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Imagine to Re-Imagine

Bringing Inter-Asian Law to Abortion

Gauri Pillai

I INTRODUCTION

In this chapter, I make a compelling, yet unique, case for Inter-Asian Law (IAL). I do so not by looking at successful instances of citation of Asian law among Asian jurisdictions. Instead, I take a field from which IAL has been starkly absent – a field dominated by the Global North, in which the Global South, especially South Asia, is a rare participant: reproductive rights, specifically abortion. I illustrate the architecture of the field by surveying India's citation pattern, noting its excessive reliance on the Global North, especially the United States (US) Supreme Court decision in *Roe v Wade*.[1] I understand this pattern as an instantiation of a broader bias within comparative constitutional law.

I then imagine a break from this pattern. The break is necessitated by where the citation of *Roe* has taken, or would take, South Asian abortion jurisprudence. The break is provided by introducing Nepal and India as hypothetical, alternate referents for India and Bangladesh. And the break is justified by the resulting re-imagined legal mandate on abortion. The break, and its implications, thus make my case for Inter-Asian learning and borrowing.

II THE PATTERN: MAPPING AND UNDERSTANDING

Comparative law citation within Indian cases on abortion tracks a clear pattern. Exemplifying *Roe's* "sweeping, global influence,"[2] courts attribute a prominent

[1] *Roe v Wade* 410 U.S. 113 (1973) (*Roe*). Most cases cited in this chapter were decided before *Roe* was overruled by *Thomas Dobbs v Jackson Women's Health Organisation* 142 S. Ct. 2228 (2022) (*Dobbs*). However, in engaging with *Roe* and its critiques, the chapter uses *Roe* as a symbol of the hallowed place consistently offered to US jurisprudence on abortion. That *Roe* has been overruled only makes the argument in this chapter stronger: that Inter-Asian comparisons are likely more generative and ought to be encouraged. The chapter, however, shows that this argument stands not only in a post-*Roe* world but even during *Roe's* heyday.

[2] Rachel Rebouché, "Comparative Pragmatism" (2012) 72 Md L Rev 86.

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place to it. Consider *Suchitra Srivastava*, a path-defining Indian Supreme Court decision from 2009, distinctive for its recognition that a "woman's right to make reproductive choices," including the decision to undergo an abortion or give birth to a child, is a "dimension" of her personal liberty under Article 21 of the Indian Constitution.[3] In *Suchitra*, the Court drew on *Roe* to construct limitations to the abortion right on the grounds of women's health and the State's "compelling interest" in preserving the potential life of the fetus.[4] Several High Courts have since endorsed *Suchitra's* reliance on *Roe*.[5] Some go beyond *Roe*, grounding the right to make reproductive decisions within a panoply of US Supreme Court decisions.[6] Others look outside the US to the German Constitutional Court,[7] the Canadian Supreme Court,[8] the House of Lords in the United Kingdom,[9] and the European Court of Human Rights.[10]

Even a cursory glance at the referents identified as relevant by Indian courts reveals the preeminence of the Global North. The Global South – as a whole, not just South Asia – is starkly absent. This is not because there have not been landmark abortion cases from the Global South (or South Asia).[11] Rather, it is part of a wider trend, endemic to comparative constitutional law, or legal modernity more broadly as the editors to this volume note in their introduction. The "grammar" of modern constitutionalism has been defined by the Global North, especially North America

[3] *Suchitra Srivastava v Chandigarh Administration* (2009) 9 SCC 1 [11] (*Suchitra*).

[4] Ibid.

[5] *Ashaben v State of Gujarat* (2015) AIR CC 3387 [8] (*Ashaben*); *R v State of Haryana* 2016 SCC OnLine P&H 7425 [25.20] ("*R v Haryana*"); *Surjibhai Kalasva v State of Gujarat* SCr.A No 585/2018 (Gujarat High Court, January 30, 2018) [19] (*Surjibhai*); *ABC v Chhattisgarh* WP(Cr) No. 454/2020 (Chhattisgarh High Court, October 6, 2020) [28] (*ABC*); *Poornima Devu Mandarkar v Union of India* WP 10835/2018 (Bombay High Court, April 3, 2019) [87] (*Poornima*).

[6] *Ranichand Baiga v State of Chhattisgarh* WPPIL No. 27/2017 (Chhattisgarh High Court, December 12, 2018); citing *Carey v Population Services International* 431 US 678 (1977) and *Elsenstadt v R. Baird* 405 US 438 (1972); *V Krishnan v G Rajan* (1994) 2 MWN (Cri) 333 ("*V Krishnan*") [34]–[39] (citing US cases on the "mature minor exception").

[7] (1975) 39 B Verf GE cited in *Ashaben* (n 5) [7]; *R v Haryana* (n 5) [25.21]; *Surjibhai* (n 5) [23]; *ABC* (n 5) [27].

[8] *R v Morgentaler* [1988] 1 SCR 30 cited in *Ashaben* (n 5) [8.1]; *R v Haryana* (n 5) [25.23]; *Surjibhai* (n 5) [23]; *ABC* (n 5) [29].

[9] *V Krishnan* (n 6) [22]–[33] (citing English law on the question of minor's rights to abortion without parental consent); *Paton v United Kingdom* (1980) 3 EHRR 408 and *H v Norway* (1992) 73 DR 155 cited in *Ashaben* (n 5) [8.2]; *R v Haryana* (n 5) [25.22]; *Surjibhai* (n 5) [23]; *ABC* (n 5) [30]; *King v Bourne* [1938] 3 All ER 615 cited in *R v Haryana* (n 5) [25].

