, with the Court making specific reference to its gendered nature.[14] The Court also invalidated the practice prohibiting women between the ages of 10 to 50 years from accessing the famed *Sabrimala* temple, although that judgment is not being reconsidered, in procedurally dubious circumstances.[15] Each of these Supreme Court judgments have relied extensively upon the verdict and reasoning in

[9] *Anuradha Bhasin v Union of India*, WP (Civ) No 1031 of 2019, 10 January 2020.

[10] *Justice (Retd) KS Puttaswamy v Union of India (II)*, (2019) 1 SCC 1.

[11] See The Aadhaar and other Laws (Amendment) Ordinance of 2019, that undid the Supreme Court's direction prohibiting private parties from utilising the Aadhaar database.

[12] For a summary see Gautam Bhatia, 'A Little Brief Authority: Chief Justice Ranjan Gogoi and the Rise of the Executive Court' (*Indian Constitutional Law and Philosophy*, 17 November 2019) <https://indconlawphil.wordpress.com/2019/11/17/a-little-brief-authority-chief-justice-ranjan-gogoi-and-the-rise-of-the-executive-court/> accessed 24 April 2020.

[13] *Navtej Johar v Union of India*, (2018) 7 SCC 192.

[14] *Joseph Shine v Union of India*, AIR 2018 SC 1676.

[15] *Indian Young Lawyers' Association v Union of India*, WP (Civ) 373/2006, 28 September 2018.

Puttaswamy; and the Indian High Courts have done the same, through a series of progressive judgments on surveillance[16] and privacy.[17]

Thus, the polyvocal character of the Indian judiciary, with its multiple High Courts and a Supreme Court that consists of thirty-four judges, resists the imposition of a single, dominant narrative. The judgments of the Supreme Court on same-sex relations, adultery, and temple entry, continue to serve as reminders of the potential of *Puttaswamy* and of Constitutionalism 3.0. But it is equally evident that this vision of the Constitution cannot survive without careful tending by the legal community of scholars, lawyers, and judges. Because constitutional jurisprudence in India, across its three iterations, including its 3.0 version, remains fickle and far from consistent. Exceptional vigilance is required in truly making something of the *Puttaswamy* legacy. This Special Issue of the University of Oxford Human Rights Hub Journal is an attempt to do just that.

2. The Special Issue

It has now been almost three years since *Puttaswamy* and of this 3.0 version of constitutionalism. We are past the early days of fervid anticipation and have had some time and space to gather a sense of what the developments in *Puttaswamy* and its progeny really mean. We think that *Puttaswamy* means an emblem of resistance. But it is a particularly opportune time to reflect on what this will come to mean in, dare we say, deteriorating political landscape in India. We hope that it continues to be seen in this light: as an emblem of resistance, in all constitutional struggles but especially those that impinge on fundamental rights. This Special Issue is conceived as a space both for reflecting on this meaning of *Puttaswamy* and the possibilities it presents for the future.

The first thing the special issue then does is to bring out some of the key substantive aspects of *Puttaswamy*. Picking through these aspects helps appreciate what is jurisprudentially salient about the case. Because there was so much in the case besides simply the eventual order the Supreme Court ended up making—recognising the constitutional right to privacy—that it requires some systematisation to understand how we got there. Three things are particularly significant here when it comes to the scheme

[16] *Vinit Kumar v Central Bureau of Investigation*, WP 2367 of 2019, 22 October 2019 (High Court of Bombay).

[17] *In Re: Banners Placed on the Road Side in the City of Lucknow*, PIL No. 532 of 2020, 9 March 2020 (High Court of Allahabad).

