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REVISITING PUTTASWAMY: A FEMINIST CRITIQUE- THE WOMAN QUESTION AND THE PHYSIOLOGICAL PARADIGM OF ABORTION IN PRIVACY

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ABSTRACT

The Supreme Court in the case of Justice K. S. Puttaswamy v. Union of India, placed the 'individual' in the heart of privacy, instead of 'walling off' the private space, thus recognizing the creation of the 'individual'. This essay seeks to analyse Justice Chandrachud's majority opinion in the Puttaswamy judgement from the lens of Feminism, discussing reproductive rights as a key aspect of decisional autonomy or intimate decision. It argues that Justice Chandrachud while trying to form a global perspective of decisional privacy in relation to abortion, ends up formulating a doctrine which lacks indigenous appeal as it is unable to engage with the 'voices of Indian women'. He upholds a highly contested physiological paradigm of abortion, by placing abortion in the private sphere, rather than as an integral condition for a decent life. This does not perpetuate the establishment of class divisions among women themselves. Further, the law of privacy protects the existing aggregation of power in the hands of man as women in India are influenced directly or indirectly by prevailing social forces and ethos or families and husbands. Thus, the law fails severely to contextualize the woman in question and instead ends up talking about an American middle class one.

I. INTRODUCTION

The Supreme Court in the case of *Justice K. S. Puttaswamy v. Union of India,*[1] [***Puttaswamy* judgment**] established the Right to Privacy as a fundamental right under Article 21, which formulates the Right to Life under the Indian Constitution. The most important tenet of this judgement is that all the nine judges unanimously place the 'individual' in the heart of privacy, instead of 'walling off' the private space, thus, recognizing this as a creation of the individual.[2] Reproductive rights in this light, form a key aspect of intimate decision or decisional autonomy.[3]

This essay seeks to analyse Justice Chandrachud's majority opinion in the *Puttaswamy* judgement from the lens of Feminism, primarily relying on the works of Katherine Bartlett, Nivedita Menon and Reva Siegel. It attempts to portray that Chandrachud while trying to form a global perspective of decisional privacy in relation to abortion, ends up formulating a doctrine which lacks indigenous appeal as it is unable to engage with "*voices of Indian women*".[4] He upholds a highly contested physiological paradigm of abortion, by placing abortion in the private sphere,

[1] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCALE 1 (India) [hereinafter Puttaswamy].
[2] Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment – II: Privacy, The Individual, And The Public/Private Divid*e, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Aug. 28, 2017), https://indconlawphil.wordpress.com/2017/08/28/the-supreme-courts-right-to-privacy-judgment-ii-privacy-the-individual-and-the-publicprivate-divide/ [hereinafter Bhatia].
[3] Arijeet Ghosh and Nikita Khaitan, *A Womb of One's Own: Privacy and Reproductive Rights,* EPW (Oct. 31, 2017), http://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights.
[4] DAPHNE BARAK-EREZ, FEMINIST CONSTITUTIONALISM, GLOBAL PERSPECTIVE, HER-MENEUTICS: FEMINISM AND INTERPRETATION IN BAINES 85-97 (Barak-Erez & Kahana, 2012) [hereinafter Barak-Erez].

thus, failing severely, to contextualize the *woman* in question.[5] He ends up basing his opinion on an American- middle class white woman, forgetting to factor in the intersectionality and diversity found in Indian women, thus decontextualizing the paradigm of abortion in privacy.[6]

II. THE WOMAN QUESTION

Asking 'the woman question'[7] as suggested by Katherine Bartlett emphasizes on revealing how women are posited in the organization of society instead of emphasizing on the inherent characteristics of women.[8] It exposes the effect of legal principles and rules on women which simultaneously help finding interpretive alternatives that relocate the disproportionate social burdens,[9] thus demonstrating how social structures inherently personify norms which tacitly render women different and thus subordinate.[10]

Similarly, the theory of Cultural Feminism argues that the 'different voices' of women should be incorporated in the predominant constitutional discourse.[11] It urges for diversifying the notion of the 'global woman',[12] by incorporating voices that go beyond that of the middle-class, educated white woman's voice, analysing that gender is within the context of multiple identities.[13]

Justice Chandrachud in the *Puttaswamy* judgment, clearly addresses 'the woman question' by dedicating an entire section of his judgement, with reference to the feminist critique of the privacy doctrine.[14] He incorporates this American white, middle-class voice by placing privacy in the individual, enshrining decisional privacy as a constitutional right. It makes interest of women in intimate privacy inviolable.[15]

This question has an important role to play in the arena of abortive rights of a woman. It empowers one to argue that a sweeping ban on the right to abortion after 20 weeks puts an inordinate burden on womankind.[16] While he addresses this issue he is unable to incorporate the diversity of women voices in his judgment.

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[5] Puttaswamy, at 201.
[6] Puttaswamy, at 199.
[7] Katherine T. Bartlett, *Feminist Legal Methods,* 103 HARV. L. REV. 829 (1990) [hereinafter Bartlett].
[8] *Id.*
[9] Barak-Erez, at 96.
[10] Bartlett, at 829.
[11] Barak-Erez, at 97.
[12] Monica Bahati Kuumba, *The Limits of Feminism: Decolonizing Women's Liberation/Oppression Theory,* 1 RACE GENDER & CLASS J. 85 (1994) [hereinafter Kuumba].
[13] Bartlett.
[14] Puttaswamy, at 198.
[15] Puttaswamy, at 199.
[16] Barak-Erez, at 97.

As the aim of asking this woman question is to problematize the notion of sisterhood and the assumption that there can be a commonality of interests and aims amongst all women. It is to argue that each feminist struggle is incomplete without its specific ethnic and historical context.[17] In plain words, "*the analysis and objective of western feminism cannot be applied abstractly and universally.*"[18] The tendency to assume a fixed definition of woman or a rigid standard for women's experiences that is homogenizing, exclusionary and oppositional and treating them as a single analytical category has serious implications.[19] While denying differences of class, race and sexual orientation amongst women, it simultaneously addresses only those oppressive practices that affect white, privileged upper-class women, which makes this unified concept of woman subject highly problematic.[20]

He falls hard, into this trope of what Adrienne Rich calls "*white solipsism*"[21] as he cites American authors on feminism like Anita Allen,[22] Catharine MacKinnon,[23] and Helen Nissenbaum.[24] Justice Chandrachud goes on to mention American landmark judgements like *Roe v. Wade*,[25] *Carey v. Population Services International*[26] and *Planned Parenthood v. Casey*.[27] He applies them prima facie with little or no analysis to check whether they are even applicable in the Indian context.

Cultural imperialism is predominant in his dialogue. Despite the fact that Indian feminism according to Kumari Jayawardena is not attributable to the imposition of feminist ideas by the West on the Third world, but rather, is indigenous to it[28]; Justice Chandrachud disregards Indians while trying to reach a global consensus, in attempting to evolve a paradigm of privacy that has global applicability. Thus, instead of demystifying the notion of the 'global woman' he upholds it.

In doing so, he misses the point in asking this woman question. He overlooks the woman subject of the Constitution, the voice of Indian women and their conception of privacy. What he formulates instead is foreign to the lived experience of Indian women. This does not suffice as it

[17] Floya Anthias and Nira Yuval-Davis, *Contextualizing Feminism: Gender, Ethnic and Class Divisions,* 15 FEM. REV. 62 (1983) [hereinafter Davis].
[18] Davis, at 62.
[19] Davis, at 62.
[20] Bartlett, at 829.
[21] *Id.*
[22] Puttaswamy, at 200.
[23] Puttaswamy, at 198-199.
[24] Puttaswamy, at 201.
[25] Roe v. Wade, 410 US 113 (1973).
[26] Carey v. Population Services, 431 US 678 (1977).
[27] Planned Parenthood v. Carey, 120 L. Ed 2d 67 (1992).
[28] Felicity A. Nussbaum, *(White) Anglo-American Feminism In Non-US/Non-Us Space*, 12 TULSA STUDIES IN WOMEN LITERATURE 263 (1993).

is essential to contextualize feminism. Any political struggle has to be seen in sync and context with other social structures existing in society. Women of subordinate groups often find it politically difficult and unsustainable to channelize their entire struggle against sexism perpetrated by the dominant majority men.[29] In the Indian Context, Dalit women are doubly affected by patriarchy. As they face both, Dalit patriarchy and Savarna patriarchy. Thus, the subjectivity of the woman in question should become an extremely important concern, when framing laws and policies for them.

An element of this subjectivity is the origin of the law on abortion in India. Nivedita Menon argues that the right for abortion in India arose as a measure of population control rather than as an achievement of feminist politics.[30] Thus the right to abortion should not be mistaken to be a revolutionary achievement of a progressive Indian state.[31] Further the politics of abortion plays out differently for Indian women in their personal lives.

The right to abortion grants women an agency to abort. However this agency should not be conflated with free will. When abortion is placed under the doctrine of decisional privacy, many social factors influencing their decision are ignored. For instance, the fact that women often do not have control over their bodies, as the real control lies with men is ignored. Here, the decisions of such women are not based on free will, but rather determined by the constraints placed by the patriarchal society they live in and by their families on the basis of sexual division of labour.[32] Menon argues that access to legal and safe abortion should not fall under right to privacy. Had Justice Chandrachud considered this Indian voice he might have opined differently on abortion rights being placed under decisional privacy.

Here historical materialism becomes an appropriate and dynamic theoretical framework to analyse the conditions of colonized or Third World women. It allows for and acknowledges the dialectical relationships existing between the multiple causes of and solutions to the oppression of such women.[33] It places class, national and gender liberation in a global context viewing them as interconnected parts of a whole. It calls for a thorough examination of the distinct historical development and material reality of each situation,[34] by treating multiple oppressions as

[29] Davis, at 62.
[30] NIVEDITA MENON, RECOVERING SUBVERSION FEMINIST POLITICS BEYOND THE LAW 72-3 (1st ed. 2004).
[31] *Id.* at 71.
[32] Nivedita Menon, *Abortion as A Feminist Issue – Who Decides, And What?,* KAFILA (May 11, 2012), https://kafila.online/?s=Abortion+As+A+Feminist+Issue.
[33] Kuumba, at 85.
[34] *Id.*

interactive combinations instead of mere add-ons.[35] Thus it allows for the correction of the errors of reductionist and universalist characteristic of other theoretical methods to the woman question.[36] Justice Chandrachud's opinion lacks in such analysis.

An analysis of such unique historical development is extremely important when making cross cultural references, comparing and analysing their condition. Material conditions that are in essence, the structural circumstances and actual state within which the women are situated, play a significant role in shaping social reality.[37] Justice Chandrachud while making reference to American decisions of privacy should have analysed those decisions better by giving more weightage to the difference in the social construction in India and America. He should have considered that whereas America is plagued by the issue of race, India still struggles with caste. Caste has a different role to play in the Indian society and the effects on women due to caste are different when compared to class. The economic disparity between various sections of society in India is vast and it might play a role in the free will of an Indian woman when seeking abortion.

Women as a diverse subject of the law should be constructed in tandem with their complicated interactions between culture, class, religion and other ideological frameworks and institutions. A critical combination of women's varied social conditions should be considered as these multiple social forces are connected and interdependent,[38] giving the woman subject intersectionality and diversity. This requires the creation of diverging modes of answering the woman question since different kinds of social changes are required to emancipate women from their subjugated status in society.[39]

For example, Nalini Karkal brings attention to the fact that in India specifically, the right to abortion is less of a right in its intrinsic sense.[40] In juxtaposition, it is used to regulate population because husbands refuse to use contraception by force. Thus women while exercising their choice are not exercising their free will in reality they are influenced directly or indirectly by prevailing social forces and ethos or families and husbands or by factors like economic constraints, stigma of illegitimacy and so on. However, while analysing the exercise of a woman's free will one needs to tread cautiously so that we do not deprive their agency.[41]

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35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 MENON, *supra* note 30, at 91.
41 MENON, *supra* note 30, at 98.

III. THE DEFICIENCIES OF THE PHYSIOLOGICAL PARADIGM & THE ROLE OF SOCIAL FORCES

With specific reference to reproductive regulation like abortion in physiological paradigms, it has been observed that the Court typically reasons it to be a form of state action that primarily concerns itself with the physical facts of sex than that of the more important social question of gender. In regulations regarding pregnancy, a real physical difference between the sexes can nevertheless be sexually discriminatory, as it can reinforce traditional assumptions about gender roles.[42] This is another trap that Justice Chandrachud falls into, while following the footsteps of the American Jurisprudence on privacy and abortion. The American Court emphasises on the contentious physiological paradigm in both equal protection and privacy law.[43]

Social forces have a powerful part to play in shaping the physiological process of reproduction. They define under which circumstances a woman becomes pregnant including the fact that whether her participation in intercourse was voluntary enough.[44] Social forces and circumstances do not only determine whether a woman has actual access to tools of preventing and terminating a pregnancy but also whether that option is acceptable for her to exercise. They also regulate the quality of health care accessible to woman and her child during and after pregnancy. Social relations govern the primary caregiver for a child once child is born. It makes human reproduction not merely a physiological process like digesting and dying but also a social process governed by culture.[45]

Institutional practices and ideological norms affecting reproduction play a dominant part in defining women's status, the deprivations to which they are exposed, the dignity they are rendered and the degree of autonomy they are permitted or dependency they must suffer. These observations, feminist critical thought and anthropological findings do not inform the reasoning of privacy governing women's reproductive rights. Instead, Justice Chandrachud in his judgement ends up emphasizing the physiological character of women's reproductive role.[46] This results in social relations being upheld by the body politic, finding constitutional justification in this organization of the female. It further curtails the judicial scrutiny of such social norms and practices that affect reproduction and its regulation.

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[42] Reva Siegel, *Reasoning From The Body: A Historical Perspective On Abortion Regulation And Questions Of Equal Protection*, 44 Stan. L. Rev. 261 (1992) [hereinafter Siegel].
[43] *Id.* at 265.
[44] Siegel, at 267.
[45] Siegel, at 267.
[46] Puttaswamy, at 201.

As Nivedita Menon puts it – "*is abortion ever a positive choice?*"[47] This portrays the lack of choice or free will in terms of cultural and socio-economic constraints which renders this choice of abortion an empty one.[48] Women often have abortions for multifarious reasons like to avoid the stigma of illegitimacy or because they are not economically capable of raising another child. Other times because her career does not allow her.[49]

Consequently the opinion in *Roe v. Wade* incorporated decisions about motherhood essentially as a private dilemma to be resolved in the sphere of privacy by a woman and her doctor, completely ignoring social organization of motherhood in the woman's problem.[50] Similarly, Justice Chandrachud fails to incorporate the class-caste dynamic in his majority opinion when he opines that decisional autonomy comprehends intimate personal choices such as those governing reproduction[51] and when he concludes that privacy includes, at its core, the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.[52] He further obscures the extent of the role of the community in regulating a woman's reproductive choices.

Reva Siegel writes that, Roe's decision to terminate her pregnancy, is criticised due to the patriarchal perceptions of the right to abortion. Abortion is perceived to be legitimate if it is used as a feminine instrument of convenience, where the burden of motherhood cannot be borne by any other social actor. This exempts men and the society from its responsibility in shaping the conditions of pregnancy.[53] In the Indian context, this right has been complexly constituted being reactionary in nature to cultural and political elements in society. This makes legal sanction precarious.[54]

IV. ABORTION – PUBLIC OR PRIVATE?

While analysing society, the dichotomy of public and private spheres become extremely important. In this dichotomy, some feminist legal scholars have accredited private sphere as the space of family and home. State is connoted to be public.[55] However, private sphere is

[47] Nivedita Menon, *Sexuality, Caste, Governmentality: Contests Over 'Gender' In India*, 91 Fem. Rev. 94 (2009).
[48] MENON, *supra* note 30, at 95.
[49] MENON, *supra* note 30, at 95.
[50] Siegel, at 273.
[51] Puttaswamy, at 201.
[52] Puttaswamy, at 263.
[53] Siegel, at 274.
[54] MENON, *supra* note 30, at 71.
[55] Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) [hereinafter Higgins].

inextricably political and is not simply physiological or natural.[56] This dichotomous separation is often the cause of women's oppression. The solution does not lie in abandoning the distinction but identifying that the two spaces should not be allowed to be oppositional, exclusivist or rejectionist. This makes them not only crucially interconnected but also mandates that liberal laws of justice need to be applied in the sphere of abortion.[57]

The courts have as a matter of fact been coy about viewing state responsibility in the private space basing on the argument of state complicity in private subordination,[58] focusing on the protection of familial privacy. This has culminated in undermining women's liberty by placing them beyond the reach of legal guarantees.[59] Justice Chandrachud however enables the State to act upon the violence women face in the domestic sphere.[60] Instead of protecting the patriarchal control of women's choices and patriarchal domination of women's inner and public lives,[61] he recognizes the power dynamics in the Indian patriarchal society, making it explicitly clear that the doctrine of privacy cannot be used to shield family honour.[62] He is able to analyse that privacy can be either used as a tool for emancipation of women or as a weapon causing oppression.[63] His analysis recognizes this imbalance; however his solution of placing the choice of abortion under decisional privacy is inconsistent with his recognition. The most significant trouble with the law on privacy is that it assumes that women are equal to men in the private domain.[64] It presumes that women enjoy formal equality whereas the ground reality dictates that various societal pressures disable them from enjoying any right equally.

The solution for this is by placing abortion in a public sphere instead of the private one. As Gayatri Spivak puts it, the fabric of the public sector is woven by the thread of the private. This weaves a unique public potential to the private sector, as it is the texture or the weave of public activity, thus, making the private and public interwoven.[65] This also means that the reversal of

[56] Raia Prokhovnik, *Public and Private Citizenship: From Gender Invisibility To Feminist Inclusiveness*, 60 FEM. REV. 84 (1998).
[57] *Id.,* at 84.
[58] Siegel, at 270.
[59] CATHERINE MACKINNON, ABORTION: ON PUBLIC AND PRIVATE TOWARDS A FEMINIST THEORY OF THE STATE 187 (1989) [hereinafter Mackinnon].
[60] Puttaswamy, at 199.
[61] Higgins, at 1657.
[62] Puttaswamy, at 198.
[63] Bhatia.
[64] MacKinnon, at 191, 194.
[65] MENON, *supra* note 30, at 11.

private-public hierarchy by feminists goes beyond a mere reversal by displacing opposition itself.[66]

Catherine MacKinnon in her book, 'Toward a Feminist Theory of the State', ends the chapter *Abortion: On Public and Private,* by making a poignant statement that privacy law keeps some men out of the bedrooms of other men.'[67] This emphasizes her notion of the idea of privacy embodying a vivid tension between the public and the private. In her opinion, the American Liberal State resolves this distinction by creating a threshold of state intervention which ends where home begins which means staying out of sexuality.[68]

The State fails to acknowledge that women's bodies have not ever been theirs. MacKinnon, argues that for women there has never existed anything called a private space to begin with thus they cannot lose something like privacy, which they never had in the first place. On the basis that the State is male, the right of privacy is a right of men, to be let alone to oppress women".[69]

However, according to Bartlett,[70] the MacKinnon's theory is a perfect example of feminist standpoint epistemology falling short of encapsulating the ground realities, obscuring the importance of differences in categories of women; thus, neglecting the fact that factors other than patriarchy victimize women.[71] Isolating gender as the sole basis for oppression of women by obscuring factors like that of material conditions, it further reinforcing other forms of oppression like abortion in physiological paradigms.

V. CONCLUSION

Rosalind Pollack Petchesky argues that women should have abortion rights as one in the public sphere instead of a private class privilege like privacy. The law of privacy according to her protects the existing aggregation of power in the hands of man.[72] Women in India are influenced directly or indirectly by prevailing social forces and ethos or families and husbands.

Making abortion an individual privacy right evades the more complicated socio-cultural realities that might cause hindrance for women to obtain safe and legal abortions even though the legal

[66] *Id.*
[67] MacKinnon, at 194.
[68] *Id.*
[69] *Id.*
[70] Bartlett, at 829.
[71] *Id.*
[72] ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 295 (9th ed. 1992).

right in privacy might be available to them.[73] The right to abortion under privacy sashays pregnancy and child bearing as an individual and personal physiological paradigm. The portrayal of abortion in privacy as a private choice rather than an integral condition for a decent life simply serves not only to perpetuate but also establish class divisions among women themselves. In such a society fragmented by class, leaving individuals to their own private resources to secure a right would exactly mean exclusion for those who lack the resources.[74]

When courts are unable to analyse the situation from the standpoint of women, it pushes them to take recourses which are illegal and unsafe. This affects women from rural areas and urban slums as they do not have access to any form of prenatal care before the expiry of 20 weeks[75] as codified in the Medical Termination of Pregnancy Act, 1971.[76] The number of abortions that take place discreetly evading the laws are ten times more than the legal ones.[77]

As Menon argues, the creation and recognition of women as subject should not be the just the starting point of feminist politics, it instead should be understood as the goal of feminist politics. The woman question in the *Puttaswamy* judgement becomes integral in this dialogue of placing the right of abortion in the right of privacy by analysing the contested realm of private in the lives of the woman in question. Justice Chandrachud by dismissing the voice of Indian women even after asking 'the woman question' on abortion in his formulation of the doctrine of Privacy upholds the highly contested physiological paradigm of abortion practiced in the American Jurisprudence, failing severely to contextualize the woman in question.

As suggested by Elizabeth Spelman, while writing about this woman it is recommended that the woman about whom the writer means to talk about be explicitly named.[78] It seems that Justice Chandrachud while wanting to talk about an Indian woman ends up basing his doctrine of the prototype of an American-middle class white woman, devoid of the intersectionality and

[73] *Id.*

[74] *Id.*, at 295.

[75] § 3(2), Medical Termination of Pregnancy Act, No. 34 of 1971: For the termination of pregnancy before 12 weeks, the opinion of one medical practitioner is required. However, when the length of the pregnancy exceeds 12 weeks upto 20 weeks, the requirement of two medical practitioners to consent of the abortion is mandated. The latter has been proved to be cumbersome for women living in rural areas, where often times the second practitioner is not available. This is slated to be changed by the Medical Termination of Pregnancy (Amendment) Bill, 2020 wherein the consent of a single medical practitioner will be required upto 20 weeks, however when the abortion is to be undertaken between 20 to 24 weeks, the consent of two medical practitioners will be required.

[76] Priyanka Borpujari, *India's 20-Week Abortion Limit Questioned After Birth Of Unwanted Baby*, NEWS DEEPLY (Jul. 13, 2017), https://www.newsdeeply.com/womenandgirls/articles/2017/07/13/indias-20-week-abortion-limit-questioned-after-birth-of-unwanted-baby.

[77] *Id.*

[78] Bartlett, at 829.

diversity found in the Indian woman subject. Asking this woman question should ideally create diverging modes of answering the woman question, as different kinds of social changes are required to emancipate women from their subjugated status in society.[79] I conclude on the note that emphasis needs to be supplied on the social organization of motherhood in the "woman's problem" when answering this question.

[79] Kuumba, at 85.

FREE WILL, SELF-DETERMINATION AND TRANSGENDER PERSONS ACT, 2019

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ABSTRACT

National Legal Services Authority v. Union of India, 2014 or NALSA judgement granted the status of "Third Gender" to the Transgender community and the right of self-identification to gender non-conforming and gender fluid individuals. Followed by the NALSA judgement, Justice (Retd.) K S Puttaswamy v. Union of India held that right to privacy is a Fundamental Right under Articles 14, 19 and 21. These two judgements paved way for Navtej Johar v. Union of India, 2018 which decriminalized homosexuality by reading down Section 377 of Indian Penal Code. In NALSA judgement, free will becomes an overarching theme as it allows an individual to self-determine.

The advocacy around LGBTQIA rights have been centred on ideas of free choice and self-determination. Transgender Person (Protection of Rights) Act, 2019 completely shifts the narrative of self-determination and subjects members to a paternal gaze by the State. The essay attempts to understand the chasm that is created between the Supreme Court judgement which favours free will and self-determination and the recent Act which strips the community of their right to self-determine. The critical analysis is done along the axis of identity, family and employment.

I. INTRODUCTION

2018 marked a watershed year in Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual [**LGBTQIA**] activism as it decriminalized homosexuality by reading down Section 377 of Indian Penal Code in *Navtej Singh Johar and Others v. Union of India*[1] [**the *Navtej Johar* judgment**]. In 2019, the controversial *Transgender Persons (Protection of Rights) Act, 2019*[2] [**the Statute** or **the Act**] was passed through a majority in Lok Sabha and Rajya Sabha. The Statute that came after a series of historical pronouncements from the Supreme Court subverted the precedent created by *National Legal Services Authority v. Union of India*[3] [***NALSA* judgement**], *Justice (Retd.) K.S. Puttaswamy v. Union of India*[4] [***Puttaswamy* judgement**] and even the *Navtej Johar* judgment. The overarching theme in all these three judgments is the idea of self-determination and the freedom to make choices. In this essay the idea of self-determination and free choice will be critically analysed in the context of the Act on the basis of three criteria present in it:

a. The first criterion being the need to procure a gender identity certificate from the State authority;

[1] Navtej Singh Johar and Others v. Union of India, (2018) 10 SCC 1 (India).
[2] Transgender Persons (Protection of Rights) Act, No. 40 of 2019.
[3] National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (India) [hereinafter NALSA].
[4] Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

b. The second criterion being the definition of family as presented within the Act under Section 2(c); and
c. The third criterion being the provisions that have been created to provide and generate employment for Transgender persons.