[10] *RR v Poland* [2011] ECHR 828 cited in *R v Haryana* (n 5) [25]; *Surjibhai* (n 5) [23].

[11] Corte Constitutional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006 (Colombia); *Christian Lawyers' Association v National Minister of Health* 2004 (4) All SA 31 (South Africa); Acción De Inconstitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Agosto de 2008, 146/2007 (Mexico); *Lakshmi v Office of the Prime Minister* 2067, 52(9) NKP 1551 (2010) (Nepal).

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and Western Europe.[12] The Global South plays a minimal role in norm-setting, particularly beyond its "usual suspects" of India, South Africa, and Colombia.[13] This pattern speaks to the "unwritten but firmly entrenched hierarchy" within the politics of constitutional knowledge-building.[14] It is a product of the assumption that the Global North is the "wellspring of universal learning," while the Global South embodies "parochial wisdom … antiquarian traditions … exotic ways and means,"[15] or at best a "weak reproduction" of Global North principles,[16] reinforcing the distinction between the "core and the periphery" of constitutional law.[17] This "northern selection bias"[18] is especially conspicuous within constitutional litigation on abortion where a "few influential jurisdictions" like the US and Germany continue to hold the fray.[19] Relying, as India does, on the North as the "gold standard" perpetuates a "soft form of imperialism,"[20] encouraging an "elusive dependence" by former colonies and "awkward condescension" by the colonizers.[21] The resulting body of knowledge "homogenises a reality that is full of shades and hues."[22] It suppresses Southern constitutional experiences,[23] painting them as "divergent and deficient, secondary and subordinate,"[24] a form of

[12] Daniel Bonilla Maldonado, *Toward a Constitutionalism of the Global South* (OUP 2013) 3; Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) 1; Zoran Oklopcic, "The South of Western Constitutionalism: A Map Ahead of a Journey" (2016) 37(11) Third World Quarterly 2081; Cheryl Saunders, "Towards a Global Constitutional Gene Pool" (2009) 4 NTU L Rev 3; Sujit Choudhry, "Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies" in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 3–31; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 15; Upendra Baxi, "Constitutionalism as a Site of State Formative Practices" (2000) 21 Cardozo L Rev 1183–1210.

[13] Ran Hirschl, *Comparative Matters* (OUP 2016) 212.

[14] Maldonado (n 12) 4; Oklopcic (n 12) 2083.

[15] Jean Comaroff and John Comaroff, *Theory from the South, or, How Euro-America is Evolving toward Africa* (Routledge 2012) 1.

[16] Maldonado (n 12) 12.

[17] David Law, "Pedagogy and Conceptualisation of the Field" in David Law (ed), *Constitutionalism in Context* (CUP 2022) 11.

[18] Hirschl (n 13) 212.

[19] Reva Siegel, "Constitutionalisation of Abortion" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

[20] Karen Knop, "State Law without Its State" in Austin Sarat et al (eds), *Law Without Nations* (Stanford University Press 2011) 76.

[21] Radhika Coomaraswamy, *Sri Lanka: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society* (Vikas 1984) 1.

[22] Ibid 14.

[23] Saunders (n 12) 3.

[24] Florian Hoffmann, "On the Significance of An/Other Modernity in Comparative Constitutional Law" in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) 62.

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"epistemic injustice."[25] Most importantly, it ignores creative constitutional alternatives offered by the Global South to contemporary legal problems.

The idea I propose is, then, "very simple really, although its implications are quite radical."[26] Through an act of imagination, the construction of two hypothetical referents, Nepal for India and India for Bangladesh, I invert the order of things. I look to the referents for their "ingenious, highly imaginative modes of survival,"[27] and create a conceptual space for rethinking key constitutional dilemmas on abortion from the South.

As a method, imagination finds no representation within comparative constitutional law which typically studies contexts where comparative citation (Inter-Asian or otherwise) has already occurred. So, the method of imagination itself requires development. For this, I draw on legal theory. Del Mar understands "imagination" as an act of entering into a "distinctive epistemic frame" where we "selectively suspend certain epistemic norms and commitments" and participate along the simulated spectrum opened up to us in this process.[28] Initiating imagination requires "artefacts," resources putting us on "epistemic alert" and calling upon us to "do things with them".[29] Imagination stimulates inquiry, a mode of experimental, what-if thinking which draws on hypothetical reasoning as a device to think with.[30] For Del Mar, imagination is thus not an "escape from reality"[31] but rather a "form of making, doing, acting, and interacting … one [that] proceeds tentatively, trying out different possibilities, generating ever more perspectives, leaving room for and inviting others to suggest alternatives."[32]

In this chapter, I imagine, as proposed by Del Mar. My artifacts are the alternate comparative referents: Nepal for India and India for Bangladesh. "Playing" with them,[33] I suspend the epistemic commitment to *Roe* and instead ask: What if India turned to Nepal and Bangladesh turned to India? Here, I bring to life the central question animating this volume: what if Asia, and not the West, is the referent for Asia's own legal modernity? Imagination allows me to access this hypothetical reality. I then participate in it to tentatively explore the implications of this change in referent.