of rights adjudication: first, the basis of and content of the right itself; second, the test for the violation of the right; and third, possible defences for the violation of the right. As the discussion in the Special Issue shows, the bulk of the work in *Puttaswamy* seems to be concentrated at the level of the first, and to an extent, the second of these inquires. The justices spent extraordinary amount of ink exploring privacy *tout court*. Every single one of the six judgments explores, in the broadest terms possible, the basis or the justification of the right, and its content in relation to the interests it protects. They enlist a whole gamut of concepts from autonomy and freedom to dignity and equality as the normative bases of privacy. Then they place privacy within the constitutional scheme of the specific rights guaranteed under the constitution and examine the interests it protects under each: personal information, home, communication, decisions, reproductive rights etc. The justices also spend some time thinking through matters such as negative versus positive and horizontal versus vertical obligations. All of these, at the first level of the inquiry, form the critical mass of discussion in *Puttaswamy* which comes to bear (fruit) in later jurisprudence from 2018. The second inquiry on the test for the violation of the right to privacy is also gleaned over, however, largely, as a matter of the standard of review to be applied: (i) the administrative standard of reasonableness, especially under Article 14 on the right to equality within which the standard translates to two different ones—the two part intelligible differentia and reasonable nexus test, and the test for arbitrariness; and (ii) the more rigorous test of proportionality especially for Articles 19 and 21. The discussion, including the ambiguities in the statement and application of these tests across the judgments seems to affect a coherent reading and application of *Puttaswamy* itself and has a significant impact on how rights violations will be adjudged—the standard to be applied to assess violations—in the future. Related issues such as the presumption of constitutionality or the deference to be accorded to the legislature or the Parliament and its statutory instruments, also matter to this level of the inquiry. They seem to have bled into the final inquiry on justification defences. While no discussion seems to be earmarked *as* justification defences, it becomes clear that considerations such as the way in which a bill is passed by the two houses of the Parliament, the impact of a possible order of unconstitutionality in terms of rolling back a large-scale programme, and the government assurances of remedying any possible breaches, all seem to play a rather fundamental role, albeit undefined, in justifying possible breaches of rights.

Elements of each of these inquires feed the six articles in this special issue. The discussion is discursive, in that each of these inquiries are used

as central pivots which then animate the particular themes under consideration. The articles explore six themes in particular: surveillance, proportionality, bicameralism, right to religion, reproductive rights, and marital rape exemption. The themes are given a comprehensive treatment in light of the post-*Puttaswamy* constitutional rights jurisprudence. The articles thus clarify both the meaning of *Puttaswamy* as well as its possibilities when applied to these other themes. Equally, each of the articles picks up on *Puttaswamy* as much as the developments in 2018 to trace the trajectory of development of jurisprudence in constitutionalism 3.0. These layers crisscross one another in every article and across articles in the Special Issue to inform the reader of the normative, conceptual and doctrinal foundations of the constitutional rights jurisprudence as well as the particular instantiations of the application of such jurisprudence across time.

This, however, is not a handbook or a companion reader to constitutional rights jurisprudence. The Special Issue does not purport to be comprehensive. It cannot, because we must stress, *Puttaswamy* is far from being capable of being condensed in such a way. But since we think that it is that vast, in terms of being a lengthy and a momentous judgment, we want to systematise ways of taking it up both specifically in terms of *its* merits, and in terms of its *applications*. We hope that the reader will appreciate both these elements come alive in each of the articles.

One peculiar way in which the Special Issue tries to systematise how *Puttaswamy* is taken up, is through the approach to comparative law. *Puttaswamy* invokes a wealth of comparative jurisprudence and to an extent, makes good use of it, in reaching a rights-affirming outcome. This is one way to gauge the use of comparative law: to assess the difference it makes to outcomes in cases. But engagement with comparative law often terminates here. Justices rarely if ever *reason with* comparative case law, revealing whether the reasoning from comparative references feeds into their own reasoning. While the Supreme Court of India is often all too open to comparative references (case law, legislation, and commentary) from around the world, this sense of abandon relates to abundant citation and some general discussion.[18] We are thus not sure of the substantive

[18] Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa Law Review 15, 21 ('Rather than a one-way transmission, the development of human rights jurisprudence, in particular, is increasingly becoming a dialogue. Judges look to a broad spectrum of sources in the law of human rights when deciding how to interpret their constitutions and deal with new problems. To a greater and greater extent, they are *mutually reading and discussing* each others' jurisprudence.') (emphasis supplied).

work comparative law does in *Puttaswamy*, or generally in the Indian Supreme Court's jurisprudence that preceded or succeeded it. This is not the same for the use of international law, which since the seminal decision in *Vishaka v State of Rajasthan*, [19] has been widely developed methodologically. *Vishaka* heralded the trend of making an international human rights treaty to which India signs up to, directly applicable in domestic law, *qua* Fundamental Rights in Part III of the Constitution, *if* India does not ratify the treaty via a domestic legislation implementing it, and if there is nothing in the domestic jurisprudence which contradicts the term of the treaty. A rights-affirming role has thus been carved out for international law where we know, with some clarity, as to when and for what purpose international law is invoked. The use of comparative law is, however, far from clear.