The first part of the essay will define free will and self-determination. This will be followed by analysis of the provisions that mandate the procurement of gender certificate. The third part will critically examine the notion of the family as it has been defined in the Act. The fourth part will examine the provisions that have been created for the employment for Transgender persons. All of these aspects will be examined against the larger theme of free choice and self-determination. The larger questions that we attempt to answer is through the various provisions of the Act- *does the State empower a Transgender person to make choices? Does the Act allow for self-determination?* The aspects of free will and self-determination are in contestation with the Statist gaze and this essay aims at analysing these contestations.

II. FREE WILL AND SELF DETERMINATION: THE THEORETICAL FRAMEWORK

The idea of free will and self-determination has been the subject of philosophical speculation since the conception of ancient philosophy. The central question surrounding the notion of free will is, whether a decision taken by an individual is solely taken by their internal states i.e. their ideas, believes and character disposition or external factors influence that process of decision making.[5] The central belief in twentieth century western philosophy was that without free will there is little reason for individuals to act morally.[6] The problem known as the freewill problem is whether we are in control of how we act.[7]

As individuals, we make choices on a daily basis. These choices are characterised as surface freedoms which are our actions for day to day living. However, freewill runs deeper than the surface freedoms.[8] While we would be free to act or to choose what we will to do but do we have the ultimate power over it?[9] Are there other external agents that are pulling strings and manipulating us into having the wishes we want to have?

[5] Timothy o' Connor & Christopher Franklin, *Free Will*, STAN. ENCYCLOPEDIA PHIL. (Spring 2020), https://plato.stanford.edu/entries/freewill/.
[6] *Id.*
[7] THOMAS PINK, FREE WILL-A VERY SHORT INTRODUCTION 3 (Oxford University Press, 2004).
[8] ROBERT KANE, A CONTEMPORARY INTRODUCTION TO FREEWILL 2 (Oxford University Press, 2005).
[9] *Id.*

It is in the context of these larger questions that two categories of freedom become important to assert one's freewill. The first category of freedom is the *freedom of self-realization* which is the power and the ability to do what we want to do and which entails the absence of external constraints preventing us from realizing our wants and actions.[10] The freedom of self-realization includes all social and political freedoms that are highly valued by all citizens and such freedom from external constraints are integral to free societies.[11]

The second category of freedom is the *freedom of self-determination* which is the power to act accordance to our own free will. This could be an identity, motive or purpose of one's own making, that the individual is ultimately responsible for forming.[12] To be self-determining is to be able to determine one's actions in terms of the Real or Deep Self with which one identifies or to which one is wholeheartedly committed; or it is to be able to control one's desires in terms of one's Reason or values—as well as being able to do what one wants without hindrances or impediments.[13]

The freedom of self- realization and the freedom of self-determination are two frameworks that will be used to analyse the *Transgender Persons (Protection of Rights) Act, 2019* along the axis of identity, family and employment.

III. GENDER IDENTITY CERTIFICATE: SUBVERTING SELF DETERMINATION?

Transgender is generally used as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. Transgender may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves as "third gender" and they do not identify as either male or female. Transgender also includes persons who intend to undergo Sex Re-Assignment Surgery [**SRS**] or have undergone SRS to align their biological sex with their gender identity in order to become male or female.[14]

The problem with gender identity certificate is that it takes away the right of self-determination. One hand the state provides the right to self-identify, but on the other hand the need to obtain a certificate is again restricting the transgender person to the State norm. Section 4(2) of the Act

[10] KANE, *supra* note 8, at 163.
[11] KANE, *supra* note 8, at 6.
[12] KANE, *supra* note 8, at 172.
[13] KANE, *supra* note 8.
[14] NALSA, ¶ 11.

states that a transgender person has the right to self-perceived identity. While the Act grants the right to self-perceived identity, the recognition of that identity is contingent upon State apparatuses as stated in Section 5 and 6 of the Act. Section 5 makes provisions for a transgender person to make an application to the District Magistrate for issuing a certificate of identity. Section 6(3) states that the certificate issued shall confer rights and proof of recognition of their identity as a transgender.

According to the provisions of the Act while a transgender person has the right to self-perceived gender identity, the right to recognition of that identity is tethered to the State and subject to State scrutiny. It is only when the certificate is issued will the transgender person be conferred with rights and proof of recognition. Hence, all the welfare measures and provisions laid out in the Act and other welfare measures that may be introduced and is applicable to transgender person as well, is subject to their recognition by the State and the subsequent issuance of the certificate. This aspect of right to self-perceived identity versus recognition by the State subverts the aspect of free will and self-determination.

The aspect of gender identity certificate as mentioned in the Act when posed against the question of freewill and self-determination as stated in Part II of the essay. The first question is whether there are external agents and constraints that determine what transgender persons as a community can and cannot have? The State being the external agent in this case and the gender identity certificate being the external constraint in this case. The main issue arising out of the provision of the gender certificate is the dependence on external factors for recognition of identity.

In the *NALSA* judgment, the Supreme Court laid down that the transgender and intersex persons have the constitutional right to self-identify their gender as male, female or transgender, even without a medical intervention.[15] The Court held, "*Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including* ***SRS****, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.*"[16]

Section 6 of the Act, only allows for an identity certificate as 'transgender'. It does not allow for recognition of gender identity as 'male' or 'female', unless a SRS has been undergone. This is

[15] NALSA, ¶ 20.
[16] NALSA, ¶ 20.

clear violation of the *NALSA* judgment, which recognised the right to self-identify oneself as male, female or transgender".[17]

Section 7 of the Act requires that if a transgender person obtains a certificate under Section 6 and undergoes SRS after that, to obtain a revised identity certificate, application shall have to be made to the District Magistrate, along with a certificate to the effect that the transgender person has undergone surgery either as a male or a female by the Medical Superintendent or Chief Medical Officer of the medical institution in which the transgender has undergone SRS. Medical procedures should not be required as a pre-condition for any identity documents for transgender and intersex persons. The clause mandating a transgender person to submit proof of medical treatment in order to prove their gender identity, violates their free will.[18]

Any law that produces a relation between the individual and the State that produces an impermissible government control over individuals is totalitarian and does violence to the letter and spirit of the Constitution.[19] In this case, the Act takes away the element of self-determination from the hands of the transgender person, and vests the decision making on the State according to its prerogative.

At the time of birth of a child, it is assigned a gender based on genital appearance. This "male" or "female" identity recorded on a birth certificate, becomes the child's legal gender, and helps structure the individual's life.[20] This identity affects how the individual navigates sex-segregated facilities, legal documentation, gendered expectations and interactions with state and non-state entities.[21] For most people, this assigned legal gender will raise little to no concern because most people identify with their assigned legal gender.[22]

In the context of legal gender, transgender people are the ones who find themselves most encumbered. Specifically, transgender people who do not identify with their legal gender experience intense expressive and dignitary harm and are often subjected to violence, harassment and insult when they try to change their legal gender in the documents.[23] They suffer through

[17] NALSA, ¶ 19 & 20.
[18] Jayna Kothari, *A law that defeats its purpose,* THE HINDU (Dec. 29, 2018), https://www.thehindu.com/opinion/op-ed/a-law-that-defeats-its-purpose/article25854190.ece.
[19] Brian T. Ruocco, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193 (2016).
[20] Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731 (2008), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1349&context=faculty.
[21] Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731,737,752.
[22] *Id.*
[23] Ruocco, *supra* note 19, at 193-226.

harassments so often that it becomes necessary for them to get their legal gender as the gender they identify themselves with, else surviving becomes a daily struggle. The process is tedious and extremely derogatory, especially when it comes to medical examinations.

Revathi, a Transgender activist recalls the struggle she had to endure to get a passport in the year 2003. **"***Getting a passport was an affirmation of my rights as a citizen of India. But being a Trans-woman made it even more complex and difficult. There are only two boxes in the passport form: Male or Female*"[24]. When she landed at the passport office in Bengaluru, the authorities pointed out the discrepancy in the name in her school leaving certificate, which was Doraiswamy which did not match her female name "Revathi". Despite insisting that she was a trans-woman who had undergone a sex change surgery she was asked to get a medical certificate proving the sex change. She endured so much humiliation, as she was treated as an object of curiosity, looked in with voyeuristic delight.[25]

Almost two decades later, The Transgender Person (Protection of Rights) Act, 2019 still demands for a certificate issued by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery. If transgender persons had no right to self-identify their gender back in 2003, and in the year 2019 and if the Act still only provides the provision to get the status of "transgender" and only further allows to be identified as "male" or "female" after the SRS and after the scrutiny by the District Magistrate, then the purpose proves to be self-defeating. If it does not provide for self-determination then on what grounds are their interests being protected? How can transgender persons exercise their free will and freedom of self-realization, if they are forced to go through a medical examination in order to obtain a certificate proving their gender? This provision of the Act violates the *NALSA* judgement, which unambiguously stated that the right to self-identity is a Constitutional right.[26]

When transgender persons are not allowed to record their true identities on legal documents, or opt out of legal gender altogether, they are compelled to affirmatively identify with a gender that is contrary to their core identity.[27] People whose gender identity matches their legal gender are often unaware of the insidious ways in which legal gender affects transgender people.[28] It is a

[24] A. REVATHI, V. GEETHA, THE TRUTH ABOUT ME: A HIJRA LIFE STORY 21 (Penguin Global, 2010).
[25] A. NANDINI REVATHI MURALI, A LIFE IN TRANS ACTIVISM XXVII (Zubaan Books, 2010).
[26] NALSA.
[27] *Id.*
[28] *Id.*

common misunderstanding that all transgender persons want or need genital surgery or SRS.[29] Such misconception objectifies transgender persons and has led to the notion that genital surgery must be a requirement for legal gender reclassification. However, transgender persons have different "aims and desires for their bodies," and they express their gender identity accordingly.[30]The State causes expressive harm by meaningfully repudiating transgender person's identities. Moreover, state restrictions on gender reclassification deny individual autonomy and self-definition.[31]

IV. FAMILY: NATURE OR NURTURE?

All of us inhabit a normative world. The law and the legal systems are a part of the normative world, which construct the systems and also give meaning to it[32]. If law is closely connected to the narratives that add meaning in a social context, then it is worth extrapolating the social narratives perpetuated by the Act, especially in relation to the institution of family.

The dominant social narrative always has the family created within the norm of heterosexuality, as the bedrock for sustaining patriarchy, communities and the nation[33]. The dominant social narrative of heterosexual family as the acceptable form of expressing sexuality and desire creates a process of "othering". The individuals who fail to comply with this framework of heterosexuality become the "others". The cornerstone of queer activism has been to contest this idea of gender as a mutually exclusive category. It challenges the idea of "normal" and "abnormal", not as naturals but rather as social constructs which can be subverted.[34] It pushes the envelope of gender beyond biology.

Section 2(c) of the Act defines family as a group of people related by blood or marriage or by adoption made in accordance with law. It is in this definition of the Act that the notion of family linked to biology is reiterated. This notion is problematic because it does not acknowledge the family like structures that transgender people have traditionally been part of which serves both as an economic and social unit. Further, biological families are often a site of violence for transgender people because of the social stigma attached to their gender non-conformity. The

[29] Lenny Bernstein, *Here is how Sex Reassignment Surgery Works,* WASHINGTON POST (Feb. 9, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/02/09/heres-how-sex-reassignment-surgery-works/.
[30] NALSA.
[31] *Id.*
[32] Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1995).
[33] NIVEDITA MENON, SEEING LIKE A FEMINIST 39 (Penguin Books, 2012).
[34] Ruth Benedict, *Anthropology and the Abnormal*, 10 J. GEN. PSYCHOL. 59-82 (1934).

definition of family within the Act is self-defeating because it reiterates the same heteronormative idea of family that the LGBTQIA activism has tried to challenge.

The problematic notion of tethering a gender non-confirming individual with their biological family is further reiterated in Section 12 of the Act which states that, "*No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child*". Section 12 (3) further states, "*Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre*". In these two sections, two aspects are emerging, the duty and care of a gender non confirming child is solely with the biological family, in the event that the biological family fails to provide care the legal system steps in. The clauses systematically exclude the transgender community and their *gharana* system of living.

V. THE SOCIAL STRUCTURE OF THE TRANSGENDER COMMUNITIES

Gharana system, which is a "structural principle of organization; they do not have a spatial dimension"[35]. There are two parts of this definition. First, there is the structural principal of organization where every *gharana* has a hierarchical organization with the *Naik* or the head of the *gharana*. Under the *Naik* there are *gurus* and every *guru* has their own set of *chelas*. It is the relationship with a *guru* that legitimizes a hijra identity. When a hijra gets associated with a *guru* she is getting associated with an entire kin the link of which is through the *guru.*[36]

There is an idealization of the *guru-chela* relationship as being equivalent to a mother daughter relationship. Reddy elaborates on this point by stating that the authenticity of the hijra identity within the community is gauged by the *gharana* with which a hijra is associated with. The ones with a *gharana* identity are considered to be higher in the hierarchy than the ones who choose to live without *gharana* identity.[37] Living without a *gharana* identity is considered to be a "social suicide" because being expelled from one community implies that the hijra will not be accepted in any other *gharana.*[38] Definition of family in the Act is rooted to the idea of family either by birth, marriage or adoption i.e., it is rooted in the idea of a "normal" family. Whereas, traditionally transgender communities have lived in the *gharana* system which serves both as a social and as an economic unit. This finds no acknowledgement in the Act.

[35] SERENA NANDA, NEITHER MEN NOR WOMEN: THE HIJRAS OF INDIA 39 (Cengage Learning, 1998).
[36] GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 145 (University of Chicago Press, 2005).
[37] *Id.*, at 31.
[38] *Id.*, at 30.

Revathi in her book 'A Life of Trans Activism' recalls an incident where she was severely beaten by her middle brother with a cricket bat for being around other transgenders in her locality. He threatened her for wearing a sari and dancing. He beat her up mindlessly and said that he would kill her. Revathi tried to protect her face and head from the blows, but they kept coming and her brother finally brought the bat down heavily on her head. Her skull cracked and blood flowed everywhere.[39] In yet another incident her family rounds her up and questions her *"Have you ever thought what people will say about our family? What is it you lack here? Don't you have enough to eat and good clothes to wear?"*. This was after she was beaten up by her brother.[40] Literature of lives of transgender persons and the biographies narrate incidents of violence that they have faced from their biological families for their explicit gender non-conformity.

The Act strips the transgender persons of the right to live safely within the transgender community because such social arrangements do not find recognition within the definition of family. It further subjects the members of transgender community for police and State scrutiny for admitting new members who maybe fleeing family violence or looking for similar communities to understand and assert their identities.

VI. PROVISION FOR EMPLOYMENT AND ITS IMPLICATIONS

The Act in Section 18 states, "*Whoever,— (a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government*". The terms "forced and bonded labour" has not been defined in the Act, which leaves it open to interpretation. Two areas which has been historically used to criminalise transgenders has been begging and sex work. Forced labour could be interpreted to include begging and sex work. This comes with its own downside and has serious implications. A large number of people from the transgender and intersex community are engaged in begging and sex work due to discrimination they face when pursuing 'normal' work. They do not have many other employment opportunities. This provision of the Act could lead to members of the transgender community being criminalised for making a living.[41]

[39] *Supra* note 24.
[40] *Supra* note 24, at 10.
[41] John. L. Paul *Metro Brings More Transgender on Board,* THE HINDU (Jan. 27 2018) https://www.thehindu.com/news/cities/Kochi/metro-brings-more-transgenders-on-board/article22538071.ece.

"Sex work" is a broad term used to describe exchanges of sex or sexual activity. Sex work is also used as a non-stigmatizing term for "prostitution".[42] Many transgender people participate in the sex trade in order to earn income or as an alternative job to earn a living. The criminalizing and stigmatizing of sex work can worsen the discrimination and marginalization that transgender people already face in society. Transgender sex workers experience harassment and violence for being out in the streets and in public, often at the hands of police.[43]

Revathi, a transgender woman narrates an incident where the police arrested her and illegally detained her for two days at the Cubbon Park Police Station. She was physically and verbally abused. She was forced to eat off the floor and then wash and clean the floor. She kept wondering as to why she was suffering like this and whether of all this was because she was into sex work. "*If other job opportunities were available, I could live like other women"*.[44] The fact finding and incident reports by People's Union of Civil Liberties, Alternative Law Forum, Sangama and other organizations working in the sphere of transgender rights show us a picture of antagonistic relations between police and transgender people. There are a few incidents which have brought to attention the violence faced by the community at the hands of the legal system, especially by the local police officers.

In 2002, four Kothi sex workers Seetam Sheela, Vimla and Malathi were taken to Sampangiramanagara Police Station in Bangalore, where they were illegally detained and physically harassed and beaten up.[45] No charges were pressed against them and they were let go with a warning that they should not be seen on streets. In 2004, a transgender named Kokila was raped and subjected to brutal physical assault at the hands of the police. Kokila was being gang raped when the police walked into the site. While the goons ran away, Kokila was arrested and illegally detained. During detention she was subjected to rape and physical assault by the police officers.[46]

Such atrocities are faced by the transgender persons regularly at the hands of the police. The Kochi Metro Rail Limited [**KMRL**] takes credit for recruiting 23 members of the transgender community in June 2017, and is also the first Government owned company in India to formally

[42] ERIN FITZGERALD ET AL., MEANINGFUL WORK, TRANSGENDER EXPERIENCES IN THE SEX TRADE 8 (2015).
[43] *Id.* at 40.
[44] REVATHI MURALI, *supra* note *25* at 28.
[45] PEOPLE'S UNION OF CIVIL LIBERTIES, HUMAN RIGHTS VIOLATIONS AGAINST THE TRANSGENDER COMMUNITY, (2003).
[46] *Id.*

appoint them.[47] However, 8 out of them quit their jobs within a month due to refusal by several landlords to give them accommodation. They were left with no remedy but to quit their jobs since their employer had no legal obligation and/ or incentive to step in and help them fight against such discrimination.

Under such cases, transgender persons are forced to take up other jobs like begging or sex work.[48] One such transgender employee walked out of the office of KMRL after her first day at work and had to find a customer for sex because she did not have enough money to pay the house rent the next day. "*It was the first time I was doing it, I had no other option*," she says. Her stay was in the terrace of a lodge, covered with a tin sheet, for which the owner charged her INR 600/- daily. It was a steep price to pay but people are unwilling to rent to transgender persons.[49]

The Yogyakarta Principle number 12 states that everyone has "The Right to Work". The kind of work that is decent and productive in just and favourable conditions, without discrimination on the basis of sexual orientation or gender identity. In light of this right, the States are required to take necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity.[50]

It also states that State must eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service.[51] Hence, it is up to the State to make arrangements to provide the gender minority with employment opportunities, and also take steps to curb the discrimination they face at workplace. Without taking these measures, criminalising begging or sex work by transgender persons would only do more harm than good. Criminalising their only means of livelihood without providing them with alternate means is highly counterproductive and would lead to more transgender persons being oppressed by State machinery and further social marginalization.

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[47] John. L. Paul, *Metro Brings More Transgender on Board,* THE HINDU, (Jan. 27, 2018), https://www.thehindu.com/news/cities/Kochi/metro-brings-more-transgenders-on-board/article22538071.ece.

[48] Nidheesh M.K. *Transgenders in Kochi Metro: The Untold Story,* LIVEMINT, (Jun. 23, 2017), https://www.livemint.com/Leisure/hAxjCCa2Ovnv9DJSULDQHP/How-Kochi-Metro-is-making-a-difference-in-the-lives-of-trans.html.

[49] *Id.*

[50] *The Yogyakarta Principles - How International Human Rights Protect LGBTI People*, Transgender Europe (Jan. 31, 2018), https://tgeu.org/yogyakarta-principles/.

[51] *Id.*

We had filed an Right To Information [**RTI**] with the Ministry of Labour & Employment to find out the exact number of transgender persons employed by the Central Government.[52] Our request was transferred to the Department of Personnel and Training, who further designated it to 9 other organisations including the Union Public Service Commission [**UPSC**], State Selection Commission [**SSC**]. The response from the concerned departments shed some light upon the nature of Transgender person employment data available with the State and its various departments.

The response for the enquiry from UPSC was, "No such data were available with the Central Public Information Officer [**CPIO**]." The response from SSC was, "No recorded information is available with CPIO being not compiled and maintained in the desired format" and also, "Such particular information is not maintained by CPIO". The Department of Personnel and Training replied with, "so far as (Reservation-II) section, Department of Personnel and Training [**DoPT**] is concerned, no such data is maintained."[53] As per the RTIs filed, the Government has no clear records of how many transgender persons are employed by it, if at all there are any. Hence, the Government's role in increasing their employment opportunities is little to none. In situations like these, introducing a provision which would result in punishing transgender person for taking up other forms of employment is quite disturbing. Often times transgender person opt for begging and sex work as a last resort.

Transgender persons are believed to be endowed with the power to confer fertility on newlyweds or new born children. They see this as their "traditional" ritual role, although at least half of the current *hijra* population (at least in Hyderabad) engages in prostitution, which hierarchically senior "ritual specialists" greatly disparage.[54] The pattern of employment and livelihood of transgender people in Delhi and UP from a field survey conducted by the National Human Rights Commission [**NHRC**] tells us that .[55]

6% of transgender people from Delhi and UP are employed in private/NGO sector. Majority of transgender people are engaged in the informal sector. The results showed that nobody is employed in the Government sector. 24.44% of them are engaged in badhai, blessings, singing

[52] The copies of RTI filed by the authors are verified and available with the Indian Journal of Legal Theory. Readers may contact IJLT in case they need the same. This is subject to the consent of the authors.
[53] Response received for the RTI filed.
[54] *Supra* note 33, at 2.
[55] Jacob John, *Study on Human Rights of Transgenders as a Third Gender,* NATIONAL HUMAN RIGHTS COMMISSION 29 (2018), https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf.

and dancing, while 4.56% of Transgender persons are sex workers. About 10.44% are engaged in begging and 13.11% are engaged in sale of food items, fruits, flowers, vegetables etc.[56]

From the above statistics it is evident that there are no measures put in place to provide job security to transgender persons, or even provide them with adequate job opportunities to begin with. In such a scenario, it would be counter-productive to criminalise transgender persons for taking up other means of livelihood. Dire economic situations and a combination of discrimination in education and the workplace pushes many transgender people to engage in sex work. It is sometime necessary and vital means of survival for many, when they lack steady income or access to other employment opportunities.[57]

VII. CONCLUSION

Freewill and self-determination are crucial aspects and have been the overarching themes in *NALSA*, *Puttaswamy* and *Navjet Johar* judgements. The Act in many ways fails to take the spirit of the judgement or even some of its mandates. In certain cases contradicts the judgement. This aspect is evident in the provision for the gender identity certificate. While it allows a Transgender person to have the right to a self-perceived gender identity, it tethers the recognition of that identity on State apparatuses. Transgender persons as a community are not free from external impediments taking them further away from the freedom to self-realization by mandating the need of a Medical certification to prove their identity.

The essay further tells how by restricting the meaning of "family", the Act tries to avoid the existence of the Community and their *gharna* system of living. Transgender literature and narrations of stories by members of transgender community has shown family as an institution that perpetuate violence to uphold social norms around gender and sex. This leads to physical, emotional and sexual violence of the transgender. Historically, they have found occupation, safety and acceptance within the *gharana* system of living. This community finds no mention or recognition in the Act, reducing family to be only biological family.

Further the Act could be used to criminalising the livelihood of transgender persons with which they earn a living, without supporting it with the required employment opportunities or vocational training seems to be serving no purpose for the transgender persons. The Act which

[56] *Id.*
[57] *Supra* note 24.

was primarily meant for the protection of transgender rights further subjects them to the mercy of the State and its machinery.

A FEMINIST ANALYSIS OF MAHMOOD FAROOQUI V. STATE: THE ISSUES OF CONSENT, POWER AND REAL RAPE

ISHANI MOOKHERJEE*

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ABSTRACT

The essay critically analyses the flaws in the Delhi High Court's interpretation of the rape law provisions in the Indian Penal Code, 1860 post-2013 Amendment, in the case of Mahmood Farooqui v. State, using the lens of Radical Feminism. While Section 375 envisions that consent should be ascertained from the woman's perspective, the Court excessively emphasized upon what had been communicated to the accused, thereby reinforcing the idea of 'man's objective standard' and using the male gaze to judge the prosecutrix's conduct. By adopting a purely performative account, the Court ignored her mental state and the convoluted power dynamics of man-woman and mentor-student relation between the parties. The Court's remark that a feeble 'no' may mean a 'yes', especially in 'acts of passion' between known people, indicates how it failed to recognise that passive acquiescence is not tantamount to meaningful consent. Lastly, by refusing to acknowledge that 'borderline' situations may constitute rape under Section 375, the Court reinforced the obsession with patriarchal conceptions of real rape and battered victim. Thus, in light of feminist jurisprudence, the judgment reinforced patriarchal norms, legitimized a masculine view of consent and ultimately, made the woman responsible for active resistance.