Reproductive rights drive home the potential of imagination as a method of comparative constitutional law. *Roe's* influence is so dominant that it requires a hypothetical suspension of the norm to create the space for Inter-Asian referents. Imagination enables this, keeping *Roe* aside for a moment to let Asia speak. Yet,

[25] Dann, Riegner and Bönnemann (n 12) 4.
[26] Comaroff and Comaroff (n 15) 1.
[27] Ibid 18.
[28] Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Bloomsbury 2020) 125.
[29] Ibid 78, 115.
[30] Ibid 6.
[31] Ibid 25.
[32] Ibid 60.
[33] Play is an important concept for Del Mar (n 28) 116.

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imagination only takes us so far. Legal imagination seeks to persuade us that shifting toward Asian referents is good for reproductive rights.[34] However, comparative citation is rarely motivated by the sole desire to enhance rights-based outcomes. Rather, courts more often engage in comparative citation to locate themselves as members of an "international conversation" on how "modern" countries balance competing rights,[35] part of the "liberal-democratic club of nations."[36] Imagination by itself cannot alter this underlying incentive structure. This requires a broader shift from a unipolar to a multipolar global legal configuration, where belonging to the Inter-Asian "club" is also seen as equally desirable. Initiatives like this volume on IAL lay the necessary groundwork for this shift.

III HYPOTHETICAL REFERENTS: CONSTRUCTION AND COMPARISON

Raghavan, Thiruvengadam, and Khilnani compellingly argue why South Asia can, and should, be a referent for South Asia:

> despite their divergent recent histories and political experiences, South Asian countries in fact display a remarkable degree of constitutional and legal kinship. There are several common elements among the region's constitutions, political structures, and legal systems. These elements are drawn from the region's colonial past and from its many diverse indigenous legal traditions. *The potential for intra-regional borrowing and comparative study is considerable*.[37]

Beyond constitutional and legal similarities, there also exist cultural commonalities, especially the role of gender as a crucial determinant of health influencing the exposure to disease, the risk of poor health, and access to healthcare including abortion.[38] South-Asian comparisons (including hypothetical ones) are therefore methodologically justifiable. Let us now imagine.

A. *Nepal for India*

Earlier I introduced *Suchitra*, a landmark reproductive rights decision in India. While much has been written about how *Suchitra* protected reproductive autonomy

[34] Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (CUP 2021) 4, noting that legal imagination is a tool of persuasion.
[35] Rebouché (n 2) 89.
[36] Hirschl (n 13) 9.
[37] Sunil Khilnani, Vikram Raghavan and Arun Thiruvengadam, *Comparative Constitutionalism in South Asia* (OUP 2012) (emphasis added).
[38] Fariyal Fikree and Omrana Pasha, "Role of Gender in Health Disparity: The South Asian Context" (2004) 328 BMJ 823–826; World Health Organisation, "Nepal: Gender and Health", https://iris.who.int/bitstream/handle/10665/344677/GER-Nepal-eng.pdf?sequence=1, accessed May 30, 2025.

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as a fundamental right,[39] negligible attention has been paid to how *Suchitra* also led to the growth of the fetus as a prominent figure within abortion law in India.[40] Here, I document this phenomenon, emphasizing *Suchitra's* reliance on *Roe* in initiating this monumental step.

To deduce whether a "cogent rationale" existed for restricting the abortion right,[41] *Suchitra* promptly turned to Justice Blackmunn in *Roe* who held:

> *the State does have an … important and legitimate interest in protecting the potentiality of human life*. These interests are *separate and distinct*. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling".[42]

From this starting point of separateness between women's rights and fetal interests, Justice Blackmunn easily obscured the interconnectedness between the two. He failed to recognize that protecting fetal interest incurs costs, just like protecting *any* State interest, whether it be security, welfare, or education, incurs costs. While the distribution of costs is typically accompanied by deliberation – Who *should* bear it? Who *can* bear it? – here, the allocation seemed deceptively simple. The costs fell to women, currently pregnant and those with the ability to become pregnant. These costs are tangible:

> They can't be measured solely in terms of money, although that is certainly at stake. Women also incur costs to their freedom, physical and mental security, identity, and privacy when they are denied jobs because they are fertile, when they are subjected to court ordered medical operations against their will, and when they are given additional civil and criminal penalties for using drugs or alcohol during pregnancy that are never imposed on women who are not pregnant or on men. Women are assigned responsibility for taking care of fetuses without being given the resources they need to do so, and then penalized for falling short.[43]

In artificially severing fetal interests from women's rights, *Roe* sidelined questions about the distribution of costs involved in protecting the fetus. Unfortunately, the *Suchitra* Court followed *Roe* down the same road. Citing *Roe*, it concluded that

[39] Dipika Jain and Payal K Shah, "Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India" (2020) 39(2) Colum J Gender L 1–53.

[40] Tracing the evolution of fetal life in India, Gauri Pillai, "Shades of Life in Indian Abortion Law" (2022) 16(1) NLSJ 131–134.

[41] *Suchitra* (n 3) [23].

[42] *Roe* (n 1) 94 (emphasis added).

[43] Rachel Roth, *Making Women Pay: The Hidden Cost of Foetal Rights* (Cornell University Press 2003) 4; See also Faith Agostinone-Wilson, "Abortion through the Lens of Fetal Personhood" in Faith Agostinone-Wilson (ed), *Enough Already! A Socialist Feminist Response to the Re-emergence of Right Wing Populism and Fascism in Media* (Brill 2020); Silja Samerksi, "Pregnancy, Personhood and the Making of the Fetus" in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (OUP 2016) 700.