The Special Issue is interested in contributing to one strand of this rather big inquiry on the use of comparative law: on *reasoning with* comparative law. [20] We want to show how working with jurisdictional specificities on seemingly identical issues requires careful unravelling, which cannot, most of all, be simply dubbed as a matter of 'context' and ultimately made little of. The Supreme Court can be tedious in its citation of comparative law, including lengthy quotations, and then in a trice, state that it is all a contextual matter anyway.[21] We do not think that context can simply be alluded to and done nothing with. *Doing* comparative law must mean more than this! So, what the Special Issue does is it juxtaposes the relevant comparative context against the Indian jurisprudence. It does so via six short response pieces mirroring each of the lead articles. Each response piece reflects back on the Indian jurisprudence through comparative law and hence tries to reason with it. None of the pieces tries to show that comparative law is useful in affirming or rejecting certain outcomes. Instead they try to pick on the themes explored in the lead

[19] AIR 1997 SC 3011.

[20] Sandra Fredman, *Comparative Human Rights* (OUP 2018) 5 ('Judges making decisions on complex issues of human rights law need to adopt a reasoning process which is thorough and persuasive ... Comparative materials constitute an important contribution to the rigour of this process, particularly with respect to canvassing alternative solutions ... whether the outcomes converge or diverge, there need to be good reasons articulated in the decision explaining why the textual, institutional, legal, social, or cultural context demands convergence or divergence.').

[21] See for example, Chandrachud J in *Puttaswamy* (n 3) [134] ('Each country is governed by its own constitutional and legal structure. Constitutional structures have an abiding connection with the history, culture, political doctrine and values which a society considers as its founding principles. Foreign judgments must hence be read with circumspection ensuring that the text is not read isolated from its context.').

articles to reflect back the complexities of those themes as seen in light of comparative law from the jurisdictions chosen by the authors.

No particular methodology defines how the authors of the response pieces chose their particular jurisdictions. All too often the choice of jurisdictions occupies more space than the justification of the purpose for which those jurisdictions are being called in. But the choice is rarely ever explained beyond tired tropes like common language, shared basis in common law, and democratic or liberal constitutions. In contrast, proximity or regionality has had little to do comparativism, with comparisons between India and the US being rather familiar in comparison to those within South Asia or South East Asia.[22] In a break from this, the reader will find a rather eclectic mix of jurisdictions referred to, including countries like Nepal, Hong Kong and the Philippines. A perusal of the response pieces will show that the methodology of choosing appropriate comparators or the right interlocutors for comparative law ultimately needs to justify the purpose or point of the comparative exercise. We think that the purpose or point of using comparative law is to show what difference it makes to the reasoning in cases. This is not the only use of comparative law we envisage but we certainly wish to focus on this one here.[23] The use of a range of comparative references in the response pieces will thus hopefully be justified by the complexities of substantive arguments that bear out in them. In other words, we want to see how comparative law comes to matter substantively post-*Puttaswamy.* It is this that we are after, and not necessarily anything more ambitious like an overhaul in how we do comparative law per se.

The Special Issue is organised thus. The opening article by Vrinda Bhandari and Karan Lahiri, takes off from *Puttaswamy* and *Aadhar*'s immediate context of data privacy and examines the legality of surveillance measures in light of the two judgments. They are particularly concerned

[22] This is not a critique of the methodology of comparativism. It is just to say that this is the case in practice, often. A break from this may be useful, even more useful than the uses of comparative law made hitherto.

[23] On the uses of comparative law, see, for example, Anne-Marie Slaughter, 'The Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99; Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771; Chris McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499; Michael Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008) 9 Melbourne Journal of International Law 171; Navish Jheelan, 'Judicial Use of Foreign Law in Human Rights Cases: Illegitimate and Unacceptable Practice?' (2011) 12 Human Rights Review 15; Sandra Fredman, 'Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law' (2015) 61 International and Comparative Law Quarterly 631.

about surveillance in the criminal context, including that which leads to illegally obtained evidence in a criminal trial. They unravel the doctrinal implications in the judgments to assess if and when surveillance in this context can be legal. The bar, they conclude, is high. With *Puttaswamy*'s dual emphases on individual liberty as the main interest at stake and the proportionality test for violations of the right to privacy, they consider executive power in relation to surveillance to be rather limited and in any case, subject to judicial oversight. Because much of their analysis rests on the application of the proportionality test, in her response piece, Cora Chan cautions against a certain reading of the test adopted by the Supreme Court. In particular, Chan considers the adoption of David Bilchitz's version of the proportionality test, amongst other versions cited by the Court, to be both unnecessary and undesirable. Chan presents a considered account of the implications of adopting Bilchitz's version of the proportionality test in light of jurisprudence from Canada, Hong Kong and the UK, and ends up giving considerable normative guidance in what the test should really look like to do the work Bhandari and Lahiri hope that it does in rights adjudication.