I. INTRODUCTION

The Delhi High Court, in the case of *Mahmood Farooqui v. State (NCT of Delhi)*,[1] interpreted the rape law provisions in the Indian Penal Code, 1860 post-2013 Amendment.[2] In this case, the prosecutrix and the accused were known to each other and had shared past physical intimacy. On the day of the alleged rape, they were alone at the accused's house. Since the accused was in an intoxicated state, crying bitterly, the prosecutrix hugged him and tried to console him. In turn the accused kissed her, disclosed his intention of sucking her and pulled her underwear down, despite her prompt denial and constant efforts to resist. The accused forced oral sex upon her and the prosecutrix, to prevent further harm, feigned an orgasm. The accused tried to repeat it, but the doorbell rang and their friends arrived, after which the prosecutrix left. On such facts, the accused was charged under the offence of rape under Section 376(1).[3]

On the basis of the evidence recorded, the Sessions Court observed that the prosecutrix was a '*firm, consistent, cogent and trustworthy'* witness.[4] 'Consent' under Explanation 2 of Section 375 meant an *intelligent, positive concurrence* of the woman, given while she is a 'free and unconstrained' possession of her moral and physical power. Submission under fear would not amount to

[1] Mahmood Farooqui v. State (NCT of Delhi) (2017) 4 JCC 2784 (India) [hereinafter Farooqui 2017].
[2] § 9, The Criminal Law (Amendment) Act, No. 13 of 2013
[3] Farooqui 2017, ¶¶1–6, at 81.
[4] State (Govt. of NCT of Delhi) v. Mahmood Farooqui (2016) Sc. No. 1590/2016 Saket Courts New Delhi, ¶1 [hereinafter Farooqui 2016].

consent.[5] Since there was no definite consent to the alleged sexual act, the accused was held to be guilty.[6] However, the Delhi High Court reversed the order. The High Court recognised that a rape victim is not accomplice, and her testimony is of sterling quality,[7] thereby rejecting *Hale's warning*,[8] as per which evidence of unchastity and prior sexual conduct was used to reduce the relevance of her actual consent. Despite such observations, the Court held that there was still doubt as to whether the incident was without the consent of prosecutrix and whether the accused could discern her unwillingness,[9] gave the benefit of doubt to the accused and acquitted him.[10]

In my opinion, the judgment is inherently problematic because of the way it interpreted and ascertained the presence of 'consent' of the prosecutrix and failed to consider her mental state, her agency and the complex power dynamics between the parties. This essay critically analyses the flaws in the Court's verdict, using the lens of feminism, primarily Radical Feminism.

II. CONSENT THROUGH THE MALE GAZE

A. Questioning the Objective Male Standard

According to Radical Feminists, patriarchy is the cause of oppression of women and rape is a pillar of patriarchy.[11] Under a patriarchal system, men occupy positions of power, owing to which, they become the standard from which the reality is judged.[12] Their perspective is deemed to be objective and credible.[13] Consequently, though 'rape is an injury from the women's perspective; it is a *crime from man's perspective'*.[14] Criticising the requirement of *mens rea* in rape, MacKinnon argues that '*the man's perceptions of the woman's desires determine whether she is deemed violated*,' even though men are 'systematically conditioned' to ignore what women want.[15] Rapists

[5] Farooqui 2016, ¶103:"*A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical or moral power to act in a manner she wanted. Submission under the influence of fear or terror or false promise is not consent.*"
[6] *Id.*
[7] Farooqui 2017, ¶64.
[8] David Giacopassi & Karen Wilkinson, *Rape and the Devalued Victim,* 9(4) LAW & HUMAN BEHAVIOR 376 (1985).
[9] Farooqui 2017, ¶102.
[10] *Id.*¶102-103.
[11] Igor Primorac, *Radical Feminism on Rape*, HEBREW UNIV. JERUSALEM 497 (1998); Sarbani Guha Ghosal, *Socio-Political Dimensions of Rape,* 70(1) IND. J. POL. SCI. 107 (2009).
[12] A. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 4-15 (2nd ed. 2005) *as cited in* R Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), https://plato.stanford.edu/entries/feminism-rape/.
[13] *Id.*
[14] Catharine A. MacKinnon, *Rape: On Coercion and Consent, in* TOWARD A FEMINIST THEORY OF THE STATE 181 (1989) [hereinafter MacKinnon-*Rape*].
[15] *Id.*

typically believe the woman loved it.[16] Moreover, a gender-neutral 'reasonable belief' standard, to ascertain whether the woman was violated, is also problematic since the objectivity is unachievable, owing to inherently unequal social positioning of men and women.[17] Since violence against women is eroticised,[18] the objective standard is inevitably based on upon pornographic and patriarchal assumptions.[19] Along with feminists, critical legal scholars also criticise the apparent neutrality and objectivity in law. Since law is entrenched within a network of social and historical relations,[20] it merely creates an illusion of neutrality and impartiality, while perpetuating the power relations and the conditions of inequality.[21] On similar lines, Estrich argues that criminal justice system normalises 'male aggressiveness' and 'female passivity', which are internalised by both men and women.[22]

Consent has often been understood as somewhere between what the woman actually wanted and what the man comprehended she wanted.[23] Feminists argue that consent is always communicated under conditions of inequality.[24] 'The naturally superior, sexually aggressive man makes an initiative, to which a naturally subordinate, passive woman consents'.[25] Consent is thus seen as a woman's form of control, different from the male initiative.[26] However, the law fails to capture this dynamic and legitimizes the man's perspective.[27] The repetition of the dynamic, wherein the man is reinforced as the 'subject' and the woman as the 'object',[28] leads to its reification across the spectrum of social activity'[29] and normalizes male domination over women in the sexual sphere. As a result, non-consent in law becomes a question of the man's force or the woman's active resistance or both.[30] Accordingly, the woman is required to unequivocally and assertively express her unwillingness.

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16 MacKinnon-*Rape*.
17 *Id.*
18 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 89 (1987) *as cited in* NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).
19 MacKinnon-*Rape*.
20 Margaret Davies, *Critical Legal Studies: The Beginnings of a Dissolution*, *in* ASKING THE LAW QUESTION: THE DISSOLUTION OF LEGAL THEORY (2002).
21 Robert Gordon, *Law and Ideology,* 3(1) TIKKUN 14 (1989).
22 Susan Estrich, *Rape*, 95(6) YALE L. J. 1087 (1986).
23 Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,* 8(4) FEMINIST THEORY 635 (1983) [hereinafter MacKinnon-*Feminism*].
24 Carole Pateman, *Women and Consent*,8(2) POLITICAL THEORY 149 (1980).
25 *Id.*
26 *Id.*
27 MacKinnon-*Feminism*.
28 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 124 (1987).
29 Michael J. Clark, *Deconstruction, Feminism, and Law: Cornell and MacKinnon on Female Subjectivity and Resistance,* 12(1) DUKE J. GENDER L. & POL'Y 107 (2005).
30 MacKinnon-*Feminism*.

B. Amended Section 375: Encapsulating the Woman's Perspective

Owing to such patriarchal conception of law, wherein the woman's perspective is ignored, feminists, including Bartlett, argue that it is necessary to 'ask the woman question'.[31] They challenge the formulation of consent from the perspective of the man and what he reasonably comprehended, rather than the intentions the woman reasonably conveyed.[32] Thereby, several feminists demand for the adoption of a 'reasonable woman standard'.[33]

As per the amended provision of Section 375, if a man commits any of the acts mentioned therein, without the consent of the woman, he is guilty of rape.[34] Consent is explicitly defined under Explanation 2 as "*an unequivocal voluntary agreement when the woman by … verbal or non-verbal communication, communicates, willingness to participate in the specific sexual intercourse*". As per the proviso, a woman is not required to prove 'utmost' physical resistance on her part to show her unwillingness.[35] Therefore, as per the codified law, consent has to be analysed from the women's perspective. This places women as the subject of the law, giving recognition to their agency and control over their sexuality.[36] Thus, while the woman is supposed to express her willingness to participate in the act, the man is also required to make a responsible effort to decipher it.[37] Thus, Section 375 encapsulates the feminist ideologies which condemn the formulation of consent from the accused's perspective.

C. Male Gaze to determine Female Conduct

However, in *Farooqui v. State*, the Court completely ignored such feminist formulation of 'consent', displaced the woman and placed the man as the centre of the law. It constantly focused on what the accused comprehended, not what the woman said. "*Even if the act was not with her consent, she actually communicated something which was taken as consent.*"[38] It even framed the issues from the accused's perspective: "*whether the appellant mistakenly accepted the moves of the prosecutrix as consent, whether the feelings of the prosecutrix could be effectively communicated to the appellant and*

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[31] Katharine T. Bartlett, *Feminist Legal Methods,* 103(4) HARV. L. REV. 829 (1990).
[32] *Id.*
[33] Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance,* 10(2) Columbia J. Gender & L.195 (2001) *as cited in* R. Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), https://plato.stanford.edu/entries/feminism-rape/.
[34] § 375, The Indian Penal Code, No. 45 of 1860.
[35] § 375, *proviso* to Explanation 2, The Indian Penal Code, No. 45 of 1860.
[36] Latika Vasisht, *The Terms of Consent: on the Farooqui verdict*, THE HINDU (Oct. 4, 2017), https://www.thehindu.com/opinion/op-ed/the-terms-of-consent/article19797667.ece.
[37] *Id.*
[38] Farooqui 2017, at ¶43, 45.

whether mistaking all this for consent by the appellant is genuine."[39] The Court relied upon Section 90 of the Indian Penal Code, 1860, observing that consent given under fear is invalid only if the accused *knew* that it was given under fear.[40] Thus, reading Section 90 read with Section 375, it held that since the accused did not know about the fear in the minds of the prosecutrix, the feigned orgasm may have been taken as non-verbal communication of consent.[41]

In my opinion, by adopting such a perspective, the Court completely erased the woman's voice in controlling her sexuality and reinforced patriarchal standards and male gaze in determining the issue of consent.[42] Section 90 embodies the element of *mens rea* in rape. There are two possibilities for vitiating consent—knowledge or reasonable belief that the consent was given under fear or mistake of fact,[43] both of which are requirements which have been challenged by the feminists. However, in this case, in my opinion, it was not consent given under fear, it was lack of meaningful consent in its entirety and hence, Section 90 should have no application. Moreover, it can be argued that Section 90 can protect a negligent rapist, but not a reckless rapist. Here, the accused forced oral sex upon the prosecutrix with callous disregard of her desire and recklessly ignored her resistance, and thus should not be protected under this Section.

In this regard, faced with ambiguity as to the presence of consent, the Court employed an interpretation, wherein 'the male standard' was used to judge the 'conduct of woman victim'[44] and the entire issue of communication of consent was ascertained from the man's perspective. It completely erased the woman's voice in controlling her sexuality and reinforced male gaze in determining the issue of consent.[45]

III. ACCOUNTS OF CONSENT AS PERFORMATIVE OR ATTITUDINAL

A. Performative account of Prosecutrix's Consent

The Court was not only mistaken in applying the codified law, which envisages that a woman's perspective should be considered, but also in assessing the presence of her consent. Feminists argue that there must be lack of meaningful consent. Consent can be analysed through either

[39] Vasisht, *supra* note 36.
[40] Farooqui 2017, at ¶80.
[41] *Id.,* ¶82.
[42] Vasisht *supra* note 36.
[43] § 90, The Indian Penal Code, No. 45 of 1860.
[44] Estrich, *supra* note 22.
[45] Vasisht, *supra* note 36.

attitudinal or performative accounts.[46] Adopting a purely performative account ignores the context in which the relevant behavior occurs and the mental state of the victim. Owing to unequal power men possess over women, there may be several explicit and implicit threats that render a woman's consent less than meaningful.[47] "Women may be socialized to passive receptivity, may perceive no alternative, may prefer it to the escalated risk of injury and humiliation of a lost fight, and hence they submit to survive".[48] Thus, while determining the presence of consent, a hybrid of performative and attitudinal perspectives must be employed.

In this case, the Court took a purely performative account while determining the issue of consent, observing that the behavior of the prosecutrix, especially the feigned orgasm, may have been taken as willingness and non-verbal communication of consent.[49] The absence of any real resistance re-affirmed that the prosecutrix was okay with the act. Further, the fact that prosecutrix remained alone with the accused despite his intoxicated condition, the exchange of hugs and kisses, the playful banter were considered to be behaviour which communicated the prosecutrix's consent to the accused.[50] However, such an analysis is incorrect since it completely disregards the mental state of the prosecutrix and the context in which the behaviour took place.

Even while just considering her behavior, it can be noted that the prosecutrix constantly hesitated, promptly denied his advance and tried to pull her underwear up.[51] Despite her resistance, the accused forced oral sex upon her,[52] with callous disregard of her protests. It has been recognised that a woman must be given sufficient space and time to formulate and communicate her consent for the specific act, which was clearly not done here.[53] Though it is accepted that consent to forms of physical intimacy such as kissing or hugging is no longer implied consent for oral sex, the accused considered it to be non-verbal consent.[54] However, the Court completely ignored these aspects of the prosecutrix's behavior, merely focusing on the accused's ability to decipher consent from her behaviour.

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46 P. Kazan, *Sexual Assault and the Problem of Consent*, *in* VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 27–42 (French et al. eds., 1998) *as cited in* R Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), https://plato.stanford.edu/entries/feminism-rape/.

47 *Id.*

48 SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1976) *as cited in* MacKinnon-*Feminism.*

49 Farooqui 2017, at ¶¶45, 82.

50 *Id.*¶ 82.

51 *Id.*¶2.

52 *Id.*¶81.

53 Shalu Nigam*, From Mathura To Farooqui Rape Case: The Regressive Patriarchy Found its Way Back,* SSRN 1 (2017), https://ssrn.com/abstract=3049756.

54 Michelle Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1421 (2005) *as cited in* R Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), https://plato.stanford.edu/entries/feminism-rape/.

B. Consent through the Attitudinal Account

Moreover, as per the attitudinal account, the Court was incorrect in completely ignoring the mental state of the prosecutrix, the fear and hesitance in her mind. The prosecutrix had heard about the Nirbhaya incident and thus, she feigned an orgasm in order to prevent greater physical harm and to end the traumatic encounter.[55] Considering the fact that in India, women are often socialised onto passivity, the prosecutrix probably did not perceive any alternative or rather preferred it to the escalated risk of injury and humiliation. Such passive acquiescence, when analysed by both the performative and attitudinal account, cannot be deemed to be meaningful consent under any circumstance. However, ignoring such considerations, the Court gave the accused the benefit of doubt since he suffered from bipolar disorder,[56] notwithstanding the lack of medical evidence and argument that this condition impaired his comprehension.[57] Instead, in my opinion, since bipolar disorder may cause aggressive behaviour, this, along with his inebriated condition, could further justify that the accused had forced oral sex upon her despite her resistance, disregarding her unwillingness.

IV. POWER DYNAMICS AND THE NEED FOR RESISTANCE

A. A Feeble 'No' may mean a 'Yes'

With regard to the context in which the incident occurred, the Court remarked that the gender binary should be considered. Rejecting the affirmative model, it noted that in acts of passion, a 'no' may sometimes mean a 'yes'.[58] However, in my opinion, such an observation blatantly ignores the ground reality and power imbalance. Both Radical Feminists and Critical Legal Scholars have argued that law protects the interests of the powerful by fostering an illusion that power inequalities are just. It uniformly presumes a 'single underlying reality', conditioned by male supremacy, rather than recognising that the reality is 'split by divergent meanings'.[59] Therefore, instead of recognising that the prosecutrix might have actually communicated non-consent and the accused might have recklessly misunderstood it as consent, the Court held that the prosecutrix communicated something that was taken as non-verbal communication of consent by the accused, thereby clearly erasing the perspective of the powerless victim and reinforcing the powerful man's version of the reality.

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[55] Farooqui 2017, at ¶¶3, 15-16.
[56] *Id.* ¶101.
[57] Shalu Nigam, *supra* note 53.
[58] Farooqui 2017, at ¶84-85.
[59] MacKinnon-*Rape*; MacKinnon-*Feminism.*

By such an interpretation, the Court reinforced the patriarchal belief that if the accused thought there was consent, it doesn't matter if the woman isn't willing in reality. If she isn't able to display real and assertive resistance, the accused is given the liberty to assume consent.[60] However, such an interpretation clearly ignores the feminist position the codified law contemplates. The burden should be put on a man, to understand, decipher and respect, not assume consent on the part of a woman.[61] Further, instead of relying upon men's ability to interpret women's non-verbal behavior, in my opinion, the Court should focus on reciprocal communication and active consultation before the sexual activity, similar to the Negotiation Model suggested by Anderson.[62]

B. Power Imbalance and the Unequal Burden

According to me, the Court's incorrect interpretation of consent and ignorance of power dynamics is blatantly explicit in the following lines: "*Instances of woman behavior are not unknown that a feeble 'no' may mean a 'yes'... If one of the parties to the act is a conservative person.., mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts.*"[63]

Often a woman's appearance and previous sexual history with the man is used as substitute for consent, thereby rendering her actual consent irrelevant.[64] While the Court recognised that prior physical intimacy cannot be taken as consent for the specific act,[65] if the parties were known, a feeble 'no' is not denial of consent. Such an interpretation ignores the fact that women are mostly raped by men they knew and trusted and are equally traumatised when raped by them.[66] Moreover, the Court created different standards of for deciphering consent in cases involving "conservative" women and those involving "intellectually/academically proficient" women.[67] Merely because the prosecutrix was an intellectually proficient woman cannot be grounds for requiring a higher standard of resistance. Most importantly, the Court's opinion that a feeble 'no' may mean a 'yes' reinforces the patriarchal burden on women to show utmost resistance and

[60] Vasisht, *supra* note 36.
[61] *Id.*
[62] Anderson, *supra* note 54.
[63] Farooqui 2017, at ¶79.
[64] MacKinnon-*Feminism*.
[65] Farooqui 2017, ¶74.
[66] MacKinnon-*Rape*, *supra* note 14.
[67] Shalu Nigam*, supra* note 53.

communicate their unwillingness to the accused, while ignoring whether the accused even tried to ascertain it.

Moreover, the Court failed to recognise the complex power dynamics between the parties, within which the communication of the alleged 'consent' took place. While I agree the consent was communicated under conditions of patriarchy and gender inequality, such an interpretation reduces the women to the position of a sexualised object, 'a victim of someone else's fantasy'.[68] Such a reality is itself constructed through male gaze and oversimplifies the situation.[69] Isolating gender as a source of oppression deprives women of their agency within the structural constraints and ignores other material conditions and power dynamics involved.[70] For instance, apart from the imbalance between men and women, it was characterised by a power imbalance between a mentor and a student. The accused was the key contact for her research work.[71] Moreover, she had shared past physical intimacy with the accused, and was even attracted to him.[72]

However, in my opinion, desire cannot be equivalent to consent. Consent has to be expressed in concrete terms. Since she was alone in her mentor's house at night, she might not have been in a comfortable position to accept or deny sexual interaction. Despite that, she resisted his efforts and constantly tried pulling up her underwear, asserting her agency and control over her sexuality. Yet, owing to the accused's physical strength, he was able to force oral sex upon her. Such factors must be taken into consideration while analysing the power imbalance.

V. THE IDEA OF BATTERED VICTIM AND REAL RAPE

A. Real Rape and Real Victim

In addition to such interpretational errors, the Court also reinforced a certain patriarchal conception of violent forced sexual intercourse to be classified as rape. The Court was faced with a complex fact situation, which lacked brutal violence and use of aggressive force, along with ambiguity regarding the communication of consent. Traditionally, rape was characterised by penetration, violence or threat of violence i.e. *real rape*.[73] The woman was expected to be a *real*

[68] Katharine Bartlett, *supra* note 31.
[69] Clark, *supra* note 29.
[70] Katharine Bartlett, *supra* note 31.
[71] Farooqui 2017, at ¶74.
[72] Farooqui 2017, at ¶16.
[73] Estrich, *supra* note 22.

rape victim, a battered woman, like Nirbhaya or Mathura.[74] This not only forced the women to believe that certain identities of victimhood are natural,[75] it also legitimised male aggressiveness, female passivity and a violent perception of rape. Therefore, cases, where the woman's resistance was overcome by 'verbal and psychological' means, were termed as 'seduction' or as instances of 'male over-eagerness and female impropriety'.[76]

B. Need for Expanding the Definition of Rape

However, over the years, by introducing the women's perspective, there have been attempts to expand the definition of rape to include various 'borderline' cases. Pineau describes an interesting incident of '*date rape*': "*even when the woman voiced her disinclination, the man told her how desirable she was and pressurized her to have sex with him. He became overbearing and engaged in 'aggressive body contact'. Despite wanting to escape, the woman could not disengage their bodies. However, given 'his aggression' and 'her queasy fatigue', the only option visible to her was to go along with him to end it.*" Thus, women are forced to submit due to the man's aggression and manipulative tactics, not her own free will.[77] According to Pineau, this should be classified as *rape*. The man asserted his '*right*' to sexual access, as if the woman was '*supposed*' to submit. Denial of such 'right' would be a 'cruelty akin to breaking a promise'.[78]

This situation bears uncanny similarity with the fact situation *Farooqui v. State*. Though such an example has no precedential value, in my opinion, the Court also needs to overcome its obsession with the patriarchal notions of rape and acknowledge that even in the absence of *real rape,* there may be a lack of 'consent' and such a situation may be punishable under Section 376. Rape should not be restricted to sexual harm to the physical body of the woman, but also include a violation of her personhood and dignity.[79] By not convicting the accused, the Court almost excused this situation as male over-eagerness and seduction. In my opinion, the Court must recognise when a man demands his right to sexual access, the woman is forced to submit to man, despite her unwillingness, such 'forced passive acquiescence' cannot be consent. The Court should overcome the restrictive perception of '*real rape',* take into consideration the prosecutrix's loss of control over her sexuality and dignity and hence, hold the accused guilty.

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[74] Debolina Dutta & Oishik Sircar, *India's Winter of Discontent: Some Feminist Dilemmas in the Wake of a Rape,* 39(1) FEMINIST STUDY 293 (2013).
[75] Eric Reitan, *Rape as an Essentially Contested Concept,* 16(2) HYPATIA 43 (2001).
[76] *Id.*
[77] Lois Pineau, *Date Rape: A Feminist Analysis,* 8(2) L. & PHIL. 217 (1989) *as cited in* Reitan, *supra* note 75.
[78] *Id.*
[79] Pratiksha Baxi, *Carceral Feminism' as Judicial Bias: The Discontents around State v. Mahmood Farooqui*, 3 INTERDISC. L. 18 (2016).

VI. CONCLUSION

To conclude, the Court was mistaken in applying the codified law to the complex fact scenario. While Section 375 envisions that consent should be ascertained from the woman's perspective, the Court wrongly relied upon Section 90 and excessively emphasised upon what had been communicated to the accused, thereby using the male gaze and perception to determine whether the prosecutrix was violated. It also wrongly assessed the presence of consent through a purely performative account, completely ignoring her mental state, her agency and the convoluted power dynamics of man-woman and mentor-student between the parties. By observing that a feeble 'no' may mean a 'yes', especially in 'acts of passion' between known people, the Court failed to recognise that passive acquiescence is not tantamount to meaningful consent, thereby placing a disproportionate burden on woman to unequivocally and not-feebly express her unwillingness, while ignoring that the man is required to make a reasonable effort to decipher consent. Lastly, by refusing to acknowledge that 'borderline' situations, which deprive women of their agency, dignity and control over their sexuality, may constitute rape under Section 375, the Court reinforced the obsession with patriarchal conceptions of *real rape* and *battered victim*. Such a stance is a 'stark illustration of law's resistance to change'.[80] In light of the feminist theory, the judgment reinforced patriarchal norms, legitimised a masculine view of consent, made the woman responsible for active resistance, protected the power of men and hence, is severely flawed.

[80] Vasisht, *supra* note 36.

DEMYSTIFYING THE JUSTNESS OF RETRIBUTION FOR AN 'ENVISIONED SOCIETY'

DHARINI SRIVASTAV & JAYANTI JAYA*

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ABSTRACT

The essay focuses on Rawls' 'Envisioned Society' (dealt with in "A Theory of Justice") which due to the efficient institutionalization of justice does without punishments. This envisioned society instead of retribution subjects its dissonant citizens to self-introspection and rehabilitation giving them a fair chance to return to their original position within the State. It thereby reflects how it is the inefficiency of the legal and social institutions today that has resulted in the genesis of a society which is an obverse of Rawls' 'Envisioned Society'.

Retribution and not rehabilitation is promoted as a logical doctrine, without considering elements such as social conditioning, poverty or the lacunae in various legal institutions. By comparing the deterrence created by retribution with the long-term benefits of rehabilitation, the essay justifies rehabilitation to move towards the vistas of an 'Envisioned Society'.

I. RAWLS' SOCIETY: AN UNACHIEVABLE UTOPIA

In '*A Theory of Justice*',[1] John Rawls, a cognoscente of political and legal philosophy unravels the establishment of a well-ordered society (hereinafter referred as the 'Envisioned Society') where the individual and the authorities share a similar vantage point regarding the concept of justice. He aims to theorize the morality of relations and social institutions by assembling the theory of a just society in socio-democratic liberalism of a postwar moment, where he elaborates upon the concept of institutional justice.[2] The legal institutions in this setup respect the law of the land and follow 'pure procedural justice', which means that punishment is authorized under a fair penalty schedule.