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there is a "compelling state interest in protecting the life of the prospective child" allowing the State to reasonably restrict abortion.[44] This observation set in motion a paradigm change within abortion law in India.

Before *Suchitra*, the fetal figure had been more or less absent within Indian abortion law. In parliamentary debates on the law in 1971 (and later in 2021), only two members voiced the concern that abortion is "virtually murder"[45] and a "crime against humanity."[46] Others unanimously agreed that "there is no violation of [the right to life] in **any** manner".[47] Indian courts too have rejected pleas that India's law on abortion violates fetal right to life. Courts have repeatedly refused to "enter upon a debate as to when fetus comes to life or the larger question touching upon the ethics of abortion", instead emphasizing that the abortion law preserves women's lives and thus is consistent with the right to life.[48] Some courts have even held that "an unborn foetus is not an entity with human rights … A child when born and takes first breath, is a human entity."[49]

Suchitra's Roe-driven recognition of the State's compelling interest was thus *the* big shift that spurred the steady growth of fetal interests in India. *Suchitra's* rationale was endorsed time and again by the Supreme Court[50] and State High Courts.[51] Some courts even took forward *Suchitra's* framing. While *Suchitra* was silent on the point at which the State's compelling interest to protect the fetus gets activated, in *R v Haryana* the Punjab and Haryana High Court indicated viability, when the fetus is capable of surviving outside the womb of the pregnant woman, as the relevant moment.[52] Once again, *Roe's* strong influence is visible here; viability was a standard initially set by *Roe* as the fetus has the "capability of meaningful life outside the mother's womb" at viability.[53] While the US has now moved past viability,[54] and viability has been extensively critiqued as a temporal threshold,[55] it still holds purchase within Indian law. Taking *Suchitra* even further, some High Courts have

[44] *Suchitra* (n 3) [11].
[45] Statements regarding Medical Termination of Pregnancy Bill, Lok Sabha (August 2, 1971) (MM Joseph; Muhammad Sheriff).
[46] Statements regarding Medical Termination of Pregnancy (Amendment) Bill 2020, Lok Sabha (March 17, 2020) (Dean Kuriakose).
[47] Ibid (Dr. Harshvardhan).
[48] *Nand Kishore Sharma v Union of India* AIR 2006 Raj 166 [4]; *Cry for Life Society v Union of India* WP(C) No. 10130/2013 (Kerala High Court, June 9, 2020).
[49] *High Court on its own Motion v State of Maharashtra* 2017 CriLJ 218 [15], [20].
[50] *X v NCT of Delhi* CA No. 5802/2022 (Supreme Court, September 29, 2022) [103] ("*X v NCT*"); *Z v Bihar* (2018) 11 SCC 572 [28].
[51] *S v State of Gujarat* SCrA No. 585/2018 (Gujarat High Court, January 30, 2018) [18]; *Surjibhai* (n 5).
[52] *R v Haryana* (n 5) [33.4].
[53] *Roe* (n 1) 97.
[54] *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992).
[55] A Burin, "Beyond Pragmatism: Defending the 'Bright Line' of Birth" (2014) 22(4) Med Law Rev 494–525.

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veered dangerously close to recognizing a fetal right to life. In *Suparna Debanath*, the Calcutta High Court observed:

> There is always a difficulty in choosing a precise point when the unborn gets a right to life. *The right answer may lie in accepting that there are degrees of right to life and the foetus gets a stronger right to life as it develops in the mother's womb.* The more it develops, the more difficult it becomes to take a decision to abort the same.[56]

As with Justice Blackmunn in *Roe*, these shifts have led Indian courts too to ignore that women unilaterally bear the costs of the State's interest in protecting fetuses. Take the example of cases of abortion sought on ground that there exists a "substantial risk" that the fetus, if born, would be afflicted by a "serious physical or mental abnormality."[57] Here, the courts' only criterion of assessment is whether the fetus is capable of surviving outside the womb. If the fetus has "grim chances of survival and limited life span,"[58] abortion is allowed. If the prospective child has some future, abortion is denied, "though it would be traumatic for [the woman]."[59] In fact, a High Court once admitted in 2018: "I have observed over a period of time that the Doctors, while expressing their opinion [on termination], do not consider the trauma and the agony, which the [woman] undergoes."[60] Yet, it went on to deny her an abortion.

Beyond outright disregard, some courts minimize the costs borne by women, trivializing them as forms of "self-indulgence."[61] They dismiss anxiety about the outcome of the pregnancy[62] or the concern that being pregnant would compel reconciliation with a violent partner and sustain financial dependence on him.[63] Other courts acknowledge the costs borne:

> I am conscious of the fact that to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she becomes an object of scorn and ostracization.[64]