Aparna Chandra's article continues the discussion on proportionality. Chandra presents an ambitious review of the development of the proportionality test by the Supreme Court. In contrast with Bhandari and Lahiri who find that the Court in *Puttaswamy* may have provided a coherent statement of the proportionality test, Chandra argues that this may not be the case. She reads *Puttaswamy* as a continuation of the preceding jurisprudence to show that neither the discussions in *Puttaswamy*'s several individual opinions, nor the preceding jurisprudence which *Puttaswamy* purported to adopt, were clear or cohesive in their treatment of proportionality review in India. The result, she argues, is that proportionality gets folded into what is a seemingly weak standard of rights review, thus bereft of its disruptive potential in reframing the relations between citizens and the State, and the different branches of the State. Paul Craig though shows that this conclusion is not inevitable. In that, even if previous versions of the proportionality test were called differently or beckoned different aspects of the proportionality analysis, proportionality review may still be considered to have existed. He shows why this may have been the case in the UK whose relationship with the proportionality test continues to be a point of contention despite its adoption of the test in cases of rights review under the Human Rights Act 1988. Thus, both unequivocal statements of adoption and rejection may deny neat conclusions about when proportionality can be said to be present and making a difference to rights adjudication.

Malavika Prasad and Gaurav Mukherjee's article examines another big-picture issue emanating from *Puttaswamy* and *Aadhar*: the future of bicameralism in India. They proceed from the controversial beginnings of the Aadhar legislation as a 'money bill' to show how the unquestioning stance of the Supreme Court towards this may have weakened the *demos*-enabling function of bicameralism. Their argument is not only that bicameralism matters in this particular way, but also that if *Puttaswamy*'s reliance on individual liberty as a constitutional value matters, then some balance of power between the two houses of the Parliament may be essential. Anthony Mughan juxtaposes this view against developments around the world. In a whirlwind survey of uni/bicameralism across jurisdictions such as the Australia, Belgium, Denmark, Estonia, France, Iceland, Italy, Mauritania, Morocco, New Zealand, Peru, Sweden, the UK and the US, Mughan shows how upper houses are 'essentially contested institutions' and over time weakened, even abolished in democratic States. This arc of bicameralism seems to show that the hope for reinvigorating the upper house or Rajya Sabha in India may be desirable and defensible, but an outlier still.

Suhrith Parthasarathy undertakes a more discrete inquiry about the *Puttaswamy* legacy. In his article, he explores the *Sabrimala* case that succeeded *Puttaswamy* in 2018 on its use of the essential practices test in deciding contests over the right to religion. He shows that despite the muddled treatment of the right to religion under Article 25 of the Constitution, there are signs that *Sabrimala*'s interpretation of the right to religion test, specifically, the interpretation rendered by Chandrachud J is autonomy affirming. The analysis is based on the emphasis placed on individuals and communities to self-define their relationship with religion, such that the limitations on religion apply only to the extent that an impugned religious practice violates the dignity and autonomy of individuals. While intensive fact-finding may be necessary in order for a court to arbitrate on this, Parthasarathy considers it both appropriate and possible for courts to do so. He argues that in fact the failure to examine religious practices closely for their impact on fundamental rights and liberal values like equality only gives a free pass to religion to violate the rights and values enshrined in the Constitution. In her response piece, Lucy Vickers resolves the conflict between freedom of religion and other fundamental rights a little differently. With examples from the European Courts (Court of Justice of the European Union and the European Court of Human Rights) and the US, she shows that these conflicts are normally resolved with far greater restraint than is exercised by the Indian courts in approaching questions over religion. This is obvious—for freedom of

religion to have any meaning, a good degree of autonomy must exist for religious groups. Thus, in Europe religious autonomy has often trumped other fundamental rights, including the right to equality. Grounds for intervention are narrow, often procedural, and oriented towards more 'public' facing religious matters, such as employment. A similar approach defines the reluctance to intervene in fact-finding exercises for fear of disadvantaging minorities, rather than privileging, majority religions. Vickers agrees that the Indian approach may be apposite keeping in view the social and culture role religion plays in India. Though her comparative analysis shows that a matured relationship between the State and religious groups, including individuals within them, looks increasingly to be of distance rather than association, leaving the reader to ponder if the course of development of the right to religion in India should, aspirationally, be similar, and ultimately in line with *Puttaswamy*'s liberal legacy.