The fundamental social unit, that is, the family, ensures nurturing and development of citizens in a manner that justice and political virtues are deeply embedded in the individual and they constantly strive towards betterment in the Envisioned Society.[3] In such a society, all individuals aim to accord with what is best for their individual growth and responsibilities and therefore Rawls sees little need for a penal law.[4]

Rawls' 'Envisioned Society' does without punishment not because it is powerful enough to be magnanimous but because magnanimity becomes unnecessary due to the efficient institutionalization of justice. This modern state has a coercive authority on its citizens, having an effective impact on their prospects in life, where criminals, the dissonant citizens are subjected to

[1] JOHN RAWLS, A THEORY OF JUSTICE (1999).
[2] KATRINA FORRESTER, IN THE SHADOW OF JUSTICE – POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY 1-3 (2019).
[3] JOHN RAWLS, THE LAW OF PEOPLES 157 (1st ed. 2001).
[4] *Id.*

introspection by means of rehabilitation and reconciliation – a fair and just chance to return to their original position within the State – instead of retribution. 12

In short, Rawls across six hundred pages and three parts constructs a society wherein economic disparity and social divisions do not create the deep crevices for crimes and punishments as it happens outside this unachievable utopia. The reason is that in the standard society, there exist delinquent citizens, crimes and petty offences, social and political injustice and competing claims.

"On November 27, 2019, brutal gang-rape and murder of a woman veterinary doctor, Priyanka Reddy shook the nation. The common masses demanded 'instant justice' to create deterrence in the society. As a result of the upheaval, authorities felt pressurized. Police encountered the rapists in broad daylight and were hailed as heroes as the legal procedure and institutions of justice stayed in deep slumber, awakening a question pertinent to law regarding retributive justice and the society that we live in."[5]

Instances such as these evince how our society is an obverse of the Envisioned Society in more ways than one.

A. Discord between Opinions on Justice

The above is a classic example of how the legislatures, law enforcement agencies and the people of the society have differing views on justice. This 'instant justice' made the Hyderabad police overnight heroes and satisfied the people while 'pure procedural justice' was conveniently ignored. In the Envisioned Society, the mass' drive to retaliate does not dictate the justice mechanism, as it does in its obverse society. It is most desirable to strike the right balance to create an amicable and satisfied society where laws are made and respected because they are in compliance with not only what society thinks is best but also are in accordance with standards of human rights and international conventions.

B. Social Conditions and the Conditioning

Punishing the offenders from the barrel of the gun does not guarantee deterrence. Crimes generally take place because of the breakdown of social control.[6] A number of offenders grow up in a violent environment in our society and through such kind of retributive justice, the cycle of violence perpetuates instead of halting it. Rawls does not delve deep into the reasons for crimes which are upshot of poverty, patriarchal mindset, disparity in income and education, gender sensitivity, deficiency of moral framework and ignorance of law, most probably because

[5] Abhinay Deshpande, *All Four Accused In Hyderabad Vet Rape And Murder Case Shot Dead*, THE HINDU (Dec. 06, 2019), https://www.thehindu.com/news/cities/Hyderabad/four-accused-in-hyderabad-vet-rape-and-murder-case-shot-dead/article30202752.ece.

[6] Molly Cheang, *Sentencing Criminals*, 16 MALAYA LAW REVIEW 204 (1974).

his Envisioned Society is perfectly well-ordered, where even the people inclined to delinquency are intimidated to be doing what is good.

C. Inefficiency of Law Enforcement Agencies

Law and its implementation require patience, which the common masses lack and that is why the society that we reside in has law enforcement agencies. In the mentioned case, it should have been the Court of Justice to decide the proportionality of crime and punishment.[7] Justice does not only imply that due treatment be rendered to the offender but also the said due treatment be rendered in accordance with the procedure established by law. Punishment may not be a requirement in a quixotic envisioned world but is indispensable in our society.

II. PUNISHMENT

Punishment is a form of revenge by society that fulfils the human need for a moral equilibrium and the need to demonstrate to offenders that some behaviors are unacceptable. Since early times punishing the dissonant citizen(s) of the society was considered a clan's common matter. Later, in civilized modern societies, crimes were said to be done against the state and not the individuals. Criminal law took the power of vengeance from private hands by penalizing the offenders in a lawful way. Justice is sought by way of vengeance, antipathy, amendment, disablement, determent, self-defense, preservation, compulsion, torture, compensation etc. as a result of some evil committed by a person.[8] Desire for revenge, therefore, has a more legitimate place in our emotions, society and the laws that we make.[9] This desire finds illustrations in the most important texts of our religions, blockbuster movies, bestseller novels and political narratives carried on from times unknown.

Plato lays down three aims of penology namely, to reform, to deter or to eradicate the offender- in accordance with the intensity of the offence that one has committed.[10] HLA Hart, in his book- "Prolegomenon to the Principles of Punishment",[11] theorizes the justification of punishments in criminal law. According to him, the key elements in the concept of punishment involve pain, inconvenience or other unpleasant consequences. This punishment is a result of an action of a delinquent against legal rules corresponding to a specific criminal offence (i.e. *Nullum crimen sine lege*), administered by a human agency following the legal practices and procedure against which

[7] RANI DHAVAN SHANKARDASS, PUNISHMENT AND THE PRISON INDIAN AND INTERNATIONAL PERSPECTIVES (1st ed. 2000).
[8] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 279 (LONDON: R. HEWARD, 1830).
[9] GURCHARAN DAS, THE DIFFICULTY OF BEING GOOD: ON THE SUBTLE ART OF DHARMA, 222 (2009).
[10] Virginia Hunter, *Plato's Prisons,* 55 GREECE & ROME 195-197 (2008).
[11] H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 23 (1959-60).

the offence is committed.[12] To stop the recurrence of similar offences in the society, Bentham[13] points out three ways by which the societal institutions choose to punish an offender- physical check, moral check and mental check.

a. **Physical check**- Physical checks ensure that the convict is physically disabled to repeat similar acts;

b. **Moral checks**- Moral checks ensure that the convict gets schooled in such a way that the inner desire of the convict to commit offences in future is taken away and;

c. **Mental check**- Mental check creates in mind the terror of law making them afraid to offend further. These are ways of deterrence. These serve as examples to other agencies of society.

Among the three, physical check pre-dominates the norms of the legal order in the form of retribution.

III. RETRIBUTIVE JUSTICE

Retributivism is defined by the Black's Law dictionary as a theory that justifies criminal punishment in terms of the ill-desert of the offender, regardless of whether deterrence or other good consequences would result.[14] Retributive punishment is a punishment that is intended to satisfy the community's retaliatory sense of indignation that is provoked by injustice.[15] Retributive Justice is the method where criminal justice is achieved through retribution.

Justice, the first virtue of social institutions,[16] is an abstract that extends itself in the canvas of criminal law and punishments. *"Justice can be understood as the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments*".[17] Though a lot has been elaborated by Rawls on the subject of distributive justice and its compulsory compliance, his theory also makes a little space by words and an infinite room for thoughts on the subject of retributive justice.

According to idealists such as F.H. Bradley, retributivism should be incorporated in penal code as it promotes penal pluralism, that is, it succeeds to fulfill various penal goals and objectives.[18] Kant, Nietzsche and Foucault express concurring views with Bradley. Kant, an absolute moralist

[12] *Id.*
[13] BENTHAM, *supra* note 8, at 20.
[14] *Reductivism*, BLACK'S LAW DICTIONARY: (9th ed. 2009).
[15] BENTHAM, *supra* note 8, at 1511.
[16] RAWLS, *supra* note 1, at 3.
[17] *Justice,* MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/justice.
[18] Thom Brooks, *On F. H. Bradley's "Some Remarks on Punishment*", 125 ETHICS 223-225 (2014).

believed that punishments act as incentives for not committing a crime. Nietzsche[19] and Foucault deduced that no other conception of deserved punishment can be defended as humans need to feel even by penalizing a criminal through an authority, despite being aware that that punishment has a largely symbolic rather than intrinsic value.

Anthony Quinton defended retributivism as a logical doctrine and does not provide a moral justification of the infliction of punishment.[20] Many other prominent thinkers who have believed in the legitimacy of retributive justice like Adam Smith, Montesque, Beccaria stood firm on establishing a proportion between crimes and the punishments.[21]

Jean Hampton puts forth how the aim of punishment is not to avenge or to impose pain or injury on the offender, but to annul the offender's claim of superiority[22]. All theories of punishment are theories of power and claim to exercise their powers.[23] Retributive justice is considered the most proportional form of punishment as it gives back the offender what it took from the society. Retribution has now become the *sine qua non* of our legal and social lives that we cannot possibly imagine a society without it.

Retribution gives immediate satisfaction towards the interest of two parties and to the public at large. But the real profit of punishment must be the prevention of crime.[24] It is imperative to understand that the delinquent is also a member of the society and while rendering retributive justice his interests and rights are sacrificed to secure the larger interests of the general public.

In some extraordinary cases, no other alternative to punishment rather than capital punishment seems appropriate as a form of retributive justice. Capital punishments are justified as a form of retribution due to the following reasons:

i. Capital Punishments may have the perfection to impede the offender forever.[25] For example, in cases of institutionalized crimes like terrorism, killing the head of such an institution will end the very hope of continuing the organization and further crimes can be prevented.
ii. It seems most proportional and analogous if the offence of murder is committed.[26]

[19] FRIEDRICH NIETZSCHE, ON THE GENEAOLOGY OF MORALITY 54 (Keith A. Pearson, 1996).
[20] James P. Sterba, *Retributive Justice*, 5 Political Theory 349 (1977).
[21] BENTHAM, *supra* note 8, at 32.
[22] GURCHARAN DAS, *supra* note 9, at 223.
[23] PHILIP BEAN, PUNISHMENT 191 (Martin and Robinson, 1987).
[24] *Id.*
[25] BENTHAM, *supra* note 8, at 177.
[26] *Id.*

iii. It is exemplary as it is deeply entrenched in the human psyche that if a good person suffers, the bad must suffer more.[27] The US Supreme Court employed this logic in legitimizing the death penalty in 1976 for terrible crimes.[28]

Retributive proportionality tends to have its own utility as an important part of a community's sense of justice. Punishing crimes of a lesser degree with less severity provides the criminal with some incentive to commit the lesser of two crimes. For example, many activists are of the opinion that the recent surge in the intensity of punishments for rape has increased the incidence of rape and threatened the life of the victim as the offender also ends up murdering and destroying their body after the act is committed.

Where there is a legal gradation of crimes and the relative severity of penalties is arbitrarily applied, there is a risk of confusing common morality and its contravention.[29] The moot question remains how far these punishments have been effective in deterring criminals from committing heinous crimes.

IV. DETERRENCE BY RETRIBUTION

To deter commission of offences, punishments are used as instruments. Punishments tend to take away liberties or even the life of a human. They are powerful instruments affecting human life and potential. Not just that, in cases of life imprisonment or death penalty, the family of the criminal has bearings too. The following aspects determine how penalty creates deterrence:

A. Probability of Incurring Penalty

The probability of incurring a liability compels a person to weigh the cost paid and benefit of committing a crime. The principle of deterrence fails when one is convinced that his or her actions are not being noted by the authority and the probability of getting caught or bearing the brunt of one's own action seems negligible. Criminals tend to muster enough courage to commit grave crimes like rape or dacoity only when they walk scot-free with smaller crimes like eve teasing or petty theft.

B. Total amount of punishment threatened

Quantum of punishment also helps to create a system of deterrence.[30] An effective deterrence system categorizes crimes according to the crime committed and in terms of its severity. It does

[27] GURCHARAN DAS, *supra* note 9, at 221.
[28] Gregg v. Georgia, 428 U.S. 153 (Ga. 1976).
[29] Alan Wertheimer, *Should Punishment Fit The Crime*?, 3 Soc. Theor. Pract. 403 (1975).
[30] PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLE OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 73-98 (2008).

not award the same amount of punishment or imprisonment for every crime except in some exceptional cases. The efficiency of a deterrence system is not just to give punishment but to award it in an accurate and discrete way.

C. Adaptation to Intensity of Punishment

According to this theory, when an offender is punished mildly for the first crime or for petty crimes it does not necessarily deter him from committing further crime. The reason for not penalizing small criminals is that they might become hardened criminals if they get in touch with other criminals. 'Hardening of Punishment' tends to condition an offender to tolerate the increasing punishment.[31]

D. Time Frame within which Punishment is Awarded

An experiment was conducted on dogs where they were beaten for eating as a punishment.[32] It was observed that the dogs which were immediately punished after eating refrained from eating for two weeks, dogs which were punished after five minutes ate food after two hours while the dogs which were punished after ten minutes ate food after five minutes only. This shows how a delay in giving punishment mitigates deterrence and destroys the whole motive of awarding justice. The immediate benefit outweighs the remote consequences and, in this way, the criminals keep on committing crimes. Delay in punishment instills the belief that immediate gains are more important than the latter consequences of it, no matter how grotesque.

V. FAILURE OF RETRIBUTION IN CREATING DETERRENCE

Deterrence is termed as the 'primary purpose' and 'core purpose' of criminal law.[33] The advocates of retributive justice assert its importance through deterrence but deterrence as a principle of retributive justice has not curbed crimes due to unilateral focus only on penalizing.

It is doubtful whether an increase in the quantum of punishment deters criminals, as it is observed that one adapts to the increasing intensity of punishments.[34] An experiment was conducted on a pigeon where 80 volt shock level was used to produce response suppression for the first time as a punishment.[35] Later, when the shock was decreased to 60 volts little behavior suppression effect could be witnessed. However, when their shock level started at 60 volts and later gradually increased up to 300 Volts, pigeons continued with the punished response, far

[31] PAUL H. ROBINSON, *supra* note 31.
[32] *Id.*
[33] GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2nd ed. 1961); WAYNE R LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW (1986).
[34] PAUL H. ROBINSON, *supra* note 31.
[35] *Id.*

beyond the initial 80 volt complete deterrence level! Applying the outcome in the human psyche, one can easily deduce that increased punishment makes a person only obdurate and does not deter him or her from the criminal activity any longer.

It's often assumed that knowledge of criminal punishment imbibes rationality in us but similar psychological tests like given above, proves otherwise. Knowledge of the quantum of punishment due to a crime does not prevent a person from committing it instead people who know the consequences are more likely to have crime tendencies. In India, severity of punishment for rape has been increased to that of capital punishment but it is still not resulting in the reduction of rape cases. The number of cases reported of child rapes especially after legislation of The Protection of Children from Sexual Offences Act, 2012 has only increased from 15950 in 2014,[36] to 17473 in 2016.[37]

Delay in punishment changes deterrence behavior. In India, criminal laws are not successful in deterring crimes because of this impediment. The judiciary in India is overburdened with cases, the Supreme Court has 61,000 pending cases, high courts have 40 lakh pending cases, whereas the subordinate courts have 2.85 crore pending cases.[38] According to National Crime Record Bureau, rape conviction in India is 32.2 percent whereas the conviction rate of rape in metropolitan cities is 27.2 percent only.[39] Conviction rate has steadily risen but the increase is minuscule compared to the quantum of crimes happening.[40]

Numbers are only a reflection of how retribution is not the most reasoned method of deterring humans to commit crimes. Where Rawls' Envisioned Society aces is in its trust in the judicial process and the impeccable role of rehabilitation in combating criminal tendencies in the state subjects. Rehabilitation is not only a moral instrument but a practical one because it is not only instrumental in creating a utopian society but a safer society, where a delinquent is reformed before stepping into the world of crime.

VI. REHABILITATION

[36] Indiastat, *State-Wise Number of Cases Reported/Chargesheet/Convicted and Persons Arrested/Chargesheeted/ Convicted under Child Rape (Section 4/6 of POSCO Act/ Section 376 of IPC) in India* (2014) https://www.indiastat.com/table/crime-and-law/6/rape-victims-cases/477185/1185842/data.aspx.

[37] Indiastat, *State-wise Number of Cases Reported/ Chargesheeted/ Convicted and Person Arrested/ Chargesheet/ Convicted under Child Rape (Section 4/6 of POSCO Act/ Section 376 of IPC) in India* (2016), https://www.indiastat.com/table/crime-and-law/6/rape-victims-cases/477185/1188927/data.aspx.

[38] Arghya Sengupta, *Hidden Factors That Slow our Courts and Delay Justice,* THE ECONOMIC TIMES, (Mar. 29, 2017), https://economictimes.indiatimes.com/news/politics-and-nation/hidden-factors-that-slow-our-courts-and-delay-justice/articleshow/57887726.cms.

[39] National Crime Records Bureau, *Crime in India, Crime Against Women (States/UTs)* (2017).

[40] Harikrishna Sharma, *32 per cent conviction rate in rape cases: NCRB,* THE INDIAN EXPRESS (Dec. 4, 2019), https://indianexpress.com/article/india/32-per-cent-conviction-rate-in-rape-cases-ncrb-6149331/.

All punishments tend to create fear in the minds of the delinquent person but not necessarily change the moral disposition and improve the character of the delinquent, in other words, fail to reform them. Rehabilitation is defined as the restoration especially by therapeutic means to an improved condition of physical function.[41] If only imprisoned, especially in the case of juveniles, the indiscriminate associations in the prisons will only lead to prisons becoming schools of crime rather than places of reforms. Expansion and intensity of penal codes do not make them effective measures to curb crimes as penal codes often progress according to penal populism and not according to the changing need of society or dimension of crime.[42] Punishment becomes too expensive when it produces more evil than good.

Rehabilitation is a utilitarian model which is centered not only on individual treatment but also tries to bring social benefit. When the ultimate intention of the law enforcement authorities is to amend or reform the moral constitution of a person, punishment can be termed as a correction. Concept of correction is more productive in modern civil democratic societies rather than prisons. Sophronesterion or Institute of Reforms were recommended to be important corrective homes by Plato for curing negative thoughts and reintroducing the delinquent as a better person in the society.[43]

There have been instances where criminal tendencies have arisen in a person due to the sheer injustice meted out to him. Where there are cases of a criminal himself being the victim of another crime, it will be clearly in contravention to the concept of justice to punish such a person mechanically. It becomes imperative to understand the mitigating circumstances, aggravating circumstances, psychological aspects, past trauma etc. rather than making culpability the only criteria to punish. Thus, in a modern civil society where draconian punishments are clear violations of human rights and personal liberties, the interplay of justice and punishment make the judicial creativity and credibility possible in criminal courts of the nation.

The end results of punishments should not be eliminating the criminals but the crime in the society and for that rehabilitation may be the most humane goal of punishment making it seem ideal in a utopian society. The process of the criminal justice system does not end with conviction; it extends beyond that till the release of prisoners and their social reintegration and re-education. Such models are effectively practiced in Spain.[44] A slightly upgraded model exists in

[41] *Rehabilitation*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/rehabilitation.
[42] NICOLAS LACEY, THE PRISONER'S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 34 (2008).
[43] PAUL H. ROBINSON, *supra* note 31.
[44] RELEASE FROM PRISON: EUROPEAN POLICY AND PRACTICE 362 (Nicola Padfield et al, 1st ed. 2010).

the Scandinavian countries where correctional homes are not an economic burden on the government; on the contrary, they effectively contribute to the country's economy as the prisoners through productive labor receive wages sufficient to provide for their homes and also to compensate their victims for crimes.[45]

VII. THE ENVISIONED SOCIETY VERSUS THE INDIAN REALITY

In India, penal sanctions are based majorly on the proportion of severity of terror a delinquent produced, mainly opting for the repressive rather than restitutive method of penalizing. Criminal trials are cumbersome, prolonged and non-productive of the desired result. The purpose of criminal law is to effectively reduce the incidences of crime that are clearly not served.

Statistics disclose a sorry state of prisoner rehabilitation in India where in the year 2018, a total of only 2250 convicted criminals were rehabilitated. Over 25 states and UTs in India have less than 10 convicted persons who have been rehabilitated.[46] The experience of a prisoner in prison also determines their role in society once they move out the negative experience during their imprisonment does not help in deterrence. But the problems associated with retributive justice system in India are:

A. No Follow-up for Justice

Retributive justice concerns itself only with punishment and not with its after effect on prisoners. The quality of justice can only be maintained when its course does not end with conviction. Therefore, justice should be followed beyond conviction.

B. Punishment-Centric

Punishment centric model of justice neither reforms the individual nor improves the society. For creating an envisioned society, at times it is important to treat criminals as victims of social conditions and their conditioning. It was observed in the case of a woman prisoner who after being imprisoned for 12 years for the crime of scarifying a child's life due to superstition still firmly believed in sacrifices and had no remorse whatsoever.

[45] Justice M.N. Venkatachaliah, *Foreword* to RANI DHAVAN SHANKARDASS, PUNISHMENT AND THE PRISON INDIAN AND INTERNATIONAL PERSPECTIVES (2000).

[46] Indiastat, *State-wise Rehabilitation and Other Support to Prisoners in India* (2018), https://www.indiastat.com/table/crime-and-law-data/6/educational-facilities-rehabilitation-of-prisoners/478342/1311506/data.aspx.

C. Addressing Inequality

This system does not care to address the social deficit. Laws are made by people in power and political systems. Thus, it is important that law considers the poor background and conditioning of a person.

D. Utility Problem:

This system uses punishment as an end. It thinks that prisoners committing the same crime should be punished uniformly as differential treatment would amount to injustice. It does not support individualized treatment irrespective of the reason for crime and only focuses on utility.

All this and more maps our society far away from the Envisioned Society. But that in no way undermines the work done by Rawls as he has single handedly given to us a goal to reach. Testing the reality of our society in the light of this utopia aids us to diagnose the bugs in our system and catalyzes our growth towards the vistas of the envisioned society.

VIII. TOWARDS THE VISTAS OF AN ENVISIONED SOCIETY

There is a clear interplay of justice and punishment in the criminal law of any land. Rehabilitation is not only a process but a humanitarian way of helping criminals to get into the mainstream and prevent them from returning to the crime world. This non-offence centric theory helps to punish the offender's according to their unique needs and not by a rigid uniform method. Severity of punishment is supported by the idea of social hygiene. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice. Therefore, the doctrine of proportionality is an established ground of judicial review in the Indian Constitutional jurisprudence.

The critics of rehabilitation theory say that this mechanism requires remaking of the society itself.[47] The collective goal should be to move towards the vistas of the Envisioned Society, a cumulative approach where retributivism is in tandem with rehabilitation.

[47] P.D. SHARMA, CRIMINAL JUSTICE ADMINISTRATION 19 (1998).

POSITIVISM AND NATURAL LAW: QUERYING THE SEPARATION

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ABSTRACT

In this essay I undertake two tasks. In the first part, I identify the core theses that positivists and natural lawyers debating the connections between law and morality ordinarily defend. In the second part, I use an Indian legislation to demonstrate what some of these arguments look like in the Indian context. I conclude by making the suggestion that we must approach the debate between positivism and natural law as a search for the truth about the connections between law and morality. Our role in this debate must not be reduced to passively choosing between divergent conceptions developed elsewhere.

I. INTRODUCTION

An enduring theme in western legal theory is the relationship between law and morality. Hart called it a 'recurrent issue' and a 'persistent question.'[1] Hart famously was one of the protagonists in a debate explicating the connections between morality and law. The debate continues to this day and has split legal theory into two camps: that of natural lawyers on one hand and positivists on the other. It is seldom that a serious theorist of law does not identify oneself with one of these sides. This theoretical divide has infected a large part of the terrain of jurisprudence. It is the theorist's take on law and morality that most often determines the trajectory of a theory in answering the great overarching question in western jurisprudence: what is law? And discussions on these issues have become increasingly abstract. An exasperated Posner once wondered why people of the caliber of Hart and Dworkin were so concerned about such questions.[2]

The battle has been internecine in another sense as well. That one can safely assert that 'talking past each other' is a feature of jurisprudence, owes a great deal to this debate.[3] An exchange in the not so remote past illustrates the problem. Raz, a leading positivist, replied to Alexy's claims in 'The Argument from Injustice: A Reply to Legal Positivism' by pointing out that Alexy had misidentified legal positivism. By omitting to refer to any modern version of the separation thesis, Raz argued, at least some of Alexy's charges were misdirected.[4]

It was not too long ago that Raz himself had been similarly refuted by Finnis-a (now unpopular) re-discoverer of classical natural law. Old wisdom was that natural lawyers believed that unjust law is no law. Raz's claim in this vein that natural lawyers use moral worth as the only criterion

[1] H. L. A. HART, THE CONCEPT OF LAW 7-11 (1961) [hereinafter Hart].
[2] RICHARD POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 11 (1996).
[3] BRIAN BIX, JURISPRUDENCE, THEORY AND CONTEXT 24 (2006).
[4] Joseph Raz, *The Argument from Justice, or How Not to Reply to Legal Positivism,* OJLS 17 (2007).

of validity of a law was rejected by Finnis. Finnis asserted that he knew of no theorist who would be committed to that theoretical or meta-theoretical position.[5]

What, then, is it that separates the positivist from the new age natural lawyer? I discuss this in Part I of the essay where I analyse the theses that lie at the heart of positivism and natural law. I also refer to some of the important inflection points in the debate between the two traditions in this part of the essay. This descriptive part is not intended to suggest that one has to passively choose between divergent conceptions of the nature of law developed elsewhere. Legal theory is of no use to us if it cannot engage with, explain and evaluate legal phenomena around us.[6]

To contextualize the claims in the first part, in the second part of this essay, I use the Insolvency and Bankruptcy Code, 2016 [**the IBC**] to explore the links between law and morality that the core theses of rival traditions emphasise. The IBC is an unusual choice for such an exercise given that, at first blush, it may appear morally inert when compared to other recent legislations which have more debatable links to morality.[7] However, the utility of IBC as the site of this experiment will be apparent in Part II.