[56] *Suparna Debnath v State of West Bengal* AST No 3/2019 (Calcutta High Court, January 29, 2019) (*Suparna*) (emphasis added).
[57] The Medical Termination of Pregnancy Act 1971, s 3(b)(ii).
[58] *Kulwinder Kaur v Chandigarh* W.P.(C) 1088/2019 (P&H High Court, January 31, 2019); See also *Manga Singh v Chandigarh Administration* W.P.(C) 23222/2019 (P&H High Court, September 2, 2019); *Pallavi Bhoi v State of Chhattisgarh* W.P.(C) 2261/2019 (Chhattisgarh High Court, July 9, 2019).
[59] *ABC* (n 5) [34]; *X v Uttarakhand* W.P.(M/S) 1909/2018 (Uttaranchal High Court, July 17, 2018) [13]; See also *Nikhil Datar v Union of India* 2008 (110) BOMLR 3293 (*Nikhil*); *Suparna* (n 56).
[60] *Surjibhai* (n 5) [24] (emphasis added).
[61] Adrienne Rich, *Of Woman Born: Motherhood as an Experience and Institution* (WW Norton and Company 1976) xvi.
[62] *Sheetal Shankar Salvi v Union of India* (2018) 11 SCC 606.
[63] *Neelam Choudhary v Union of India* 2019 (1) BomCR 681.
[64] *Ashaben* (n 5) [11.5].

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Yet they require the pregnant woman, who was kidnapped and gang raped, to "bravely" continue with the pregnancy, reminding her that post-abortion, her grief might only "double" as she had "just ended the life of [her] child."[65] And if a woman refuses to bear the costs, she is publicly shamed, with one court condemning her refusal as "reproductive materialism"![66]

It is here, then, that we must take seriously my call to suspend established epistemic norms and imagine. Let us ask: What if *Suchitra* had not turned to *Roe* to seek direction on fetal interests? What if it had, instead, looked to Asia? Would it have allocated the costs of fetal protection differently?

Just a few months before *Suchitra*, the Nepal Supreme Court decided *Lakshmi Dhikta*.[67] Unlike *Roe*, and despite citing *Roe*,[68] *Lakshmi Dhikta* began by emphasizing the interconnectedness between the woman and the fetus: "A fetus cannot be recognized as a separate personality from that of the mother as it owes its existence to the mother . . . the interests of the mother and that of the fetus are not separate. Instead, it is appropriate to view it in an integrated manner."[69] This crucial recognition functioned as the Court's inflection point, from which it refused to consider the fetus as an entity bearing the right to life *because* the costs on women would be too high:

> If a fetus is to be considered a life in itself and identity of a fetus and that of the mother who carries the fetus through conception is to be considered separate, the existence of fetus's life cannot be endangered even when the physical or mental health of a mother is under threat, and in such a situation, the independence of the fetus shall have to be recognized until the last stage of mother's life. Thus, even if the existence of the mother is endangered, she will have to endure until the last minute for the protection of fetus's life or last measures for the protection of the life of the pregnant mother shall be taken only after ensuring the protection of the independent life of the fetus. In reality, such an argument is not practical.[70]

The Court painstakingly set out the costs incurred by women:

> Women may be forced to become pregnant and to continue pregnancies if their reproductive health rights are not protected in a correct manner, and instead of being respected as rights holders they will be transformed into mere instruments

[65] Ibid [12].
[66] *Nandini Tushar Rawool v State* W.P.(C) No 8313/2018 (Bombay High Court, August 14, 2018).
[67] *Lakshmi* (n 11); India–Nepal comparisons on abortion are not unprecedented and have been justified in light of alignment in their constitutional understandings of gender equality and privacy, and the similarity of their statutory frameworks on abortion: See Mara Malagodi, "Intersectional Inequalities and Reproductive Rights: An India-Nepal Comparison" (2020) 3(2) U OxHRH J 195–201.
[68] *Lakshmi* (n 11) [9].
[69] Ibid [14].
[70] Ibid [13].

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> bearing compulsive responsibility of producing human. Although becoming pregnant is a noble human act, no other situation that can be more burdensome and condemnable when the pregnancy is forced. Once the bearer is denied of its right to either carry the pregnancy or not, the outcome cannot be considered to constitute the fulfilment of one's highest duty, and instead of right it becomes a form of slavery.[71]

Such "servitude,"[72] the Court acknowledged, would harm women's physical and mental health, life, dignity, freedom, and participation in society.[73] She may lose her "opportunity of employment or income generation," affecting her chances of "professional development" (a cost which the Court did not trivialize).[74] It would also treat women unequally – "while becoming pregnant is not a consequence of women's act alone; after conception, only women [bear] the direct burden"[75] – and have a heightened adverse impact on vulnerable groups of women, "rural, illiterate, and poor," causing the "feminization of poverty."[76]

This comprehensive cataloguing of costs and their bearers did not mean that the Court denied any role for fetal interests at all stages of pregnancy. The Court concluded that the right to abortion did not vest "the right to oppose pregnancy at all times, therefore, it is necessary to consider the right to abortion within an appropriate limit."[77] While the Court was silent on what this "appropriate limit" might be, the Court's starting point is what is most important: the recognition that the costs incurred by women ought to be central in determining the legal status of the fetus. *Lakshmi Dhikta* could have gone further and offered a re-imagined distribution of costs for fetal welfare. The Court did acknowledge that the "existence and evolution of the human race ... is a matter of common public interest."[78] Yet, the costs for it are borne by just one group. A reimagined cost structure would not ignore potential life. Rather it would distribute more fairly the costs of protecting it. That is, to protect fetuses, the State would not restrict abortion, compelling women alone to bear the costs of the *State's* interest. Rather, it would target the incidence of unwanted pregnancy (through better sex education and improved contraceptive provision) and support parents in providing childcare,[79] therein redistributing the

[71] Ibid [33].
[72] Ibid.
[73] Ibid [36].
[74] Ibid [37].
[75] Ibid [18]; on the vision of transformation equality underlying *Lakshmi*, see Melissa Upreti, "Toward Transformative Equality in Nepal: The Lakshmi Dhikta Decision" in Rebecca Cook, Joanna Erdman and Bernard Dickens (eds), *Abortion in Transnational Perspective* (University of Pennsylvania Press 2014).
[76] *Lakshmi* (n 11) [18].
[77] Ibid [41].
[78] Ibid [32] (emphasis added).
[79] Roth (n 43) 12.