Severyna Magill's article continues this line of inquiry in the context of reproductive rights. Magill's aim is to see what difference *Puttaswamy* has already made and can come to make in matters of reproductive justice. Magill considers this especially in light of the wealth of existing reproductive rights jurisprudence in India and asks whether it stands modified by the recognition of the right to privacy. She concludes that this may be inevitable; given not just the reliance on the right to privacy but also values of dignity, liberty and autonomy, each of which contributes to strengthening women's claims to greater access to, in particular, abortion, contraception, and pregnancy and maternal healthcare. She tackles some thorny issues relating to the rights of disabled persons in assessing how far the liberal paradigm carries the rights of women or parents to not carry foetuses to term. She concludes that there are limitations, such as in the case of rights of disabled persons, which may constructively apply within the *Puttaswamy* framework. Magill's piece thus maps the future of reproductive rights in India as against the existing jurisprudence on reproductive rights, developments in *Puttaswamy* and the reigning issues which continue to define the area. In her response piece, Mara Malagodi compares this projected trajectory with that of Nepal. Malagodi shows that the similarities in approach here are revealing, especially in contrast with 'Western' approaches to reproductive rights, especially the US. She shows that both countries seem to have developed a substantively richer foundation for reproductive rights based on autonomy, liberty, dignity and equality, rather than being simply limited by the right to privacy as in the US. Even *Puttaswamy*'s self-standing right to privacy may do more work than the slimmed down notions of privacy as leaving the State out of personal or private decisions. This, Malagodi argues (in agreement with

Magill), befits the vast socio-economic differences in India and Nepal in women's access reproductive rights. This turn allows reproductive rights to be interpreted as having a greater positive content to achieve substantive equality for women. Malagodi counsels that while desirable, this may throw the relationship between judges and legislators into conflict, especially when the latter have been slow in expanding reproductive rights statutorily in both the countries.

The final article by Agnidipto Tarafder and Adrija Ghosh is a comprehensive case against the constitutionality of the marital rape exemption (MRE) in light of the *Puttaswamy* developments. Tarafder and Ghosh argue that the judicial and legislative unwillingness to do away with the MRE no longer withstands constitutional scrutiny after *Puttaswamy*. They consider the privacy route to a constitutional challenge conclusive and peel through the many layers of arguments to do with history, context and contemporary society in framing essentially private, familial and religious matters, while urging restraint in seeing privacy as driving a wedge between public and private matters, a divide which continues to besiege women's rights. They take us through the interpretations of Articles 14, 15, 19, 21 and 23 as rendered by the *Puttaswamy* Court, to bolster their multi-pronged case against the continued validity of the MRE. In his response piece, Bryan Dennis Gabito Tiojanco agrees that their case is too strong to fail on any considered legal basis. The problem he explains lies not in accepting this conclusion but it asking *who* may actually bring this change about? Tarafder and Ghosh's case is made before the courts, especially the Supreme Court of India. Tiojanco, comparing the history of the MRE in Philippines (which has been outlawed) and the history of the honour killing exemption (which still exists), shows that the professional role of judges may not come to yield in this context. In particular, he shows that unless one can show that the legislatures will *not* do their part, it may be difficult to justify courts' intervention. In such a case, Tiojanco argues that there may be merit in making a moral case to invite the courts to intervene, based on a conclusive finding of legislative dysfunction in the area. He invites the readers to consider what that may take in resolving particularly knotty issues like this one.

That then is a brief summary of the articles and the comparative responses that make up the Special Issue. We invite the readers to peruse the Special Issue based on the discrete themes and maneuvers we highlight here, or read it as a whole to appreciate the uptake of *Puttaswamy* jurisprudence. Whichever route readers takes, they will be able to appreciate the immense potential in *Puttaswamy* for serving as an emblem of resistance for struggles of individual freedom and social justice. But with

a measured view of the possible pitfalls, they will also be able to appreciate the sheer interpretive will required to be able to genuinely activate, but more importantly, sustain constitutionalism 3.0.