I conclude by observing that we must resist the temptation of believing that exploring the connections between law and morality is matter of choice between core theses offered by rival systems of thought developed elsewhere.

II. UNJUST LAWS, MERITS AND SOURCES – FOUR KEY THESES

A. The Historical Debate: An unjust law is no law?

The natural law tradition is as old as the hills and some of its core thesis are often traced to Cicero – a first century BC Roman statesman, who wrote 'the Laws' inspired by Plato's work of the same name. There are quite a few passages in the book that capture the idea that law must accord with divine reason. For instance, Cicero notes that "*it should be clear that in the interpretation of the word "law" itself there is the significance and intention of choosing something just and right*".[8] To Cicero, since reason is eternal and divine, a law does not become law when it is written or promulgated, but it comes to being at the same time as the eternal reason. To understand the depth of what may be dismissed as ancient arguments, it is useful to quote an example given by Cicero. His

[5] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 6 (2nd ed. 2011).
[6] AAKASH SINGH RATHORE & GARIMA TIWARI, RETHINKING INDIAN JURISPRUDENCE 3 (Taylor & Francis, 2018).
[7] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, No. 18 of 2016, The Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019 and the Citizenship Amendment Act, No. 47 of 2019, have all been controversial legislation.
[8] MARCUS TULLUIS CICERO, ON THE COMMONWEALTH AND THE LAWS 133 (Cambridge University Press, 1999).

interlocutor, Marcus asks, would not sexual violence or rape be contrary to (eternal) law even if was not written anywhere that it is forbidden?[9] Cicero does not exactly say that an unjust law is no law. What he suggests instead is that laws that are unjust or destructive to the people are 'something different from laws'[10] or 'do not deserve the name law'.[11]

This thesis of natural law is slightly different from the flat assertion that an unjust law is no law or *lexiniusta non est lex*. That assertion is commonly attributed to St Thomas Aquinas. However, the maxim *'unjust law seems to be no law'*[12] is something that Aquinas attributes to Augustine, while making the point that human law diverging from natural law is a perversion of law and no longer a law. However, Aquinas immediately carves out a space for positive law and accounts for the wide differences between laws amongst populations. This is an interesting distinction. While some laws such as 'one should not kill another human being' can be derived theoretically from the natural law that 'one should do no evil', the specific kind of punishment that should be meted out for a crime is not a conclusion that can be drawn in the same manner. This, Aquinas argues, is a matter for human-made positive law and is more in the nature of a specification than a conclusion that can be derived from natural law. Also, he adds a critical observation: laws that are so derived which are in the nature of specifications derive their entire binding force from human law.[13]

Centuries later, a cruder version of this thought is expressed by Blackstone in the introduction to his Commentaries to the Law of England. He argues:

> *"This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."*[14]

Although the paragraph above seems to express the thought that any human law would be invalid if it contradicts natural law, Blackstone also nuances it by making space for positive laws by pointing out that natural law may not be prescriptive as far as the entire variety of human affairs is concerned. In fact, he believes that there are a large number of points on which natural

[9] *Id.*
[10] *Id.*
[11] MARCUS TULLIUS CICERO, THE POLITICAL WORKS OF MARCUS TULLIUS CICERO: COMPRISING HIS TREATISE ON THE COMMONWEALTH; AND HIS TREATISE ON THE LAWS 83 (trans. Francis Barham, London: Edmund Spettigue, 1841).
[12] THOMAS AQUINAS, TREATISE ON LAW 46 (Richard Regan, 2000).
[13] *Id.,* at 47.
[14] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 35 (Lemmings, 2016).

law and divine law are indifferent leaving humans to legislate. He chooses a dull example to illustrate his point. He says, for instance, natural law can have little to say substantively on whether export of wool should be permissible. It is here alone that the inferior human legislature has freedom to legislate unhindered.[15]

Blackstone's views were pivotal to the birth of the central tenet of modern positivism: the separation thesis. Blackstone's view that a human law is invalid if it contradicts divine law irked many. Bentham's first work, 'A comment on the Commentaries' was a savage critique of Blackstone's commentaries. Bentham's primary charge was that Blackstone had all along muddled the law *as it is* with what *it ought to be.*[16] While Bentham's is/ought distinction is popular to this day, it was Austin who isolated what the purist would call the core of positivism. In the fifth lecture of the canonical work, the Province of Jurisprudence Determined, Austin termed Blackstone's notion of the validity of human law being contingent on divine law as "*stark nonsense*"[17] and noted, "*the existence of law is one thing; it merit or demerit another. Whether it be or be not conformable to an assumed standard, is a different enquiry."*[18]

At the time this claim was made, this was a revolutionary thought. What made it revolutionary was the fact that its proponents – Bentham in particular – were passionate utilitarians advocating scientific reform of the law. They advocated positivism as they suspected that natural law theories aided *status quo*: if it were to be thought that the law "as it is" is what "it ought to be", it could not be the subject of moral appraisal. In separating the validity of law from morality, they were not seeking to distance law from morality. Rather the intent was to separate the validity of positive law from morality in a way that would open up positive law to clear and complete moral scrutiny.

In a sense, this is ironic. Today the positivist tradition is associated with a kind of austerity and neutrality.[19] Positivism is thought of as the favoured doctrine of those seeking to preserve the status quo. Nowhere is this more apparent than in constitutional adjudication. Where difficult questions of morality and legality arise today, it is theories developed in opposition to positivism that are invoked in support of moral advancement of the law.

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[15] *Id.,* at 36.
[16] JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 229 (1843).
[17] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 158 (Wilfrid Rumble ed., 1999).
[18] *Id.,* at 157.
[19] SCOTT SHAPIRO, LEGALITY 254-5 (2012).

B. Identifying the Separation Thesis

Positivism acquired a bad name in the immediate aftermath of the fall of the Nazi regime. The blame for the enforcement of abhorrent statutes enacted by the National socialist Government was laid at the doorstep of positivist theories. Radbruch's autopsy of the Nazi legal order in a short piece termed 'Statutory Lawlessness and Supra-statutory Law' was in particular, heavily influential. Radbruch squarely alleged that (German) positivism's slogan 'law is a law' left the legal profession and judges defenceless in the face of criminal and arbitrary statutes.[20] It is worth noting that subsequent work has challenged the narrative of a causal link between positivism and the capitulation of the legal system in Germany.[21]

Hart's work in positivism emerged in this backdrop. That positivism emerged unscathed from the onslaught that linked it to the judgments of the Nazi era courts owes much to Hart. Hart's response to Radbruch and his debate with Fuller garnered worldwide attention. Hart extricated the separation thesis from other notions that were thought to be central to positivism. For example, until Hart, there was a widespread belief that some version of the command theory had to be endorsed by all positivists. In the 'Separation of Law from Morals'[22] and his later work, 'The Concept of Law', Hart demolished Austin's model based on the idea that law is a command. What he preserved, however, was the separation thesis.

Hart commended the separation thesis for the virtue that it was plain speak. To say that an unjust law is no law, he thought was a recipe for confusion. The theoretical or scientific study of law could not ignore laws that exhibited the complex characteristics of law, and instead focus on some narrower set that fulfils an additional condition of being in accord with societal morality or even true morality, Hart argued.[23] Hart's work in positivism was monumental. Those who did not entirely agree with him or even disagreed with him entirely conceived their own theories in opposition to Hart. Dworkin's work is a good example, and his claims in Law's Empire are best interpreted as a series of counterpunches to positivism. Serious questions were asked of the separation thesis by Dworkin's challenges to positivism.

Dworkin's interpretive theory took, as its starting point, positivism's inadequacy to explain what he identified as theoretical disagreements in law. By pointing to cases where lawyers and judges disagreed about the identification and existence of law, he questioned the positivist's account of

[20] Gustav Radbruch & Stanley Paulson, *Statutory Lawlessness and Supra-statutory law*, 26 OJLS 1 (2006).
[21] Stanley Paulson, *Lon L Fuller, Gustav Radbruch, and the 'Positivist' theses*, 13 LAW AND PHIL. 313 (1994).
[22] H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. LAW REV. 593 (1957)
[23] HART, at 209.

adjudication and by extension, their entire theory. His point was that cases such as *Riggs v. Palmer*,[24] *the Snail Darter case*[25]and *Brown v. Board of Education*,[26] showed that law could not be identified by its sources alone. The existence of law and the identification of law in these cases involved moral evaluation, or so he argued. In doing so, and outlining his interpretive theory, his challenge was to the plain fact view of the law that "*Law exists as a plain fact, in other words, and what the law is in no way depends on what it should be.*"[27] This was a Dworkinian reformulation of the separation thesis. His rival claim was that adjudication is a process of constructive interpretation which involves moral reasoning to determine what the law, that governs a dispute, is.[28] This was an immensely successful claim. It is not necessary to detail Dworkin's challenge any further here. But it is important to note that it had a profound impact on positivism.

Dworkin's work split positivists into two camps. Exclusive positivism, the purer form of positivism, continues to maintain that a norm is never rendered legally valid as a result of its moral content: determining what the law is entirely dependent on the source of the law.[29] Inclusive positivism, on the other hand, maintains a separability thesis that moral evaluation is not necessarily required to determine the validity of law, but it may be the case that in a given legal system, moral criteria are so used. This position, therefore, only holds that it is possible that there is a legal system where there are no moral criteria to determine the validity of a law.[30] Raz, Marmor and Shapiro are amongst the prominent exclusive positivists while Coleman, Waluchow and Himma[31] describe themselves as inclusive positivists. This debate within positivism has bred complexity and some onlookers are content to deem this a demarcation dispute within positivism with very little at stake for outsiders.[32]

In the meantime, parallel to the erosion of the separation thesis, the natural law thesis has also been weakened. As alluded to in the introduction, theorists such as Finnis assume that it cannot be a logical line of argument to claim that an unjust law is no law. To him the statement, plainly read, is a self-contradiction. Finnis suggests that no one, even Aquinas, could have ever meant

[24] Riggs v. Palmer, 115 N.Y. 506.
[25] Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
[26] Brown v. Board of Education, 347 US 486 (1954).
[27] RONALD DWORKIN, LAW'S EMPIRE 7 (1986) [hereinafter Dworkin].
[28] *Id.,* at 90.
[29] Andrei Marmor, *Exclusive Legal Positivism*, OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1 (Coleman et al, 2004 Oxford Handbooks Online).
[30] Kenneth Himma, *Inclusive Legal Positivism*, OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 6 (Coleman et al, 2004 Oxford Handbooks Online).
[31] HART, at 265.
[32] John Finnis, *Classical Natural Law,* OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 7 (Coleman et al, 2004) [hereinafter Finnis-Classical].

that an unjust law is literally no law.[33] The purpose of such statements where they do occur is only to point out that unjust laws are not central or focal cases of law, while not denying them legal validity. Finnis, on this account, claims that everything that positivism reasonably wishes to insist is clearly and coherently accommodated in classical natural law theory.[34]

For reasons different from Finnis, Mark Murphy, another leading natural law theorist, also argues for a weak natural law thesis under which dictates that are not backed by decisive reasons (from the point of view of practical rationality) are defective as laws.[35] To couch the thesis in an example he repeatedly considers the Fugitive Slave Act 1850 (requiring that citizens aid the capture of runaway slaves), which was defective as law in an intrinsic sense, but one would not deny it the label law for the time it was in force. While one can point to modern theories taking forward the classical natural law tradition, it is important to point out that Dworkin's *sui generis* theory has made his work the principal target of positivism replacing the classical natural law tradition.

This climbdown from the seemingly extreme positions of the past may seem to suggest that the debate is almost over. However, the relationship between morality and law is still approached through the prism of rival theses of which we have now identified four key ones. We began with the strong thesis of natural law that an unjust law is no law. We ended with the weaker thesis of natural law. On the positivist's side, the separation thesis was formulated in opposition to the strong natural law thesis. Dworkin's work has since splintered the positivist's side into inclusive and exclusive positivists, each side with their own version of the positivist thesis. As I have previously noted, it is essential to correlate theoretical claims with facts around us. Only then can we have truly meaningful conversations in legal theory. I attempt to do this in the next section.

III. LEGALITY AND MORALITY: THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The IBC was enacted after a comprehensive study conducted by the Bankruptcy Law Reforms Committee [**the Committee**] in 2015.[36] A bankruptcy law may not be the first legislation that springs to mind when we debate issues of law and morality but the creation of a bankruptcy regime involves questions of justice at multiple levels.[37] The heart of any bankruptcy regime would be a mechanism for ensuring distributive justice: that creditors of the insolvent entity are

[33] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 364 (2011).
[34] Finnis-Classical.
[35] MARK MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 11 (2006).
[36] BANKRUPTCY LAW REFORMS COMMITTEE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (2015).
[37] FINNIS, *supra* note 33, at 188.

paid in a fair and transparent manner.[38] Further, a person who suffers genuine business failure should not be unduly penalised.[39] These principles aside, there are important economic rationales to be pursued in the creation of a modern bankruptcy regime. For instance, the absence of an efficient bankruptcy system would mean that lenders in market would be averse lending leading to a shortage of credit in the market.[40]

The Committee's detailed report contained a draft Bill that eventually went through the legislative process and became law in 2016. The first part of the Act that came into force deals with Corporate Insolvency. Under the Act, on the initiation of proceedings by a financial creditor or an operational creditor, the day to day affairs of the Corporate debtor is placed in the hands of a Resolution Professional.[41] Important decisions as to the fate of the Corporate Debtor are to be taken by a Committee of Creditors constituted under the Act. The first attempt in the resolution process is to find applicants who are willing to infuse money into the corporate debtor, repay the creditors as per a resolution plan and continue operations of the Corporate Debtor as a going concern.[42] If the process of resolution fails, then the Act mandates liquidation of the Corporate Debtor in which case creditors are to be paid as per the priority prescribed under the Code.[43]

A major advance in jurisprudence in the last century was the awareness that in order to discover the true nature of law as a practice, we must view law as it appears to a participant in the practice. So I consider a few interactions of participants with the law in the legal process beginning with the stage of lawmaking.

Any law begins, as it were, with some form of moral content. The contents of any law are norms that Parliament or a state legislature has identified as worthy of enforcing as law. In our example, the provisions of IBC embody a new economic approach to the problem of bankruptcy in an economy that is expected to grow at a fast pace. Positivism, as an analytical tradition, has very little to say about this moral content of laws. To be clear, this does not render the separation thesis invalid in any way. The separation thesis is a descriptive claim about the nature of law. By contrast, natural law deals squarely with practical rationality, the moral content of the law and offers a view on how we should individually and collectively engage in the pursuit of some idea

[38] *Id.*, at 18, 22.
[39] *Id.,* at 33.
[40] *Id.,* at 10.
[41] §§16, 22, Insolvency and Bankruptcy Code, No. 31 of 2016.
[42] §25, Insolvency and Bankruptcy Code, No. 31 of 2016.
[43] §53, Insolvency and Bankruptcy Code, No. 31 of 2016.

of the common good.[44] Therefore, if a bankruptcy system is manifestly unjust in some way that it fails to pursue the common good, a classical natural law theorist would presumably contend such a law to be defective. This, historically, was the major point of difference between the two traditions.

We leave the issue of validity for the time being and move to an instance of a simple invocation of the law once it is in force. Consider a situation where an operational creditor wants to initiate some action in respect of a debt due. This is almost a banal application of the law. The operational creditor would look at the IBC with the help of her lawyers and decide to proceed by first issuing a notice under Section 8 and thereafter initiating the corporate insolvency process under Section 9 of the IBC. There is good reason to suspect that a vast majority of interactions that people have with the law are of this nature. In such instances, one deals with the law as a matter of fact, as the positivist insists. Both the contents of the law and its validity are determined as matters of fact and involves no moral evaluation. This is the central insight that positivism offers as a claim about the nature of law and defends as the separation thesis asserting it to be true of all our interactions with law. Once a law comes into force, an overwhelming share of the interactions that persons have with the law will be of this kind. However, this claim comes under some stress in more complex interactions with the law which are not uncommon in modern legal systems.

IV. THE HOMEBUYER'S PROBLEM

A. The Facts

The IBC was enacted just when several real estate companies were floundering. These companies had huge debts to banks and other financial institutions but they were also in default to thousands of homebuyers who had booked residential flats. The IBC recognises primarily two kinds of creditors who can initiate action against the Corporate Debtor: financial creditors and operational creditors. The IBC follows a model of placing the creditor in charge during the insolvency process and only financial creditors are part of the Committee of Creditors.[45]

In one of the first cases pertaining to a real estate company under the IBC, when insolvency proceedings commenced against a large company, homebuyers realised that they were neither financial creditors nor were they operational creditors.[46] The moratorium under Section 14 of the

[44] MURPHY, *supra* note 35, at 1; Finnis-Classical.
[45] §21, Insolvency and Bankruptcy Code, No. 31 of 2016.
[46] Chitra Sharma v. Union of India, (2018) 18 SCC 575 (India).

IBC meant that on the commencement of insolvency proceeding, their right to exercise other statutory remedies such as under Consumer Protection Act, 1986 or the Real Estate (Regulation and Development) Act, 2016 was also frozen. Since homebuyers were not given the status of financial creditors, they would not have any say in the fate of the Corporate Debtor. It seemed unjust as the people who had the highest stakes could not participate in the resolution process.

A writ petition was filed in the Supreme Court challenging the constitutional validity of various provisions of the IBC.[47] In the meantime, the Union Government took note of the anomalous position of the homebuyers and introduced an ordinance to amend the IBC and include homebuyers as financial creditors. Parliament subsequently amended the IBC in line with the ordinance[48] [**the IBC Amendment Act**]. Soon thereafter, the amendment was challenged in the Supreme Court and was held to be constitutionally valid in *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*.[49]

B. Theoretical Disagreements and The Separation Thesis

One important argument before the Supreme Court was that the amendment that added an explanation to Section 5 (8) (f) that an allottee of a real estate project is to be a financial creditor was in violation of Article 14. The challenge, on behalf of real estate developers, on equality was twofold. First, by picking out real estate developers alone, who are otherwise suppliers of goods, to be subject to the IBC, equals had been treated unequally and second, by equating homebuyers with other financial creditors, unequals had been treated equally.

The determination of the contents of the constitutional rule that a law must not breach equality, is plainly different from our earlier situation of an operational creditor invoking the IBC to initiate action under the IBC. What is of significance here, is that to the real estate developers' lawyers, the amendment as on the date it was enacted, violated the contents of Article 14 which reads "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"

Parliament which enacted the law amending the IBC to remedy the homebuyers' problem had, however, thought otherwise.

While it is true that the rule of equality exists as a matter of fact as do decided cases interpreting the rule, in disputed instances different actors in the legal system arrive differing conclusions as

[47] *Id.*
[48] §3, Insolvency and Bankruptcy Code (Amendment) Act, No. 26 of 2018.
[49] (2019) 8 SCC 516 (India).

to the purport of the rule. The core of Dworkin's challenge to positivism turns on this point that in adjudication, lawyers and judges employ the language of what the law is and disagree about what the law is, which means that the plain fact views of law being source-based that the positivist presents, cannot be correct.[50] Dworkin's theory, instead, is an elaborate account of the kind of constructive interpretation that is involved in the process of discovering what the law is that governs a case. This involves moral reasoning of a profound nature which therefore dislodges the separation thesis.

Dworkin's reliance on the language employed by lawyers and judges of 'discovering what the law is' is therefore a critical move in his argument. He then uses this to refute a simple positivist claim that what judges and lawyers are doing in these cases is altering a norm without actually claiming to do so. In the homebuyer's case, the lawyers and judges appeared to be engaging in a theoretical disagreement while employing the language of what the law is. The lawyers for the petitioners seemed to suggest that the law of equality *is* that a homebuyer cannot be treated as financial creditor, the judges disagreed and held that the law of equality *is* that it permits a homebuyer to be treated as financial creditor.

The interesting feature about our legal culture however, is that cases abound where this language is not really adhered to. In our superior courts, it is not hard to find judges altering laws rather explicitly and the pretense of discovering the law is minimal. For example, in *Arcelor Mittal,*[51] the Supreme Court interpreted Section 12 of the IBC to hold that the period of 270 days in which the resolution process was to be mandatorily completed excludes the period consumed in litigation.

> *"It is also true that the time taken by a Tribunal should not set at naught the time-limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation."*[52]

This is a thinly veiled act of altering the law rather than discovering the law and seems to have been done with the awareness that the law is being altered. The judges did discover the law as a matter of plain fact and did not find it in accordance with the principle that the act of a court can do no harm. Hence, they decided that the only reasonable construction of the statute could be

[50] DWORKIN, at 37.
[51] Arcelormittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1 (India).
[52] *Id.*, at ¶ 86.

that the period of litigation be excluded from the time limit for completion of the resolution process.

It is important to remember that Dworkin's claim that interpretive theory is addressed to the particular legal culture of the author. What the above instances show is that while it might be easy to find similar instances of theoretical disagreements in our legal system, it might be easy enough to find counter-examples as well, where judges and lawyers explicitly alter norms after finding out what the law is from social facts. That leaves us in an interesting position. We might be able to find enough instances of theoretical disagreements to sufficiently destabilize the separation thesis. On the other hand, we can set out on an expedition to find enough counter-instances to affirm the separation thesis and stick to some kind of positivism. In the conclusion of this essay, I argue that we must, however, not succumb to such temptations.

V. CONCLUSION: A GLIMPSE OF THE WAY FORWARD

As I detailed in the first part of the essay, debating the connections between law and morality has a long historical past. The centerpiece of this rivalry even today is the Hart/Dworkin debate though a generation of legal theorists in the Anglo-American tradition who have expended their energies on it. There are those who acknowledge that the debate is stale and that legal theory must move on.[53] Removed as we are from the thick of this debate, we are better placed to think afresh about law and morality than those who born into these rival traditions. Our first task must be to not find ourselves in a position where our role is limited to picking a side. That does not necessarily mean forsaking all that can be learned from the debates between these traditions. Instead, if we were to unburden ourselves of the notion that we have to be singularly committed to one of the rival theses, we can catch a faint glimpse of the way forward.

We interact with the law in diverse circumstances. A lawmaker is tasked with converting moral content into law while adhering to constitutional rules. The view of citizen who follows the law in one instance unquestioningly differs from that of a citizen or a lawyer who challenges the constitutional validity of a law believing a law to be unjust. There may be a judge who sees the legal system as a coherent whole who discovers the law governing each case through moral reasoning as opposed to a judge who interprets a law with the full awareness that he is altering the law.

[53] Scott Hershovitz, *The End of Jurisprudence*, 4 YALE L. J. 124 (2015).

If one approaches the myriad contexts of our encounters with the law armed with stubborn theses of one kind or another, it is likely that we see what we want to see and not what there is actually to be seen. Perhaps, there is something in the very nature of law that accounts for the mysterious relationship between law and morality. Perhaps, the regularities that the positivists rely on for their thesis and the oddities that natural lawyers point out in their refutations are mere manifestations of some deeper truth. All or nothing approaches do not tell us the whole story. Worse, they may blind us to the truth.

ANOTHER BRICK IN THE WALL: DEFINING THE MORAL CONTOURS OF A RESTITUTION OF CONJUGAL RIGHTS PROVISION

PRIYANSHI VAKHARIA[*]

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ABSTRACT

The restitution of conjugal rights provision, born in medieval England and bequeathed to colonial India, is a problematic provision in modern day Indian jurisprudence. Its problems are not new. Since its introduction into personal law, which for the purposes of this essay is Hindu law, a restitution of conjugal rights decree has been misused for one purpose or another. Marital cohabitation is nearly always an ostensible object.

A relic of both colonial supremacy and Victorian morality, this provision has historically been protected by the illusory rectitude of keeping families together, which has effectively given courts the license to construct and adjust a marital relationship at their discretion.

A recent family court order quashed by the Aurangabad Bench of the High Court of Bombay raises new questions of constitutionality of restitution of conjugal rights in the mind of the author. By tracing the moral complexities of its origin, this essay argues that a restitution of conjugal rights provision blurs the lines between the reproductive autonomy of a woman and the independent decision of parties to end their marriage and creates a constitutional catch-22 situation regarding marital rights.

I. INTRODUCTION

In December 2019, a young wife caught in divorce proceedings against her husband, sought directions to have a second child during the pendency of a petition seeking restitution of conjugal rights. The family court judge held reproductive rights to be basic civil rights with the condition that any In Vitro Fertilisation [**IVF**] procedure to bear such child, would require the estranged husband's consent. The Aurangabad Bench of the High Court of Bombay quashed the order, finding the conclusion of the family court to be 'western' and 'shocking to the judicial conscience of the court.'[1]

Many questions arise is this situation: If the restitution of conjugal rights provision encourages a marital relationship by way of intercourse, does that not include the right to bear a child? Would it then be unconstitutional to restrict such a right? Should the court's moral imperative be the sanctity of the marital institution or the welfare of the parties involved? How does the constitutional morality of such a provision align with the jurisprudential morality of the courts?