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costs of fetal welfare among society as a whole. In fact, a "wealth of evidence" shows that fetal interests are also more "effectively" pursued this way.[80]

Lakshmi Dhikta did not go this far. However, it did present the seeds for this radical re-imagination. In taking its cues from *Roe* and its progeny, this re-imagination is what *Suchitra* lost out on. Hypothetically, then, a change in frame of reference – from *Roe* to *Lakshmi* – could have ushered in this fundamental realignment of India's abortion law. There is, of course, no guarantee of such an outcome; judicial decisions are rarely a product of applicable doctrine alone. Yet, it certainly serves to illustrate the central thrust of this chapter: imagination as a method to tap into the immense creative potential of IAL.

B. *India for Bangladesh*

To make my case stronger, I construct a second hypothetical referent: India for Bangladesh. While India is, typically, a "usual suspect" of comparative constitutional study,[81] having received significant attention for its approach to access to justice, socioeconomic rights, and transformative constitutionalism, India remains absent from global deliberations on reproductive rights. This is possibly on account of the existing Northern tilt within constitutionalism on reproductive rights and India's own nascent initial jurisprudence on the theme. However, with time and as shown in the Nepal for India, Indian decision-making on reproductive rights has not only become more robust but also offers innovations demanding to be studied across borders. Here, I focus on two such innovations and their relevance to Bangladesh.

India and Bangladesh have identical criminal prohibitions on abortion, a legacy of colonialism. The Bangladesh Penal Code criminalizes voluntarily causing a woman to miscarry. The only exception is a procedure to save the life of the pregnant woman.[82] Unlike the Indian Medical Termination of Pregnancy Act 1971, Bangladesh, however, does not have a regime of legislative exceptions to criminal law, allowing abortion under a more expansive set of conditions. As a result, abortion law in Bangladesh remains strict and narrow.

During the Liberation War in 1971, many Bangladeshi women were sexually assaulted by members of the Pakistani army. In response, Bangladesh introduced a transitional "waiver" on the criminalization of abortion to preserve national honor.[83] Over time, the object of safeguarding national identity was replaced with a second

[80] Sally Sheldon, "The Decriminalisation of Abortion: An Argument for Modernisation" (2016) 36 OJLS 358; Catharine A. MacKinnon, "Reflections on Sex Equality Under Law" (1991) 100(5) Yale Law Journal 1320, 1281–1328.

[81] Hirschl (n 13) 212; India-Bangladesh comparisons are also not "unusual", as noted by Psymhe Wahud, "State, Abortion and Women: Bangladesh in Context" (2022) 23(2) Austl J Asian L 116.

[82] The Penal Code 1860, s 312.

[83] Keertana Kannabiran Tella, *Abortion Rights, Reproductive Justice and the State* (Routledge 2022).

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nation-building project: controlling population, for which successive Planning Commissions recommended the liberalization of Bangladesh's abortion laws.[84] To that end, the State crafted a procedure, menstrual regulation (MR), involving vacuum aspiration to regularize the menstrual cycle when it is absent for up to two weeks. MR sat outside the existing criminal framing, proposed as a method of post-contraception (to deal with contraceptive failure) rather than abortion. With the introduction of MR, the State priority of controlling the population was satisfied. Any further attempt at liberalizing Bangladeshi abortion law was abandoned.[85] This is despite clear evidence that the rates of (unsafe and illegal) abortion continue to mirror those of MR,[86] suggesting that the latter alone is not sufficient in meeting women's reproductive needs.

In May 2020, a writ petition was filed before the Supreme Court of Bangladesh challenging the constitutionality of its criminal prohibition on abortion for forcing pregnancy and violating "individuals' rights to life, liberty, freedom of choice and privacy."[87] In foregrounding reproductive self-determination, the petition made strides in an arid constitutional landscape otherwise dominated by concerns about women's health.[88] Reflecting a by-now-familiar script, the petition drew heavily on *Roe's* articulation of privacy.[89] However, *Roe's* privacy-based abortion right has been subject to extensive critique. Privacy, it is argued, typically protects private spaces, like families, homes, and marriages, from State intervention. These spaces may be sources of oppression to vulnerable groups, with privacy serving as an "injury got up as a gift" for members of these groups.[90] Even if privacy protected intimate decisions, *Roe's* construction of privacy envisages only a negative duty of non-intervention on the State rather than a positive duty to assist in accessing abortion.[91] The only beneficiaries of *Roe's* right are, then, privileged groups of women, who do not need State assistance, financial or otherwise. The limitations of *Roe's* framing spill over into the Bangladeshi writ petition. In understanding privacy as protecting

[84] This is in line with the global politics of population control, see Kalpana Wilson, "The 'New' Global Population Control Policies: Fuelling India's Sterilisation Atrocities" (2015) 87 Different Takes 4.

[85] Wahud (n 81).

[86] Susheela Singh et al, "The Incidence of Menstrual Regulation Procedures and Abortion in Bangladesh, 2010" (2012) 38(3) IPSRH 122–132.

[87] *Syeda Nasrin v The Government of People's Republic of Bangladesh* WP No. ___/2020 (Supreme Court of Bangladesh) [8] (Writ Petition) (on file with author).

[88] Sajeda Amin and Sara Hossain, "Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh" (1995) 44 Am Univ Law 1324; For critique of health as framing for abortion, see Catherine Albertyn, "Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts" (2019) 1 OxHRH J 90–97.

[89] Writ Petition (n 87) [10].

[90] Catherine MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade" *Feminism Unmodified* (Harvard University Press 1987) 100.

[91] *Harris v McRae* 448 U.S. 297 (1980); Loretta Ross, "Understanding Reproductive Justice: Transforming the Pro-Choice Movement" 36(4) Off Our Backs 14–19.

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women's personal decisions on abortion, the petition limited itself to challenging State intervention through criminal law. It did not demand State action to ensure equal access to abortion. The overreliance on *Roe* within the petition thus detracted Bangladesh from a "gender transformative outcome."[92]

Now, let us enter the alternate epistemic frame made possible by the act of imagination. Imagine that Bangladesh had looked not to *Roe* but to India to construct its privacy right. India offers an affirmative conception of privacy which moves far past *Roe's* limitations. At the outset, the Indian Supreme Court has rejected privacy's "spatial" account for serving as a "veneer for patriarchal domination and abuse of women."[93] Instead, it understands privacy as "decisional autonomy" to make "intimate decisions … [about] one's sexual or procreative nature"[94] including "whether to bear a child or abort her pregnancy."[95] The Court also imposes on the State not just negative duties of non-intervention but also positive duties to "remove obstacles for an autonomous shaping of individual identities,"[96] based on the recognition that it is "meaningless to speak of" negative duties "in the absence of" positive duties. The State is therefore required to take "active steps" to improve access to reproductive healthcare, including abortion.[97] A turn to India instead of *Roe* would therefore have significantly altered the nature of the privacy right grounding Bangladesh's right to abortion.

Beyond privacy, a case has also been made for Bangladesh to base the constitutional challenge to its abortion law on the right to sex equality. The argument is that restrictions on abortion reflect and further stereotypical assumptions about women as mothers. They also compel women to do the labor of motherhood, which is undervalued and invisiblized because mothering is seen as natural and inevitable. Further, Bangladesh's law criminalizes a healthcare procedure only women need without altering the structurally unequal social conditions that often prompt abortions. Overall, "women are disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion."[98] In contrast to privacy, the sex equality argument, the claim goes, would recenter the "women's question," undoing historical oversight and marginalization, to bring "gender-transformative changes in the abortion discourse."[99]

Locating such an argument within Bangladesh's constitutional equality clause is, however, difficult, as the provision currently endorses a formal conception of

[92] Wahud (n 81) 117.
[93] *KS Puttaswamy v Union of India* (2017) 10 SCC 1 [140] (Chandrachud J) (*Puttaswamy*); *Joseph Shine v Union of India* (2019) 3 SCC 39 [50] (Chandrachud J.).
[94] *Puttaswamy* (n 93) [142] (Chandrchud J).
[95] Ibid [229] (Chelameshwar J) and [239] (Nariman J).
[96] Ibid [140] (Chandrachud J).
[97] *X v NCT* (n 50) [130], [133].
[98] Wahud (n 81) 119.
[99] Ibid.

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equality.[100] Pregnancy falls outside formal equality's mandate of treating likes alike, as pregnancy renders women unlike, defeating their claim to equality at the threshold.[101] Looking outward, Bangladesh might first, as is common practice, turn back to the US. Here, too, Bangladesh would stumble, as the US Constitution has arguably not yet recognized pregnancy discrimination as a form of sex discrimination, bound as it is to the notion of formal equality. This is best exemplified by the cursory rejection of the sex equality argument in *Dobbs*.[102]

In contrast, India's constitutional conception of equality is substantive, aimed not at offering like treatment to likes but rather at redressing the disadvantage experienced by groups of "citizens who [have] suffered historical disadvantage, whether it be of a political, social, or economic nature".[103] It seeks to eliminate "age-long disabilities and sufferings"[104] and abolish "social inequity, the social stigma and the social disabilities in our society"[105] to achieve "real equality" among groups.[106] In transcending formal equality's sameness–difference paradigm, substantive equality treats pregnancy discrimination as sex discrimination.[107] In denying abortions, restrictive abortion laws thus not only dehumanize individual women but also subordinate women as a group.[108]

While India, too, has been slow to bring a non-discrimination lens to reproductive rights,[109] the first steps have already been taken. In *X v NCT*, the Indian Supreme Court recognized that reproduction is not just "biological" but also "political," with the decision to reproduce being bound up within broader social structures: "[a] woman's role and status in family, and society generally, is often tied to childbearing and ensuring the continuation of successive generations."[110] In *Devika Biswas*, the Court condemned State policies compelling women from marginalized groups to undergo sterilization for mirroring prevailing "systemic discrimination" by denying reproductive freedom to "the most vulnerable groups of society whose economic