The remedy of restitution of conjugal rights is for the purposes of Hindu law, to which this essay is restricted, enshrined in Section 9 of the Hindu Marriage Act, 1955.[2]

Conjugal rights connote both the right which spouses have to one another's company and the right to marital intercourse. When one spouse leaves the other without any just cause or excuse,

[1] KGP v. PKP, (2019) SCC OnLine Bom 5305 ¶28, 30 (India) [hereinafter KGP].
[2] § 9, Hindu Marriage Act, No. 25 of 1955.

the provision enables the latter to bring the former into the conjugal fold so to speak. The restitution of conjugal rights decree requires amicable co-residence, though not necessarily sexual intercourse, and is viewed as a mechanism that preserves the institution of marriage for the parties involved. Thus, deprived of the primary rights of cohabitation and companionship in a marriage, a spouse so bereft is entitled to approach the courts seeking the restitution, or the restoring of marital cohabitation.

When early British settlers first came to India, in search of both thrill and treasure, they left their womenfolk at home in England. Away from their spouses in a foreign land, the early Englishmen in India, established *bibi* culture or the taking up of an Indian mistress while in India, as a common law wife of sorts.[3] In peak emigration years, it was found that 'leaving' was the most common male response to domestic problems.[4] In those days, desertion without cause for two years and upwards was a valid ground for judicial separation. What such wives most required was alimony, and with every petition for judicial separation there was filed an application for interim alimony, calculated at little less than a fifth of her matrimonial income.[5]

Yet, research indicates that judicial separation was redundant for such a deserted wife, who could at the very best only refuse to entertain such an emigrant husband upon his future return.[6] Deserted wives increasingly preferred the speedier and simpler remedy of a restitution of conjugal rights petition, which statutorily entitled a deserted wife to interim alimony just as in a suit for judicial separation but without the onerous two year wait period.[7] Research indicates that if such suits came to hearing they were unencumbered by strict rules of evidence and were generally designed to succeed unless the husband was able to attribute any adultery or legal cruelty to the petitioner wife. [8] In fact, records reflect that as many as 33 restitution petitions were filed between 1858 and 1860, but only 17 petitions were filed for judicial separation on the ground of desertion.[9] Towards the end of the century, restitution of conjugal rights was adapted to fit into both Hindu and Muslim personal law in India.

Although it was a century before restitution of conjugal rights was imagined in the context of independent India, its tenuous origins in England had set the stage for its subsequent acceptance into the fold of Indian personal law. What is remarkable, however, is that while the Supreme

[3] VIKRAM SAMPATH, MY NAME IS GUAHAR JAAN, Chapter 1: The Early Years (2012).
[4] Olivia Anderson, *Emigration and Marriage Break-Up in Mid-Victorian England*, 1 Ser. 2 ECON. HIST. REV., 104-7 (1997).
[5] Olivia Anderson, *Civil Society and Separation in Victorian Marriages*, No. 163 Past & Present, 173 (May 1999) Oxford University Press on behalf of The Past and Present Society, https://www.jstor.org/stable/65117.
[6] Macqueen, *Practical Treatise on the Law of Marriage*, Divorce and Legitimacy, 309. *See* Olivia Anderson, *supra* note 5, at 172.
[7] § 17, 20 & 21 Vict., c. 85 (U.K.); *See* Olivia Anderson, *supra* note 5, at 173.
[8] *See* JOHN M. BIGGS, CONCEPT OF MATRIMONIAL CRUELTY, 205 (1962). *See also* Olivia Anderson, *supra* note 5, at 174.
[9] Parliamentary Papers, 1862 (99) XLIV, 11-13; *See* Olivia Anderson, *supra* note 5, at 174.

Court of India stood by the restitution of conjugal rights provision in 1962, eight short years later, it was abolished in England in 1970.[10] This essay argues in Part I, that a restitution of conjugal rights provision has no place in contemporary jurisprudence, as it creates more problems than it solves.

Part II of this essay traces the origins of the remedy of restitution of conjugal rights, in the context of introduction in Indian law. It outlines some of the fundamental misuses of the provision, such as being a stepping stone to divorce or a ploy to defeat other financial claims. Part III deals with the moral implications of the restitution of conjugal rights provision. It follows the jurisprudence on the constitutional validity of the provision before re-contextualizing the challenge to the restitution of conjugal rights provision, in face of the nuanced exposition of privacy in *Justice (Retd.) K. S. Puttaswamy v. Union of India* [***Puttaswamy***].[11]

Part IV specifically analyses the outcome of a recent judgment of the Aurangabad Bench of the High Court of Bombay which might change the course of how restitution of conjugal rights is viewed in India. Part V concludes the essay by encapsulating the moral and legal ambiguities of the restitution of conjugal rights provision, defending why such an antiquated provision cannot continue to occupy space in modern day Indian jurisprudence.

II. THROUGH THE LOOKING GLASS: RESTITUTION OF CONJUGAL RIGHTS

A. The Origins of Conjugal Rights and the Colonial Necessity to Provide for their Restitution

Ancient Hindu law as originally laid down, did not entertain the concept of conjugal rights. Derived from a sacrament, enjoined by divinity, marriage in ancient Hindu law bound two parties with reciprocal obligations, within which litigation was forbidden. Given that divorce was unthinkable, the restitution of conjugal rights much less so. The remedy of restitution of conjugal rights is a creation of medieval English law. The extent to which it could be imported into Hindu law in India formed a considerable question of late nineteenth-century jurisprudence.

The remedy of restitution of conjugal rights was one of the many products of the coverture rules that originated in eighteenth century English law, which followed the legal doctrine of yesteryears, marking husband and wife as one entity. The legal, political, sexual and economic rights of the wife were subsumed by those of her husband to the extent that the wife was considered a 'dependent', incapable of independent existence.[12] In this respect, the presumption

[10] §20, The Matrimonial Proceedings and Property Act, 1970 (U.K.).

[11] Justice (Retd.) K. S. Puttaswamy v. Union of India (2017) 10 SCC 1 (India) [hereinafter Puttaswamy].

[12] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND BOOK 1, Chapter 15: Of Husband and Wife, LONANG INSTITUTE (1765-1769), https://Lonang.Com/Library/Reference/Blackstone-Commentaries-Law-England/Bla-115/.

of consent was effectively invalid for women. In that pre-suffragette political climate where men and women fell into two very distinct categories with unimpeachable boundaries, the law encouraged withholding political, social and economic rights that concerned daily functioning in the outside world, from the domestic, house-bound and family-oriented women of the time.[13]

Given that a wife was considered the legitimate 'chattel' of her husband,[14] the husband was entitled by way of their marriage to her consortium. The feudal remedy of restitution of conjugal rights enabled one spouse to move the court when the other withdrew from such consortium. The court would then, upon an examination of the facts, order the erring spouse to return into the conjugal fold. Early Indian observations on the remedy, have not failed to recognise the feudal anachronism from which it originates: *The wife was treated like a cow, who if she ran away from the master's shed, could be brought back and tied to the post in that shed.*[15]

Yet, there is little to give credence to the necessity of importing the remedy of restitution of conjugal rights into Hindu law. The borrowing of the remedy was considered by the Privy Council in the context of Muslim law, where the court held that the remedy of restitution of conjugal rights could be availed in Muslim law.[16] The remedy was also held to apply *mutatis mutandis* to Hindu law as well.[17] Exactly where and how the restitution of conjugal rights fit into the pervasive idea of marriage as a sacrament, was left unanswered.

B. Restitution of Conjugal Rights as a Means to Divorce

The real predicament with a restitution of conjugal rights provision is not always with itself, but in the purposes that such a remedy is often used for. One of these purposes is, as a stepping stone to divorce. The restitution of conjugal rights provision has always been considered a means to either thwart or hasten divorce proceedings. In the general realm of uncodified Hindu law, divorce was not recognized unless where tempered and accepted through custom. The codification of Hindu personal law resulted in the inclusion of a divorce provision through Section 13(1A) of the Hindu Marriage Act, 1955;[18] although divorce is to this day, granted on extremely specific and limited grounds.

The earliest recorded instance is *Ishwar Chander Ahluwalia v. Shrimati Pomilla Ahluwalia*[19] [***Ishwar Chander Ahluwalia***] wherein the applicant husband filed for, and subsequently received a decree of restitution of conjugal rights provision, one year after his marriage. Shortly thereafter, he filed for a decree for nullity of marriage on the grounds that the restitution of conjugal rights

[13] Priyanshi Vakharia, *Unveiling Privacy for Women in India*, (2019) 10 Law Rev. GLC 37, page 44-45.
[14] SIR WILLIAM BLACKSTONE, *supra* note 12.
[15] Paras Diwan, *Week-end Marriages and Restitution of Conjugal Rights*, 20 J. IND. L. INST. 1 (1978).
[16] Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, (1886) 11 MIA 551 (PC).
[17] Kateeram Dokanee v. Mt. Gendhenee, (1875) 23 Suth WR 178.
[18] § 13(1A), Hindu Marriage Act, No. 25 of 1955.
[19] Ishwar Chander Ahluwalia v. Shrimati Pomilla Ahluwalia, AIR 1962 (Punj.) 432 (India).

decree had not been complied with. The court remarked that the very fact that the nullity petition was filed a year after the restitution of conjugal rights decree was passed, makes it doubtful whether any sincere efforts were made on behalf of the husband to get his wife to comply with the decree for restitution of conjugal rights.[20] The idea of a sincerity test was loosely fashioned in *Ishwar Chander Ahluwalia* and generally left unencumbered. However, the implications are significant.

In *Captain B. R. Syal v. Smt. Rama Syal* **[*Captain B. R. Syal*]** the very same Court illuminated the concept of a sincerity test in holding that the essence of a restitution of a conjugal rights decree is that the spouse desiring the company of the other makes an effort through the court to restore cohabitation.[21] The court observed that in the case before it, the restitution of conjugal rights petition was filed as a mere pretense or sham. It was actually intended for an extraneous and different purpose, that is, to enable the husband to obtain a divorce from a wife against whom the charges justifying a divorce could not be leveled, and who was free from blame or blemish, and was mentally and physically sound.[22] The court held that in a petition for the restitution of conjugal rights, where the purpose was cohabitation in preservation of marriage and not its dissolution, the petitioner was required to show that s/he was sincere.[23] For the court, this meant showing that the petitioner had a bona fide desire to resume marital cohabitation and to render the rights and duties of such cohabitation. In fact, the court went so far as to clarify that a petitioner who was sincere in this sense was entitled to a decree, even if the parties may not have evinced any affection for each other.[24]

Despite the lucid interpretation of the sincerity test in *Captain B. R. Syal,* there is no doubt as to the continued misuse of the remedy. In *Shreevastava v. Veena*, a decree for the restitution of conjugal rights was passed on application by the husband.[25] The wife had no objections. However, the husband, actively resisted the wife's attempts to resume marital cohabitation. When the wife moved court to record the satisfaction of the decree as far as her conduct was concerned, the husband objected on the grounds that such decree cannot be unilaterally complied with. The court observed that the husband's conduct was clearly indicative of a planned design to obtain a decree for divorce on the basis of the decree for restitution of conjugal rights in order to rid himself of the liability towards his wife and child.[26] Non-compliance of a decree of restitution of conjugal rights is not a fact to be acknowledged which

[20] *Id.*, at ¶10.
[21] Captain B. R. Syal v. Smt. Rama Syal, 1968 SCC OnLine P&H 5 (India).
[22] *Id.*, at 397.
[23] *Id.*, at 398.
[24] *Id.*, at 398-99.
[25] M. P. Shreevastava v. Mrs. Veena, 1967 AIR 1193 (India).
[26] *Id.*

may then serve a broader purpose. In *Someshwar v. Leelavathi*, when the husband refused access to the wife in resuming cohabitation under a decree for restitution of conjugal rights, the court found that while the wife had returned with the genuine intention of resuming marital cohabitation, she was prevented from doing so by an act of the husband himself.[27]

The ability of one spouse to use the non-compliance of the other spouse with a decree for restitution of conjugal rights, as grounds to move a divorce petition under Section 13 of the Hindu Marriage Act, 1955, did not slip by unnoticed by the courts of the time. Indeed, the court opined in *Bimla Devi v. Singh Raj* that while the conduct of the parties following a decree for restitution of conjugal rights could be considered while granting relief, the refusal thereof was not a consideration which could weigh against a party claiming dissolution of marriage.[28]

This does not suggest that misuse of the remedy is in all cases prevented. Often the weight of the court has rested behind the erring party. One instance of this, is *Santosh Kumari v. Mohanlal* [***Santosh Kumari***], wherein the wife against whom a decree for restitution of conjugal rights was passed, was ready to resume marital cohabitation.[29] She was materially prevented from doing so by the husband, upon which she filed an execution application against the husband. The husband defended his non-acceptance of his wife, and his non-resumption of marital cohabitation on the grounds that he had already initiated divorce proceedings. The court dismissed the wife's execution application as its purpose had been fulfilled.

It must be noted that if recourse was taken to the sincerity test first broached in *Ishwar Chander Ahluwalia,* and then crystallised in *Captain B. R. Syal,*, the court in *Santosh Kumari* might have found the husband's petition for restitution of conjugal rights a mere sham or pretense, made simply for the extraneous purpose of obtaining a divorce. The court might have then reasoned that the husband's conduct was not for the purpose of resuming cohabitation under a restitution decree, but for obtaining a divorce, thus lacking sincerity. It is remarkable if somewhat puzzling to note how the sincerity test has been pushed to the sidelines despite streamlining the considerable ambiguity surrounding the restitution of conjugal rights. This indeed has paved the way for precisely what *Captain B.R. Syal* cautioned against—the misuse of a restitution decree to defeat other claims.

C. Restitution of Conjugal Rights as a Means to Defeat Claims

The misuse of a decree for the restitution of conjugal rights is not restricted to serving as ground for divorce. A decree for the restitution of conjugal rights need not even be a means to an end. It may as well be an impediment thrown in by one spouse to defeat claims made by the other

[27] Someshwar v. Leelavathi AIR 1968 (Mys.) 274, ¶27 (India).
[28] Bimla Devi v. Singh Raj, AIR 1977 (P&H.) 167 (India).
[29] Santosh Kumari v. Mohanlal, AIR 1980 (P&H) 325 (India).

spouse. The most tangible form such claims take is in the context of maintenance, claimed for by one spouse and denied by the other spouse. Therefore, a decree for restitution of conjugal rights becomes a tool of strategy that is used as a ploy to either escape or impose maintenance as per the party's intentions.

For instance, in *Teja Singh Subedar Santa Singh v. Sarhit Kaur*, the wife had been living apart from her husband for a period of several years, during which there was no litigation. Compelled by her circumstances, the wife filed for maintenance. Once she had obtained such an order, the husband filed for a decree for restitution of conjugal rights in order to defeat the maintenance order.[30] Similarly, in *Venkattama v. Patel Venkatswamy Reddy* the wife left her matrimonial home as her husband had taken on a second wife.[31] However, when the wife filed for maintenance, the husband moved the court for a decree for restitution of conjugal rights. Although the decree was ultimately refused on other grounds, it was observed that the husband did not want to resume cohabitation with the first wife, but had filed for restitution of conjugal rights to defeat her claim for maintenance.

In *Jinarthanammal v. P. Srinivasa*, the husband filed a decree for restitution of conjugal rights whilst in the middle of divorce proceedings, merely to defeat the wife's claim for maintenance.[32] The court dismissed the restitution of conjugal rights petition on the grounds that it was not bona fide. It is seen that the decree of restitution of conjugal rights is often less a remedy, and more a barrier for an applicant to break through in order to prove their claims.

III. AN ENGLISH ANACHRONISM IN INDIAN LAW: THE MORAL IMPLICATIONS OF THE REMEDY OF RESTITUTION OF CONJUGAL RIGHTS

A. *Addressing the Bull in the China Shop: The Constitutional Validity of Restitution of Conjugal Rights*

The restitution of conjugal rights has often been regarded as an affront to liberty and equality. Its most compelling critique comes from the High Court of Andhra Pradesh, which found Section 9 of the Hindu Marriage Act, 1955 to be unconstitutional and violative of the life and personal liberty guaranteed under Article 21 of the Constitution of India.[33] In *T Sareetha v. T Venkata Subbiah* [***T. Sareetha***], Justice Choudhary, had considered the restitution of conjugal rights provision to have the effect of coercing unwilling parties into having sex against such person's free will and consent, through the judicial process.[34] This was based on the reasoning that sexual

[30] Teja Singh Subedar Santa Singh v. Sarhit Kaur, AIR 1962 (Punj.) 195 (India).
[31] Venkattama v. Patel Venkatswamy Reddy, AIR 1963 (Mys.) 118 (India).
[32] Jinarthanammal v. P. Srinivasa, AIR 1964 (Mad.) 482 (India).
[33] T Sareetha v. T Venkata Subbiah, AIR 1983 (AP.) 356 (India).
[34] *Id.,* at ¶17.

expression in itself is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation.[35] Therefore, the very provision of restitution of conjugal rights constituted the grossest form of violation to an individual's right to privacy.[36]

Justice Choudhary's focus on sexuality rests on the exposition of marital privacy. Marital privacy forms an important constitutional thread of thought that carries forward in the judgments that counter decision in *T. Sareetha*. The traditional concept of marital privacy afforded protection to the institution of marriage and not to the two individuals who constituted the sphere therein.

Very often, courts have felt it their moral imperative to preserve the sanctity of marriage rather than specifically assessing the rights of the individuals therein. This preservation of the marital sphere is echoed from the verdict of the High Court of Delhi in *Harvinder Kaur v. Harmandar Singh Choudhry*, which protected the spatial construct of marital privacy when it likened the introduction of constitutional law in the home to letting loose a bull in a china shop, to the detriment of the institution of marriage and all that it stood for.[37] In deciding a restitution of conjugal rights petition, the High Court of Delhi found that because the nature of marriage was so intimate, and protected by the traditional idea of marital privacy, it would be inappropriate to apply constitutional principles to marriage.

The Supreme Court of India eventually confirmed the judgment of the Delhi High Court, effectively overruling the decision in *T. Sareetha*.[38] Conjugal rights were found to be inherent to the very institution of marriage itself. They served the social purpose of aiding the prevention of breaking up of marriages. Indeed, as far as the concerns of liberty were concerned in a restitution of conjugal rights matter, it was held that the provision itself contained sufficient safeguards to prevent it from being a tyranny. Further, it was found that a spouse reluctant to comply with a restitution of conjugal rights decree would always pay the requisite fee provided they had properties which could be attached.[39]

The moral imperative of the courts, with notable exceptions of Justice Choudhary of the High Court of Andhra Pradesh and a few others, has always been to protect and preserve the institution of marriage. The judicial morality is ensconced in protecting general society against a more 'western' outlook on marriage by adopting an attitude of apparent non-interference. In this context the restitution of conjugal rights provision is an interesting intersection. The provision

[35] *Id.*, at ¶18.
[36] *Id.*, at ¶30. *See also* Smt. Saroj Rani v. Sudarshan Kumar Chadha, AIR 1984 SC 1562, ¶10 (India).
[37] Harvinder Kaur v. Harmandar Singh Choudhry, AIR 1984 (Del.) 66, ¶34 (India).
[38] Smt. Saroj Rani v. Sudarshan Kumar Chadha, AIR 1984 SC 1562, ¶16 (India).
[39] *Id.*

itself allows courts to intervene in marital relationships by decreeing when and for how long marital cohabitation must take place.

Having already been involved in the apparently intimate space of a marriage by the letter of law, the court's moral imperative is not then to interfere as little as possible. Instead the court must perform its duty as the guardian of constitutional and fundamental rights, by ensuring that the rights and liberties of parties are not infringed. The non-interference argument is thus suspect: the courts cannot adopt an attitude of respecting the privacy of a marriage, when the legislation allows parties to come forward and compel their spouses to marital cohabitation. Interestingly, the Supreme Court of India is currently hearing a petition as to the validity of the restitution of conjugal rights provision in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, thus offering perhaps a second chance to do away with what is essentially a feudal anachronism in Indian jurisprudence.[40]

B. *Peering through the Privacy Lens: Re-examining the Restitution of Conjugal Rights*

These clear-cut lines of constitutionality however, have blurred after the Supreme Court of India's incisive decision in *Puttaswamy*. Just as Justice Choudhary broke open the shell of marital privacy in *T. Sareetha,* in the same way, the Supreme Court of India, asserted that the unit of privacy is first and foremost the individual. The individualistic notion of privacy that *Puttaswamy* propounds rests on the fact that in creating a private sphere for oneself, one chooses the space surrounding oneself and actively controls it thereafter to warrant safeguard from unwanted intrusion. As a result, privacy is attributable to the individual; it is at the individual's discretion to create a space for themselves in a way that they see fit.

Justice Choudhary's reasoning of unconstitutionality of the restitution of conjugal rights provision is based on the fact that the presumptive lack of consent and compelling of sexual relations at the hands of the adjudicating court is an infringement of the right to life and personal liberty under Article 21 of the Constitution of India. Of course, in his exposition of sexual privacy, he did not have recourse to the Supreme Court of India's nuanced interpretation of privacy in *Puttaswamy*. However, if the constitutionality of the restitution of conjugal rights provision is considered today, it might read something like this.

[40] Samanwaya Rautray, *SC to decide validity of provisions governing restitution of conjugal rights*, ECONOMIC TIMES, Mar. 6 2019, https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-decide-validity-of-provisions-governing-restitution-of-conjugal-rights/articleshow/68279688.cms?from=mdr.

According to the majority opinion in *Puttaswamy*, violations of privacy under Article 21 must satisfy the proportionality standard.[41] The Supreme Court opined: "An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."[42] The Court further held:

> '*The concerns expressed on behalf of the Petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State: (i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference.*'[43]

Of the three requirements of the Article 21 standard, it may be construed that the State has its evidence for legality – there certainly is the existence of a law, Section 9 of the Hindu Marriage Act, 1955, which sanctions the ability of one spouse to file a decree against another. The question that arises is with regard to the other two prongs: necessity and proportionality. The legitimate State aim, so to speak, is to safeguard the sanctity of the marital institution. In democratic twenty-first century India, there is little, if nothing, to justify such an absurdly outdated State aim. Further, the preservation of the institution of marriage cannot come at the cost of the safety and autonomy of the individuals in a marriage. The proportionality standard applied in this context does not draw a rational nexus between the object of protecting marital relationships and forcing sexual relationships to the detriment of one party or the other. This is suspect especially when there exists a plethora of case law (as discussed in the earlier sections) that outline the potential mischief a restitution of conjugal rights decree can cause.

In order to substantiate a privacy claim under Article 21, it is important to revisit the origins of a restitution of conjugal rights provision. In eighteenth century England, because women were confined to the domestic sphere, it was the legitimate aim of the State to ensure their dependency on their male counterparts.[44] The umbrella protection of the coverture rules which may have rendered the State aim of eighteenth century England legitimate, is difficult to justify in

[41] The proportionality standard arose from the Wednesbury principle of reasonableness in English law. The proportionality standard is a common test of review to keep State infringement of individual rights under check. It requires that the measure to be enacted *via* legislation or executive action is likely to achieve its ends and cause as little harm as possible.

[42] Puttaswamy, at ¶3(H).

[43] *Id.*, at ¶71.

[44] Priyanshi Vakharia, *supra* note 13.

modern day India.[45] Having adopted the constitutional ideals of equality and liberty, women are no longer 'dependents'—they are independent (if not always equal) citizens under law.[46] Their sexual freedom must be reflected in their agency to enter or end marriages. A provision like the restitution of conjugal rights therefore interferes with their inherent right to privacy, which encompasses their sexual privacy.

It must be disclaimed that unlike other provisions, such as for instance the marital rape exception which is undeniably disadvantageous to women in particular, a restitution of conjugal rights provision is disadvantageous to an unwilling party, who could be either husband or wife. The dubiety surrounding the provision therefore need not be restricted to the coverture rules of England alone. After all, it is perfectly possible for an applicant wife to move the courts for a decree of restitution of conjugal rights against her respondent husband. The pervasive idea however, that it is for the courts to decide when and how a marriage is to be salvaged and to what extent this is done by marital cohabitation is problematic.

Another interesting perspective to re-evaluate is the feminist exposition of privacy and how this affects the case against the restitution of conjugal rights.[47] Feminist scholars usually find that privacy is ambiguous; often an excuse to protect male bad behaviour; creates a problematic distinction between acts performed in 'public' spaces; and is largely irrelevant to claims of liberty.[48] Eminent feminist scholar Martha Nussbaum, has said of the validity restitution of conjugal rights in India, that marital privacy has no place in claims of bodily integrity. She argues that the guarantee of life and liberty in Article 21 of the Constitution of India involves protection of the very basic right of sexual autonomy, including the right to refuse sex one does not want.[49] Of course, this was written seventeen years before *Puttaswamy* came to be. When read in light of the individualistic notion of privacy that *Puttaswamy* propagates, the idea of marital privacy is unsustainable, if not done away with entirely.

IV. TO BEAR OR NOT TO BEAR: A MORALLY TROUBLING CONSEQUENCE OF THE RESTITUTION OF CONJUGAL RIGHTS PROVISION

The potential trouble that a restitution of conjugal rights provision creates is not restricted to its role in giving impetus to divorce or in defeating other claims. The trouble is far more permanent and far more damaging to the fabric of the very society such a provision seeks to protect. The

[45] *Id.*, at 45.
[46] *Id.*, at 45.
[47] *Id.,* at 48-49.
[48] Martha Nussbaum, *Is Privacy Bad for Women?* The Boston Review, Apr. 1, 2000, http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women.
[49] *Id.*

continued existence of a restitution of conjugal rights provision certainly gives rise to some tricky questions.

For instance, consider a recent case where an applicant wife sought directions to have a second child with her estranged husband, either through sexual relations or through IVF procedure, during the pendency of a petition seeking restitution of conjugal rights. The husband strongly resisted the want of a second child and initiated divorce proceedings against the wife. The family court judge, in deciding the restitution of conjugal rights petition held reproductive rights to be basic civil rights with the condition that any IVF procedure to bear such child, would require the estranged husband's consent.[50] The Aurangabad Bench of the High Court of Bombay quashed the order, finding the conclusion of the family court to be 'western' and 'shocking to the judicial conscience of the court."[51] The family court judge invoked international treaties like the United Nations Convention for the Elimination of all Forms of Discrimination Against Women, to hold reproductive rights of women to be basic civil rights which could not be thwarted by the other spouse's decision to initiate divorce proceedings.[52]

The complications that ensue are palpably landmark: a ruling that allows for such IVF procedure might have the effect of including within the fold of a restitution of conjugal rights petition, the right to ask for, or to bear (depending on whether it is the husband or the wife who so asks) a child. A ruling to the contrary might limit the well-established position in law that a woman's reproductive rights are basic civil rights of which she may not be deprived. A ruling on either side plays directly into the dilemma of the constitutionality of a restitution of conjugal rights provision: assuming marital cohabitation could and would probably include the right to bear a child, if the parties so choose. Any interference of the court with the extent of the marital cohabitation between two parties would be inherently unconstitutional. In fact, it might very well be the introduction of a bull in the china shop, as cautioned by the High Court of Delhi in *Harvinder Kaur*.

In the context of the clashing proceedings and the questions to be answered, the Aurangabad Bench of the High Court of Bombay settled two fundamental issues: firstly, if either spouse could be compelled to have another child despite strong resistance from the other spouse; and secondly, what the fate of such child might be were he to in the future, stumble upon the litigation between his parents.[53] The latter issue is a novel, if somewhat peculiar framing: certainly

[50] Swati Deshpande, *Maharashtra: HC says it's shocked by family court's view on reproductive rights,* TIMES OF INDIA (Dec. 9, 2019), https://timesofindia.indiatimes.com/city/mumbai/maharashtra-hc-says-its-shocked-by-family-courts-view-on-reproductive-rights/articleshow/72433226.cms.
[51] KGP.
[52] Deshpande, *supra* note 50.
[53] KGP, at ¶24.

the possibility that a child's mental state might be affected upon learning of vexatious litigation between his or her parents cannot in any way play a conclusive role in determining or denying the parents the basic rights that accrue to them. The reasoning is not far from the logic of the coverture rules as laid down in England, or from the so-called social purpose of the restitution of conjugal rights provision in *Saroj Rani*. The Aurangabad Bench asserts that the growth of a child is not money centric but instead family centric—a fact they find the family court to have lost sight of.[54] Yet, no heed is paid to the mother's assertion that she does not require any financial assistance in raising her children, nor does she expect any financial support from her estranged husband.

The Aurangabad Bench remained unconvinced that a single mother might be complete family to her children. Just as the constitutional validity of the restitution of conjugal rights provision was tested against the sanctity of marriage, similarly, the ability of one spouse to bear a child is tested against the sanctity of family. To be precise, the traditional idea of what constitutes a family. Noble as these concerns are, they further obfuscate the murky waters in which restitution of conjugal rights lay.

Even as to the former issue, of compelling the bearing of a child by one spouse despite strong protest from the other, the Aurangabad Bench loops in the sanctity of family to hold to the contrary. Indeed, they felt the conclusion of the family court that women have the upper hand over men in matters of procreation and reproduction, to be unsustainable. Although the Aurangabad Bench found the conclusion of the family court to be 'western'[55] and 'shocking to the judicial conscience of the court',[56] the exact reason as to why such IVF procedure was untenable remained unanswered.

This is particularly stark, when contrasted with the reasoned judgment of the family court. Recognising the international legal bases upon which reproductive rights of a woman is a basic civil right, and a fundamental right under Article 21 of the Constitution of India, the family court opined that women had the right to both be and not be mothers as they wished. This choice was to be respected and unreasonable restrictions as to their exercise were not to be placed. The curtailing of a woman's reproductive rights, by preventing her from procreating was akin to compelling her to forcibly sterilize.[57] The family court's exposition of family life somewhat preemptively addresses the Aurangabad Bench's concerns:

Involvement of men in reproductive decisions and choices of women, which are pragmatic and reasonable, will create a gender synergy between men and women. Men can propagate

[54] *Id.*, at ¶35.
[55] *Id.*
[56] *Id.*
[57] *Id.*, at ¶27.

responsible fatherhood and gender equality by supporting the women's choice of family planning. In issues of reproduction the common aim of both genders should be the well-being of all family members.[58]

The concern to protect institutions, whether they might be those of marriage or family, is an old and outdated concern. It does more harm than good to the parties whose very rights and duties, courts are tasked with exacting. A restitution of conjugal rights provision therefore is no more than a complication. Unfortunately, the dilemma as to its constitutionality is not merely academic. Whatever turn this proceeding might take, will substantively change the application and understanding of restitution of conjugal rights and reproductive rights as they exist today. Until and unless the provision regarding restitution of conjugal rights is done away with for good, the troubles of liberty, equality, privacy and now reproductive rights will continue to rage.

VI. CONCLUSION

The restitution of conjugal rights provision which was a relic from medieval England and passed down to colonial India, is a complication in modern day personal law. Despite the historic scope of misuse, the remedy of restitution of conjugal rights gives rise to more dubiety in a recent case before the Aurangabad Bench of the High Court of Bombay. If and when the restitution of conjugal rights provision can be used to affect reproductive rights of women, it would set forth a precarious precedent, open to abuse.

The restitution of conjugal rights provision has already been tested for constitutional validity once before. In the absence of a crystallised notion of individualistic privacy, the provision was retained to fulfill the so-called social purpose of preserving the sanctity of marriage. However, in a post-*Puttaswamy* era, its value is no longer supported by an outdated State aim. It is a burdensome provision, with burdensome consequences that impinge on not only the constitutional fabric of society as a whole but also on the right of life and personal liberty of individuals in particular.

Any challenge to the restitution of conjugal rights provision now would necessarily have to be construed in light of the individualistic notion of privacy: the preservation of the marital sphere can no longer be prioritised over the rights to privacy, and liberty of the individuals in such a marriage. The restitution of conjugal rights provision is a constitutional complication which left as it is, will create significant dilemmas in the enjoyment of one's fundamental and constitutional rights.

[58] *Id.*

INTERPRETATION OF THE ABROGATION OF ARTICLE 370 AND THE JAMMU AND KASHMIR REORGANISATION ACT, 2019 IN LIGHT OF THE THEORY OF THE CONSENT OF THE GOVERNED

SUBHALAXMI HOTA*

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ABSTRACT

This essay aims to understand the theory of the consent of the governed in light of India's representative democratic setup with special reference to the abrogation of Article 370 of the Indian Constitution. The abrogation of Article 370 and the withdrawal of statehood from Jammu and Kashmir poses questions as to whether the idea of consent of the governed was effectively exercised in this situation and to what extent can positivist interpretation of existing legislations assume hypothetical consent of the governed in such situations. This essay aims to question the scope of the 'governed' and whether it is a rigid or dynamic concept. The author seeks to undertake interpretation of relevant provisions of the Constitution to identify whether the theory of the consent of the governed is germane to the political discussion on Jammu and Kashmir and whether the framers of the Constitution intended to apply such theory in all effectiveness to this situation.

I. INTRODUCTION

"The will of the people shall be the basis of the authority of government."

-Article 21 of the Universal Declaration of Human Rights[1]

Democracies, across time and time zones, have been the torch bearers of the will of the people. Although this abstract concept of the will of the people forms the core of the idea of democracy, its manifestation in reality is questionable and obscure. John Locke, in his 'Second Treatise of Government', propounded a state of nature wherein men, bereft of a politically organised state, existed.[2] The state of nature was a state of equality among men with the right to all actions except those undertaken to cause detriment to self or others in terms of body or property.[3] It was a society devoid of civil bonds and structures of authority and laws. According to Locke, men are born naturally free and cannot be deprived of their freedom without their own consent.[4] Thus, the basis of civil society, that is, subjugation to the political power of another, lay in the consent of a free man.

Once a person agrees to be a part of one body politic with one government, he becomes obliged to adhere to the decisions of the majority of such body politic irrespective of whether he approves of such decision.[5] This marks a key difference between the state of nature and a civil society governed by a State where a free man puts fetters on his own actions by consenting to be

[1] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[2] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 4 (C.B. Macpherson et al. Eds., 6th ed. 1980).
[3] *Id.*, at 6.
[4] *Id.*, at 95.
[5] *Id.*, at 97.

a part of a civil society. Thus, consent is the cornerstone of political obligation in a democracy and the premise on which free men have entered into a social contract to form the civil society.

However, as mentioned above, even though entrance into the social contract is based on consent of free men, subsequent compliance to the obligations put forth by the State in furtherance of the social contract, is not based on unanimous consent of the people. Under such circumstances, it is necessary to analyse the contours of the social contract and to what extent the State can oblige people to follow laws against their consent. This gives birth to the idea of the consent of the governed and raises questions about the relevance of such consent of the governed in a continuing democracy.

Locke's idea of the consent of the governed was based on the process of evolution of a civil society from a state of nature through a social contract, thereby imposing political obligations in the form of laws on people. Locke's idea of social contract was strictly based on the consent of the parties to such contract. He also protected the right to rebellion and the right to self-determination as being a part of the social contract.[6]

In applying these concepts to a real democracy, the problems faced are in terms of the interpretation of the word 'consent', i.e., mode of giving consent, what it entails, to what extent consent given to one action can be construed to mean consent given for other actions and whether consent can be given by an individual for self-detriment; the word 'governed', i.e., its scope, whether it applies uniformly or specifically and whether it is dynamic in nature; and the implementation of such concepts in the real time interpretation of laws.

This essay aims specifically to deal with the abrogation of Article 370 of the Indian Constitution and the Jammu and Kashmir Reorganisation Act, 2019 and the interpretation of the same in light of the concept of consent of the governed. For the purposes of this essay, the author seeks to restrict her analysis to the ideas put forth by John Locke only.

II. THEORY OF THE CONSENT OF THE GOVERNED

Consent of the governed comes from the consent theory of political obligation propounded by John Locke. As mentioned earlier, Locke believed that individuals experienced unfettered freedom in a state of nature. The state of nature, as described by Locke, was a situation in which individuals were perfectly free and equal and no one enjoyed differential power or authority.[7]

[6] *Id.*, at 222.
[7] *Id.*, at 4.

However, such liberty was at the exclusion of the detriment to self and others. According to Locke, unfettered liberty could not be used to destroy self or to the detriment of others in body or object.[8]

However, such a state of equality is utopic and such unregulated state of nature based only upon self-imposed obligations in favour of others leads to a state of inequality based on force and violence.[9] This drawback of an egalitarian state of nature stems from the fact that there exist inherent differences among human beings and an unfettered state of nature intensifies inequality between them. Thus, it can be surmised that a civil society regulated by laws is necessary to create a situation of artificial equality propagated by the existence of legal rights and remedies. This paves the way for formation of a civil society and a single body politic by the creation of a social contract.[10]

One of the key elements of this social contract forming a body politic, as strongly emphasised upon by Locke, is consent. Locke states that since individuals are naturally free, they can only renounce the free state of nature on the basis of their own consent. Therefore, the transition of a group of individuals from the state of nature to a political society happens in accordance to the consent given by them.[11] In doing so, the three general criteria of consent must be fulfilled, i.e., consent must be given freely, the individual giving consent must be aware of what it construes to mean and the individual in question must be competent to give such consent.[12]

According to Locke, consent may be given either expressly or tacitly. Locke understood the hurdles express consent posed and thereafter proposed a more realistic mode of giving consent through their actions, that is, tacit consent.[13] Further theorists have also extended the concept of consent to hypothetical consent wherein the State assumes consent on part of its citizens if they do not overtly revoke such consent.[14]

Conclusively, it can be said that consenting to the existence of the State forms an important part of the social contract. The question that arises is whether such consent is to be given only during the formation of the State and if so, whether it construes blanket consent for all government actions.

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[8] *Id.*, at 6.
[9] *Id.*, at 11.
[10] *Id.*, at 95.
[11] *Id.*
[12] GEORGE KLOSKO, *Consent Theory of Political Obligation* in The Routledge Handbook of the Ethics of Consent 2 (Schaber & Muller ed., 2018).
[13] JOHN LOCKE, *supra* note 2, at 119.
[14] KLOSKO, *supra* note 12, at 12.

Another aspect to such consent theory is that of the giver of consent or the 'governed'. The flip side of the consent theory revolves around who can and should give consent in this setup of the social contract. The social contract theory and the political society as envisaged by Locke presents a scenario wherein certain group of individuals voluntarily come together to undertake political obligations and accept the supremacy of the State. Thus, in this case the 'governed' is made up of all such people who would undertake political obligations by giving consent.

The consent of the governed, as a theory, is best represented by representative democracies prevalent across the world, wherein the people choose their representative, who in turn makes laws that govern the people. The ultimate objective is that the people on whom laws and political obligations are applied should consent to such application before they are compelled to obey such law. This can be displayed through an example of traffic regulations wherein most people on whom traffic laws apply, believe that these laws should be implemented to further the goal of safety and order and therefore, in spite of the penalty imposed for violation, consent to the implementation of such laws, as they agree to the objective that the law seeks to fulfil and the means it employs.[15] Thus, the concept of the consent of the governed entails the idea that a State can legitimately use its power justifiably and legally only when consented to by the people or society over which that political power is exercised.

The concept of consent of the governed emphasises on the idea that even though a social contract reduces the scope of consent of individuals and instates the State as the maker of law, since the State is made for the people and not vice versa, the extent to which the State can exercise supremacy over the people must be restricted by the consent of such people whom the State aims to govern. Further, the idea of majoritarianism, which the social contract encompasses, must be constrained by the idea of the governed.

III. THE ABROGATION OF ARTICLE 370 AND ENACTMENT OF THE JAMMU AND KASHMIR REORGANISATION ACT, 2019

In 2019, the incumbent National Democratic Alliance [**NDA**] government came out with a Presidential Order abrogating Article 370 and subsequently passed the Jammu and Kashmir Reorganisation Act, 2019 in the Parliament.[16] This was done in a step wise manner.[17] Article 370

[15] C.W. Cassinelli, *The "Consent" of the Governed,* 12 WESTERN POL. Q. 2. 391-409 (1959) (discussing the practical implications of consent based legislations).
[16] The Jammu and Kashmir Reorganisation Act, 2019.
[17] Press Release, *Shri Amit Shah introduces Jammu and Kashmir (Reorganisation) Bill, 2019 President issues Constitution (Application to Jammu and Kashmir) Order 2019 Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019 introduced in Rajya*

of the Indian Constitution provided for a special status to be given to the State of Jammu and Kashmir such that it was entitled to its own Constitution and the laws made by the Parliament of India could only be applied in consultation or concurrence, as the case may be, with the Government of the State.[18]

The original text of Article 370 of the Indian Constitution provided for application of the provisions of the Constitution with modifications, in respect of the State of Jammu and Kashmir, by the President in concurrence with the Government of the State of Jammu and Kashmir.[19] Clause (3) of Article 370 said that the entire Article could be repealed by Presidential Order provided that such notification be released in concurrence with the Constituent Assembly of the State.[20]

The Government, on 5th August 2019, released a Presidential Order C.O. 272 which inserted a new clause (4) in Article 367 of the Constitution which read:

> "*(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—*
>
> *(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;*
>
> *(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;*
>
> *(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and*
>
> *(d) in proviso to clause (3) of Article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State".*"[21]

Sabha All of the above passed in Rajya Sabha unanimously, MINISTRY OF HOME AFFAIRS (Aug. 5, 2019), https://pib.gov.in/newsite/PrintRelease.aspx?relid=192487.

[18] INDIA CONST., art. 370, § 1, cl. b.

[19] INDIA CONST., art. 370, § 1, cl. d.

[20] INDIA CONST., art. 370, § 3.

[21] The Constitution (Application To Jammu And Kashmir) Order, 2019, C.O. 272, G.S.R. 551 (E) (Aug. 5, 2019), http://egazette.nic.in/WriteReadData/2019/210049.pdf.

The above mentioned Presidential Order C.O. 272 explicitly included the Governor of Jammu and Kashmir within the meaning of the term 'Government of the State for the purposes of Article 370 and expressly replaced the phrase 'Constituent Assembly' with the phrase 'Legislative Assembly of the State' in the proviso of clause (3) of Article 370.

Therefore, by amending Article 367, the government has explicitly given the right to apply the Constitution of India with respect to the State of Jammu and Kashmir, to the President in concurrence with the Governor; and has given the right to repeal Article 370 to the President, in concurrence with the Legislative Assembly of the State.

The legality of the abrogation of Article 370 has been questioned due to its convoluted interpretation and the possibility of multiple outcomes. As discussed earlier, clause (3) of the original text of Article 370 provides for the repeal of Article 370 through a Presidential Order in concurrence with the Constituent Assembly of Jammu and Kashmir.[22] However, since the Constituent Assembly of Jammu and Kashmir no longer exists, the status of Article 370(3) becomes ambiguous. Two divergent arguments have been proposed to resolve the ambiguity.

First, theorists have argued that the provision is etched in time and that since the Constituent Assembly of Jammu and Kashmir ceases to exist, the procedure for repeal of Article 370 provided for in clause (3) is obsolete, rendering the Article a permanent character.[23]

Second, it has been argued that since Article 367 has been amended to substitute the 'Constituent Assembly' with 'Legislative Assembly', the President, in concurrence with the Legislative Assembly, can repeal Article 370 through a Presidential Order. This argument is *prima facie* legal and appears to be a practical solution to resolve the ambiguity that the obsolescence of the Constituent Assembly places in this case. However, this argument has certain problematic aspects.[24]

The Presidential Order abrogating Article 370[25] was passed when the State of Jammu and Kashmir was under President's Rule i.e. a situation of State Emergency imposed by the

[22] INDIA CONST., art. 370, § 3.
[23] Madhav Khosla, *The constitutional questions that arise from the end of Jammu and Kashmir as a state*, THE PRINT (Aug. 5, 2019), https://theprint.in/opinion/the-constitutional-questions-that-arise-from-the-end-of-jammu-and-kashmir-as-a-state/272689/.
[24] Chandrachud, Abhinav, *The Abrogation of Article 370*, SSRN (Aug. 24, 2019), https://ssrn.com/abstract=3448331.
[25] Declaration Under Article 370(3) of the Constitution, C.O. 273, G.S.R. 562(E) (Aug. 6, 2019), http://egazette.nic.in/WriteReadData/2019/210243.pdf.

President.[26] The Presidential Order amending Article 367 was done in concurrence with the Government of the State which effectively meant the Governor of Jammu and Kashmir since the State was under President's Rule and the Presidential Order abrogating Article 370 was passed without any mention of the requirement of the concurrence of the Legislative Assembly, which was not in existence at the time. It is to be noted that the Governor of a State is an agent of the President as the Governor holds his office at the pleasure of the President,[27] and he is not an elected representative of the people.[28] Thus, it can be inferred that through the Presidential Orders, the Government of India, confers upon itself, the right to repeal Article 370, without being in concurrence with the Legislative Assembly.

The Parliament of India subsequently passed the Jammu and Kashmir Reorganisation Act, 2019 which took away Jammu and Kashmir's statehood and made it a union territory. It also bifurcated the region of Jammu and Kashmir into 'Jammu and Kashmir' and 'Ladakh', wherein Ladakh was declared as an independent Union Territory.[29] The manner in which it was passed was filled with discrepancies. The bill was introduced without circulation in violation to Rule 69 of the Rajya Sabha.[30] Further, Jammu and Kashmir, prior to the bifurcation was divided into 6 Lok Sabha constituencies and 4 Rajya Sabha constituencies. This meant that under all circumstances, the State was not being represented by more than 6 people in the Lower House and more than 4 people in the Upper House out of strength of 543 and 250 respectively. Therefore, not more than 2% of the number of people taking decisions on the statehood of Jammu and Kashmir legitimately represented the political interests of the State of Jammu and Kashmir.

Since 5th August, 2019, Jammu and Kashmir has been in a state of emergency with the Central Government imposing Section 144 of the Code of Criminal Procedure, 1973 in parts of the state and shutting telephone lines and the internet for long durations of time.[31] Further many of the State's political leaders were put under house arrest under the Jammu and Kashmir Public Safety

[26] Press Trust of India, *President's Rule in J&K Extended for 6 more Months beginning July 3,* ECONOMIC TIMES (Jun. 12, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/president-rule-in-jk-to-be-extended-for-6-more-months/articleshow/69759938.cms.

[27] INDIA CONST., art.156.

[28] INDIA CONST., art. 158, cl. 1.

[29] The Jammu and Kashmir Reorganisation Act, No. 34 of 2019, http://egazette.nic.in/WriteReadData/2019/210407.pdf.

[30] Maansi Verma, *Diminishing the Role of the Parliament: The Case of the Jammu and Kashmir Reorganisation Bill,* 54 ECON. & POL. WKLY. 45 (Nov. 16, 2019), https://www.epw.in/engage/article/diminishing-role-parliament-case-jammu-and-kashmir.

[31] Express Web Desk, *Explained: What is Section 144 of CrPC?,* THE INDIAN EXPRESS (Aug. 5, 2019), https://indianexpress.com/article/explained/what-is-section-144-crpc-jammu-and-kashmir-5878543/.

Act, 1978.[32] The Central Government's measures have been construed to indicate a tendency of curbing people's right to revolt and their freedom of expression.[33] Therefore, this becomes a crucial juncture at which whether the people of Jammu and Kashmir at all consent to this act of the Central Government is questioned and the necessity to reaffirm that the source of the government's power lies with the consent of the people becomes necessary.

IV. INTERPRETATION OF THE ABROGATION OF ARTICLE 370 AND THE JAMMU AND KASHMIR REORGANISATION ACT, 2019 IN LIGHT OF THE THEORY OF THE CONSENT OF THE GOVERNED

In this section, the author seeks to interpret Article 370(3) of the Indian Constitution and the Jammu and Kashmir Reorganisation Act, 2019 based on the theory of the consent of the governed.

In interpreting the law, the framers of the law are given utmost importance.[34] The legislative intent of the members of the Constituent Assembly and the Parliamentarians cannot be questioned and serves as a guiding force to the interpretation of the law of the land. The Constituent Assembly, during the framing of the Preamble, included the phrase "We, the People of India" to show that the source of the authority vested in the government came from the people of India. Dr. B.R. Ambedkar explained the importance and the meaning of these terms in the Preamble specifically to assert that the power and the authority of making and adopting the Constitution of India was vested in the people of India and it was from the people that such power to enact and implement the Constitution was derived.[35] Thus, the Indian Constitution through its Preamble and the intent of the Constituent Assembly clearly displays an intention to follow the theory of the consent of the governed wherein the people of the nation are considered the source of authority for all laws and thus their consent to the laws is of primal importance. The idea of a democracy rooted in the people is the lens through which the Indian legal framework is viewed and the Constituent Assembly through its proceedings has immortalised such intent unambiguously. The consent of the governed, that is, the people of India, is thus necessary to impose any political obligation upon them.

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[32] Sruthi Radhakrishnan, *Explained: The Jammu & Kashmir Public Safety Act*, THE HINDU (Sept. 17, 2019), https://www.thehindu.com/news/national/explained-the-jammu-kashmir-public-safety-act/article29438694.ece.

[33] Meenakshi Ganguly, *India Failing on Kashmiri Human Rights*, HUMAN RIGHTS WATCH (Jan. 17, 2020), https://www.hrw.org/news/2020/01/17/india-failing-kashmiri-human-rights.

[34] MAXWELL ON THE INTERPRETATION OF STATUTES, 28 (P. St. J. Langan ed., Lexis Nexis, 12th ed. 1976).

[35] CONSTITUENT ASSEMBLY DEBATES, *speech by* DR. B.R. AMBEDKAR 10 (Oct. 17, 1949), https://www.constitutionofindia.net/constitution_assembly_debates/volume/10/1949-10-17.

The consent of the governed, as discussed above, comes into play when a set of individuals are affected by certain laws and embrace certain political obligations consequently, which gives rise to the question, that is, whether they consented to the law or the objective behind the law, in the first place.