[100] Ibid 118.
[101] Jennifer Hendricks, "Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion" (2009) 45 Harv CR-CLL Rev 26.
[102] *Dobbs* (n 1) 10, 11; See, in contrast, Reva Siegel, Serena Mayeri and Melissa Murray, "Equal Protection in Dobbs and Beyond" (2023) 42 Colum J Gender & L 67–97.
[103] *Navtej Singh Johar v Union of India* AIR 2018 SC 4231 [15] (Malhotra J).
[104] S Nagappa, Constituent Assembly Debates (Volume VII, November 29, 1948) [7.62.99], [7.62.101].
[105] Santanu Kumar Das, Constituent Assembly Debates (Volume XI, November 24, 1949) [7.62.172].
[106] K T Shah, Constituent Assembly Debates (Volume VII, November 29, 1948) [7.62.87].
[107] Sandra Fredman, "Reversing Roles: Bringing Men into the Frame" (2014) 10(4) Int J L in Context 445.
[108] Dorothy Roberts, "Race, Gender and Genetic Technologies: A New Reproductive Dystopia?" (2009) 34(4) Signs 1480.
[109] Gauri Pillai, *Reproductive Rights in India: The Search for a "New" Constitutional Home* (Doctor of Philosophy Thesis, University of Oxford 2022).
[110] *X v NCT* (n 50) [97].

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and social conditions leave them with no meaningful choice in the matter."[111] In *Sambara Sabar*, the Orissa High Court recognized that the death of an impoverished, pregnant woman during childbirth violated not only her right to life but was also part of an abiding, historical pattern of disadvantage:

> [her death] is not an isolated instance as far as Odisha is concerned. The number of women in the tribal belts, in the rural and semi-urban areas, who have lost lives during pregnancy and as a result of unsafe deliveries is a matter for deep concern . . . The increasing numbers of maternal deaths in Odisha point to a systemic failure of the health care system which appears to have failed the poorest and the weakest at a time when they need it the most.[112]

In recognizing the denial of reproductive rights as discrimination, these cases shine light on the full extent of the constitutional wrong at play, going beyond the severe impact on individual women to locating each instance as part of a systemic structure of disadvantage. This shift in emphasis is of immense relevance in a context where the very decision to grant the transitional waiver and craft the MR policy was made to fulfill State priorities, like "flushing out" Pakistani blood and controlling population, rather than to guarantee women's rights.[113] Resting on this shaky foundation, Bangladesh's MR policy and access to this service are inevitably mediated by gender and class. The policy mandates the consent of husband (or legal guardian) to obtain MR.[114] Unmarried women are, then, turned away, and sometimes accused of being sex workers. Providers hold negative perceptions even about married women seeking MR, who are pestered to keep the child and accused of infidelity, leaving them guilty and ashamed. Providers also scold and shout at women, especially illiterate and impoverished women, and demand extra fees if they cry in pain. They also blame later miscarriages on women having undergone MR previously.[115] Within these "structural and social inequalities . . . shaping decision-making surrounding pregnancy terminations" in Bangladesh,[116] the criminalization of abortion not only denies women privacy but also entrenches their inequality.

Turning away from *Roe*, Bangladesh could learn from India by reading its privacy clause affirmatively and equality clause substantively. The strengthened

[111] *Devika Biswas v Union of India* (2016) 10 SCC 733 [87] (emphasis added).
[112] *Sambara Sabar v State of Odisha* 135 (2023) CLT 85 [36] (emphasis added).
[113] Wahud (n 81) 113; Shireen Huq, "Bodies as Sites of Struggle: Naripokkho and the Movement for Women's Rights in Bangladesh" (2003) 29 BDS 47.
[114] Wahud (n 81) 115.
[115] Meda Chesnay-Lind and Syeda Hadi, "Patriarchy, Abortion, and the Criminal System: Policing Female Bodies" (2017) 27(1) Women & Crim Just 73–88; Sabina Rashid et al, "Experiences of Abortion in Nepal and Menstrual Regulation in Bangladesh: A Gender Analysis" (2008) 16(2) Gender & Development 252–272.
[116] Sabina Rashid, "Quality of Care and Pregnancy Terminations for Adolescent Women in Urban Slums, Bangladesh" in Andrea Whittaker (ed), *Abortion in Asia: Local Dilemmas, Global Politics* (Berghahn Books 2010) 103.

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constitutional framework could then be used as a lever to challenge Bangladesh's criminal abortion laws, in turn reconfiguring its approach to abortion. This possibility is brought to life by the act of imagination, helping us see that the "Asian region is a dynamic field of legal modernization and experiment."[117]

IV CONCLUSION

This chapter, in its title, invites readers to imagine bringing IAL to abortion so as to re-imagine key constitutional dilemmas. I have attempted such imagination by invoking two artifacts (the hypothetical referents), suspending *Roe's* dominance, and traveling along the simulated reality to explore its implications. The exercise revealed how IAL inherits from the North, here, *Roe's* legacy, but experiments, modifies, and innovates to rethink the law. The act of imagination allowed us to access this re-imagined law and, at the very least, posit it as a referent for Asia. The chapter also inaugurated imagination as a method of comparative constitutional law, of relevance beyond the immediate confines of abortion litigation. The potentiality of both the imaginative method *and* the substantive shifts to abortion law made possible by it cements the place of IAL.

[117] See generally, Introduction: The Emergence of Inter-Asian Law, this volume 4.

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