In this case, the people of the State of Jammu and Kashmir, by virtue of the existence of Article 370, were given a special status in the legal framework of India. Despite being a part of the Union of India, they were subjected to certain beneficial application of the law. However, such special status was not the product of the whims and fancies of certain past governments. The historical background of the accession of Jammu and Kashmir plays a key role in determining the significance of restoring a situation of effective consent of the governed in Jammu and Kashmir.

The transfer of power in Kashmir is peculiar and does not resemble other cases of transfer of power during the Independence. Post-independence, Kashmir was attacked by tribesmen and other armed groups.[36] The then ruler of Kashmir, Raja Hari Singh requested for military aid from India in return of the Instrument of Accession in favour of India on the condition that the Government of India would be in control of only defence, external affairs and communications.[37] All other sectors were to be under the domain of the king under the Jammu and Kashmir Constitution Act, 1939.[38] The terms under the Instrument of Accession of Jammu and Kashmir were debated upon when the Constituent Assembly of India was drafting the Constitution of India.[39] According to Jai Shankar Agarwala, "*Article 370 was necessitated to accommodate the then prevailing legal status of the Jammu and Kashmir State in the body of the Constitution of India.*"[40]

Another tangent that affected the accession of Jammu and Kashmir was the United Nations which give international exposure to the conflict seeking satisfactory resolution to the dispute.[41] Gopalaswami Ayyangar, a member of the Drafting Committee of the Constitution argued that,

[36] Jai Shankar Agarwala, *Article 370 of the Constitution: A Genesis,* 50 ECON. & POL. WKLY. 16 (Apr. 18, 2015), https://www.epw.in/journal/2015/16/commentary/article-370-constitution.html.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Amitabh Mattoo, *Understanding Article 370*, THE HINDU (2019), https://www.thehindu.com/opinion/lead/understanding-article-370/article11640894.ece1.

"*will of the people through the instrument of the [J&K] Constituent Assembly will determine the constitution of the State as well as the sphere of Union jurisdiction over the State.*"[42]

Additionally, it should be noted that Article 370 is preceded by the heading "Temporary provisions with respect to the State of Jammu and Kashmir".[43] Thus, it can be surmised that the framers of the Constitution of India were hopeful that this conflict would be put to rest and the State of Jammu and Kashmir would be amicably integrated in the Union of India.

Even though the argument that Article 370 is a temporary provision has been taken to justify the abrogation, the context in which such temporary character was put on this provision has been forgotten. Article 370 was framed in the backdrop of political and social volatility and insecurity. The special status acted as a safeguard provision to ensure that the conditions of accession of Jammu and Kashmir would not be revoked without the consent of the people of Jammu and Kashmir. Further, Article 370 meticulously places the phrase "in concurrence with" with respect to the Government of the State and the Constituent Assembly of Jammu and Kashmir to signify the importance of the assent of these institutions before any modification is effected on the status of Kashmir's territorial and political sovereignty. This specifies the relevance of the consent of the governed in this situation.

The reorganisation legislation which has revoked Jammu and Kashmir's statehood, as discussed in the previous section, was passed in haste without complying with the rule of circulation in the Lok Sabha.[44] The constitution of the Lok Sabha reveals that not more than 2% of the representatives of the people of the State of Jammu and Kashmir could have been involved in such reorganisation legislation that reduced a Jammu and Kashmir from being a state to a Union Territory as explained in Part II of this essay. This has resulted in people, completely dissociated from J&K's political landscape and unaccountable to its masses, playing a chief role in distorting the sovereignty of the State of Jammu and Kashmir.

Even though the constitution of the Lok Sabha with only a certain number of seats allocated to a state is an acceptable practice in representative democracies, it must not be forgotten that giving the right to decide upon the statehood and sovereignty of a particular state, to an unrelated third party, here being the representatives of other states, goes against the very spirit of democracy stemming from the consent theory of political obligation. Thus, even though only 2% of the

[42] *Id.*
[43] INDIA CONST., art. 370.
[44] Maansi Verma, *supra* note 30.

people representing J&K is an acceptable constitutional procedure, in this unique case of deciding statehood, the consent of the governed, i.e., the people of J&K must be given primacy in deciding upon such a legislation.

The Presidential Orders, systematically abrogating Article 370 and the special status given to the State of Jammu and Kashmir, and the Jammu and Kashmir Reorganisation Act, 2019 may be argued to be prima facie legal as it may not violate the letter of the law given in the Constitution of India.[45] However, its legality should be checked on the touchstone of the consent of the people of Jammu and Kashmir. The Constitution-makers foresaw a future wherein the people of Jammu and Kashmir would be governed by a government of their choice, which forms the essence of a democracy. Even though a literal interpretation of the amended Article 367 and Article 370(3), as well as the powers given to the Parliament to enact the Jammu and Kashmir Reorganisation Act, 2019, make such governmental actions legal, a purposive interpretation needs to be undertaken keeping in mind the consent of the governed, i.e., the people of Jammu and Kashmir in this case.

Following Locke's consent theory of political obligations, the idea of the consent of the governed applied in the Indian context could be construed as taking the majority opinion with respect to the entire Indian population. However, here the operative word is 'governed', that is, on whom the laws impose a political obligation. In this case, the abrogation of Article 370 and the enactment of the Jammu and Kashmir Reorganisation Act, 2019 affect the political rights of the citizens of Jammu and Kashmir. Therefore, the consent and the majority opinion of the people of Jammu and Kashmir should be sought. It is therefore argued that 'governed 'is a dynamic concept which differs on the basis of the legislation that is being interpreted and the stakeholders it seeks to affect through its execution.

V. CONCLUSION

The application of the theory of the consent of the governed in a twenty-first century democracy poses various tactical hurdles. The modus operandi for obtaining consent and the logistical issues associated with obtaining consent for a different set of governed for every legislation or government action is problematic. However, the aim of the author in proposing the implementation of such theory is to view laws and their interpretation thereof in reference to the

[45] Press Release, *Soli Sorabjee: Abrogating Article 370 is constitutional, detaining leaders disturbing*, ECONOMIC TIMES (Aug. 11, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/soli-sorabjee-abrogating-article-370-is-constitutional-detaining-leaders-disturbing/articleshow/70622834.cms?from=mdr.

democracy that is India and the democratic goals that were envisioned by the forefathers of our Constitution.

The objective that interpretation of these laws using the theory of the consent of the governed seeks to fulfil is that the stakeholders of a particular situation get to decide the political obligation that is imposed on them by virtue of a law or government action. The abrogation of Article 370 withdrew the historic special status that was given to Jammu and Kashmir due to its volatile geopolitical situation without consulting or taking into consideration the majority opinion of the people affected by such decision. Interpreting the validity of the Presidential Orders as well as the Jammu and Kashmir Reorganisation Act, 2019 in light of the theory of the consent of the governed will restore the democracy that the people of Jammu and Kashmir had consented to while acceding to the Union of India, thereby giving their consent for the social contract of the Indian political society.

LOCATING A RIGHT TO "DIGNITY" OF RELIGIOUS DENOMINATIONS: THE CURIOUS CASE OF SABARIMALA TEMPLE

YASHOWARDHAN TIWARI*

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ABSTRACT

The Sabarimala episode provides a wonderful opportunity to rethink the idea of dignity in the context of religious denominations. This essay seeks to delve into the possibility of chalking out a theory for dignity of religious denominations based on the idea of communitarian dignity. Relying on Justice Sikri's construction of 'substantive' or 'communitarian dignity' in the Aadhaar judgment, the author fuses it with noted legal theorist Jeremy Waldron's concept of "group dignity". Using the foregoing scholarship, the author argues for the need for a new theory of dignity of religious denominations. Justice Sikri's postulates of intrinsic value (uniqueness and identity being a part of it), public or group autonomy, and community value form the 'core values of human dignity'. The author argues that these postulates pave the way for making a case for religious denominations as having a dignity of their own, both 'intrinsic' and 'public'. Their dignity forms a core value of their 'identity', and thus is inviolable. A plausible test for the 'balancing' of the communitarian dignity of religious denominations vis-à-vis individual dignity will be one subsumed within the essential practices' doctrine. Upholding of the essential practices would be the touchstone for evaluation of violation of the denominations' dignity.

I. INTRODUCTION

Recently, the Sabarimala temple in Kerala has been a hotbed of protests[1] and a site for contestation of a multitude of arguments in light of the lifting of ban by the Hon'ble Supreme Court of India on women between the ages of 10-50 years entering the temple.[2] This essay attempts to explore the possibility of making a case in favour of the ban by presenting an argument based on the notions of communitarian dignity through the lens of Hon'ble SC judge Justice Sikri's argument as postulated in the *Justice K.S. Puttaswamy (Retd.) v. Union of India* [3] [**Aadhaar judgment**]. A cautionary note needs to be given at the outset that this would be a purely speculative essay forwarding the arguments of Justice Sikri in order to apply it in the context of religious denominations. The essay consists mainly of three parts: **a)** the idea of communitarian dignity as expounded in *Aadhaar* judgment, **b)** right to practice one's religion as an intrinsic part of human dignity and communitarian dignity of religious denominations and **c)** balancing of dignity of religious denominations vis-à-vis an individual's dignity. At the end of this exercise, the author tries to establish that the Court should not interfere in religious matters

[1] *Sabarimala Row Explained: Why were women barred and the ensuing legal battle*, THE ECONOMIC TIMES (Nov. 14, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/sabarimala-row-explained-why-were-women-barred-amp-the-ensuing-legal-battle/the-2018-judgement/slideshow/72049957.cms; Kerala Bureau, *1,400 arrested for violence during Sabarimala protest*, THE HINDU (Oct. 25, 2019), https://www.thehindu.com/news/national/kerala/1400-arrested-for-violence-during-sabarimala-protest/article25325722.ece.

[2] R. Krishnakumar, *Flare-up over Sabarimala again after Supreme Court order is interpreted variously*, FRONTLINE (Nov. 27, 2019), https://frontline.thehindu.com/dispatches/article30096500.ece.

[3] (2019) 1 SCC 1 (India) [hereinafter *Aadhaar* judgment].

which qualify the test of the essential practices doctrine as it would amount to a violation of the denomination's dignity.

II. THE IDEA OF COMMUNITARIAN DIGNITY

The renowned American political philosopher and public intellectual Michael Sandel conceptualizes a unique theory of communitarianism which could be a good starting point to help us imagine the contours of dignity in terms of the community. He argues for a novel model of the "*community that could penetrate the self more profoundly*"[4], such that the community would turn out to be a "*mode of self-understanding partly constitutive of the agent's identity*".[5] Sandel's communitarianism does not confine itself to the members of the unit professing communitarian goals and ideas, but rather they have a sense of their identity being defined to some extent by the community itself, of which they are a part.[6] The community helps in constructing their identity by describing "*not just what they have as fellow citizens but also what they are, not in a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity*".[7] The profundity of this insight should not be underestimated in terms of its implications. It can be proclaimed in no uncertain terms that one derives a sense of dignity by the realization of the value of one's identity, and the 'community' (especially when it manifests itself in the form of a religious group) plays a significant role in shaping one's identity, as well as helping one in conceive the path to a dignified life.

Now, the author shall give a brief summary and analysis of the concept of 'substantive or communitarian dignity'[8] (borrowed from the Universal Declaration of Human Rights model[9]) as described in the *Aadhaar* judgment by Justice Sikri. It shall elaborate upon the substantive or communitarian concept of human dignity which is based on the idea of communitarianism as 'common good' or 'public good'.[10] However, as opposed to the general understanding of the concept, human dignity is being regarded as being intrinsic to the individual rather than being based on a common conception of the community as to what constitutes as dignity. It is only the "*realization of intrinsic worth of every human being*"[11] that the concept stresses upon, and the onus for such a realization is put on the state in most of the cases (in the context of socio-economic

[4] MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 149 (Cambridge University Press, New York, 2nd ed. 1998).
[5] *Id.*, at 150.
[6] *Id.*
[7] *Id.*
[8] *Aadhaar* judgment, at ¶114.
[9] *Id.*
[10] *Id.*, at ¶109.
[11] *Id.*, at ¶114.

rights). Therefore, a distinction needs to be drawn between the general postulates of communitarian dignity and the one which is being proposed here in terms of the dignity being intrinsic to every human and realized for the entire community rather than just being defined according to the community. Moreover, it needs to be distinguished from Bentham's theory of 'hedonistic utilitarianism'.[12]

The general understanding of communitarian dignity can be derived from the conception of communitarian morality. Such a notion of what the governing morality should be flows from the community's idea of what constitutes as morality. In a similar manner, dignity which is defined by a society or community in terms of what it thinks dignity should be, would qualify as communitarian dignity. Consequentially, it follows logically that the availability of 'public good' to every individual of the community would define the dignity of every individual of the community. Again, what constitutes as public good would be decided upon by the community itself.

However, what Justice Sikri has proposed in the *Aadhaar* judgment is a very different interpretation of communitarian dignity, wherein he has arrived at an amalgamation of two contrasting interpretations of dignity. The first interpretation is the 'intrinsic dignity' of the individual, while the other is the 'community's values' which define the dignity of an individual.[13] These two conceptions function as two opposite poles of dignity as a constitutional value, but they have been merged as one single theoretical concept of dignity. The idea of intrinsic dignity has been extended to the entire community as a public good which should be made available to each and every person of the community in order to uphold the communitarian morality. Such an understanding of dignity would serve as a path-breaking notion and help in the furthering of the fundamental human rights to the entire community. Justice Sikri has opened up the possibilities of going beyond the restricted paradigms of individual dignity which views intrinsic worth as being available only to individuals and not to communities. Thus, his conception of dignity beautifully encapsulates both intrinsic as well as communitarian dignity of individuals, and can also be extended to communities. What Justice Sikri promotes in the judgment is

[12] JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE, AND SOCIAL CONTROL, A STUDY IN JURISPRUDENCE 267-98 (Associated General Publications, Sydney, 1946).

[13] Neomi Rao, *Three Concepts of Dignity in Constitutional Law,* 86 NOTRE DAME L. REV. 243-7 (2013) (explaining how individual dignity is in part derived and defined by the community, covered under the rubric of "dignity as recognition").

essentially a form of 'liberal communitarianism',[14] where the rights of the individual and the community are balanced against each other.

But, as already noted, it needs to be distinguished and differentiated from hedonistic utilitarianism as propagated by Bentham and Mill, since the latter does not function on the intrinsic worth of the individual. As lucidly explained in *National Legal Services Authority v. Union of India & ors.* [**NALSA judgment**],[15] the welfare of the society rather than welfare of an individual is the primary focus of this school of thought. It propounds the maximum happiness for most of the people as a cardinal principle. The *Aadhaar* judgment leans more towards a Kantian notion of dignity wrapped in a communitarian framework. It can be realized that Justice Sikri adopts an interpretation of the Kantian notion as explained in the *NALSA* judgment (along with the way it is expressed in the international human rights regime, such as the Universal Declaration of Human Rights)[16]. The reinterpretation of the term "freedom" as not merely meaning the absence of restraint but in terms of attainment of individual perfection was understood as also being a part of the Kantian criterion of 'justice'. The court noted this reinterpretation to be the 'second tendency' of the Kantian criterion. It added that the foregoing trend still holds good. [17] Elucidating further, they recalled that post the Second World War, there was a greater emphasis in drafting of law such as the UN Charter and what followed it. There was a revival of the natural law theory of justice in the united sense that developed after the great world war. Moreover, referring to Blackstone's opening pages in his 'Vattelian Fashion', the court added that the principal aim of a society lies in protecting individuals' enjoyment of those absolute rights which were vested in them by the 'immutable laws of nature'.[18]

Justice Sikri (after stating the previous discussion from *NALSA* in his judgment) goes on to state that, 'right to choice' and 'right to self-determination' were accepted as facets of human dignity.[19] He adds that much like the rights of transgenders discussed in *NALSA*, recognition of the foregoing aspects of human dignity would yield happiness to the individuals.[20] At the same time, such an approach would also be in public good. [21] The importance of right to choice and the right to self-determination as a part of human dignity entirely transforms the concept from

[14] W. Brugger, *Communitarianism as the social and legal theory behind the German Constitution*, 2 INT'L. J. CONST. L. 440-3 (2014) (discussing liberal communitarianism as a midway between "conservative" and "universalistic egalitarian communitarianism").
[15] National Legal Services Authority v. Union of India & ors., (2014) 5 SCC 438 (India).
[16] *Id.*
[17] *Id.,* at ¶108.
[18] *Id.*
[19] *Aadhaar* judgment, at ¶97.
[20] *Aadhaar* judgment, at ¶97.
[21] *Aadhaar* judgment, at ¶97.

the question of the requirement of the employment of dignity to achieve the existential minimum, to dignity playing the role of defining an individual's or a community's identity, and this is reflected the most in cases involving socio-political and cultural rights.

Justice Sikri gives content to the concept by recognizing three elements of human dignity; namely, intrinsic value, autonomy and community value, and regards these as the "*core values of human dignity*".[22] He states that it is these elements which have to be considered while exercising legal reasoning while delving upon 'hard cases'.[23]

Intrinsic value of dignity is described as the uniqueness which it assigns to the individual, is anti-utilitarian, and protects the individual against any form of discrimination. Autonomy is regarded as the 'ethical element'[24] of human dignity, which helps an individual realize its self-worth and instils it with the right to self-determination. However, with the growth of the welfare state, this notion of autonomy is expanded to include 'public autonomy'[25] as well. In the context of socio-economic rights, autonomy is seen as the realization of the existential minimum of all the individuals, and both private and public autonomy are dependent on it for their exercise. The last of the core values of human dignity, i.e., community value, is labelled as the 'social dimension'[26] of human dignity, and is supposed to emphasize "*the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life*".[27] In order to maintain plurality in a constitutional democracy, this value pushes for the idea of 'overlapping consensus'[28] (as used by John Rawls) in an act of balancing to be done by the court.

Thus, we come up with a triad of values pushing the communitarian doctrine of dignity, and these are uniqueness/identity, autonomy, and plurality. It is this triad which forms the basis of the argument of this essay. The right to assert one's identity, to be unique and to have autonomy, when clubbed with the right to have self-determination and choice, fostered in a culture espousing plurality, lays the foundations for claiming religious liberty and to assert the intrinsic dignity of religious communities and denominations. Community value of dignity recognizes that the individual is not a separate entity, but is an integral part of the community and survives and sustains itself within the community. So, plurality being an intrinsic part of our community, and our right to assert our religious freedom being a part of our identity and right to self-

[22] *Id.*, at ¶116.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

determination, it becomes imperative that freedom of religion and religious liberty be asserted and assured as a fundamental human right to every citizen and to every religious community. Justice Sikri has arrived at his interpretation of dignity from the human rights model which regards the right to religious freedom and liberty as its integral part and one of the most important human rights. As he acknowledges in one of his papers:

"*Jurisprudentially, therefore, if some were to argue the question "Why are human rights valid?", the answer would be that it has roots in human dignity which provides justification for human rights. No doubt, discussion of dignity goes back to Kant, which assumed prominence after the Second World War and in last few decades 'dignity' has received much broader meaning. Dignity, as fulcrum of human rights, is not only accepted by jurists, it is given imprimatur by courts as well. This story of human rights, from its inception, hundreds of years ago, finding its roots in 'dignity', is beautifully summed up by Professor Dr. A. Lakshminath and Dr. Mukund Sarda in their Article*[29] *in following words*:

From exploitation to exploration
From exploration to proclamation
From proclamation to declaration
From declaration to protection
From protection to perfection."[30]

III. RELIGIOUS LIBERTY AND HUMAN DIGNITY

This section seeks to explore the moorings of religious liberty in human dignity. It argues that just like any socio-economic right, religious freedom (as a socio-cultural right) should also be considered as an intrinsic part of human dignity as it is an equally essential part of the seamless web of social rights.[31] Being an intricate and inalienable facet of one's identity, everyone must have the autonomy to exercise their religious freedom and assert their religious identities.[32] Besides, it should also be regarded as a part of the existential minimum required for a dignified life of any individual. The exercise of every individual's religious freedom demands the state (here, the judiciary) to strike a balance between various contesting rights (overlapping consensus)

[29] Dr. A. Lakshminath and Dr. Mukund Sarda, *From Human Rights to Human Dignity- An Unending Story'*, 5 CNLU L. J. 16 (2015).
[30]Justice A.K. Sikri, *Human Dignity as a Constitutional Value*, UNIVERSITY OF HAWAII (Feb. 28, 2020), http://blog.hawaii.edu/elp/files/2016/06/HUMAN-DIGNITY-HAWAI.pdf.
[31] Mark P. Lagon, *Dignity, Pluralism, and Religious Freedom: An Interests-Based Case*, 17 GEO. J. INT'L AFF. 72 (2016); James E. Jr. Wood, *Religious Pluralism and Religious Freedom*, 31 J. CHURCH & ST. 7 (1989); Kathleen A. Brady, *Religious Group Autonomy: Further Reflections about What Is at stake*, 22 J. L. & RELIG. 153 (2006).
[32] Andras Zs. Varga, *Personal Dignity and Community*, 6 HUNG. LAB. L. J. 167 (2010); Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. & PUB. POL'Y 81 (2003); Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights- Towards a Communitarian Revision*, 25 COLUM. L. REV. 651 (1995).

and to put reasonable restrictions on individual freedoms in order to maintain plurality, which is the very essence of any constitutional democracy.

There is no reason why groups shouldn't be regarded as having intrinsic dignity. On the contrary, as Waldron puts it, a strong argument could be made for groups having a dignity of their own, separated from the idea of individual dignity and the community's notion of dignity and identity built upon it.[33] Waldron strongly asserts that there is no way as a matter of logic that can rule out the idea of inherent dignity of groups, or 'group rights'. He adds that as a matter of liberal dogma, we should not rule out such a possibility. The belief that a given group or community makes a massive contribution to sustaining dignity of its individual members could be the basis of making an argument in favour of the inherent dignity of groups or group rights.[34] To quote Waldron, "*It is possible that everything we want to say about the dignity of a people could by some heroic effort of analysis be reduced in the end to an account of the massive contribution that a given community makes to sustaining the dignity of its individual members* [emphasis supplied]."[35] Waldron further states that a people *qua* community may have a human importance. This importance could be in terms of culture, identity or destiny which goes beyond what is severally or cumulatively good for the human individuals that it comprises. Such an importance, he adds, cannot be characterized except in 'communal terms'.[36] Furthering the possibility of inherent dignity of groups or group rights, he adds that even though groups ultimately are composites of individuals, yet there could be *something* (of importance) in the group that characterizes such a communal dignity. Waldron further mentions that we should be ready to give the best account of this 'something' (if it exists). This best account may be impossible to create without characterizing the existing value in dignitary terms.[37]

Nonetheless, Waldron also warns about the risks that may be posed by talk of group dignity, *particularly*, when it proves impossible to give a proper account of the importance of a certain sort of group except in terms of group dignity. He cautions that the notion of "group dignity" can be abused, although the potential of abuse does not mean that we must eschew the notion when it is appropriate.[38] In order to discuss dangers of this notion, he makes an argument like the moral realists would (in his learned opinion) that the accuracy of a way of characterizing moral phenomena is no guarantee of its harmlessness. *Alternatively*, he adds that even if the foregoing

[33] Jeremy Waldron, *The Dignity of Groups*, Acta Juridica NYU L. REV. 66 (2008) (discussing the importance of individual dignity vis-à-vis group dignity).
[34] *Id.*, at 83-4.
[35] *Id.,* at 83-4.
[36] *Id.*, at 83-4.
[37] *Id.*, at 83-4.
[38] *Id.,* at 83-4.

moral realist approach is discarded (i.e., even if one chooses 'value'), then characterizations for pragmatic reason rather than metaphysical ones does not guarantee that the pragmatic reasons would all line up tidily on one side.[39] Although, even if there are important values endangered by discussing the notion of group dignity, there may be important things to be gained from discussing the notion. In any case, if we are led to the idea of inherent dignity of groups[40] by our sensitivity to the elements of value involved in these situations, Waldron states that we should be clear-headed about two asepcts: *firstly*, the reasons by which we describe things in this way, and *secondly*, the risks and the dangers that such characterizations involve.[41]

However, Waldron does not regard the idea of group dignity as a good enough reason to form the basis of religious freedom. Waldron believes that the reasons generally provided to emphasize group dignity and group rights lack substance. He states that in order to sustain rights like freedom of religion, it is unnecessary to talk of group dignity.[42]

Further asserting his disagreement, Waldron adds that it is unnecessary to believe in 'group dignity' in order to ground social and economic rights.[43] He asserts that social and economic rights too can be given an individualistic grounding. While he concedes that such a grounding would inevitably appeal to notions of 'group solidarity', the understanding of 'solidarity' itself is more a matter of mass altruism among individuals. Such an understanding of solidarity does not subscribe to strong valuation of the group considered as an entity apart from the needy individuals who compose the said group. He therefore feels that in order to sustain a sense of altruistic obligation, group dignity is unnecessary.[44]

Moving on, Waldron argues that 'inherent dignity' of groups should be discussed for the correct reason, which according to him indicates that there must be 'something of value' about groups or something of concern with the 'human experience' of groups which cannot be expressed in any other way.[45]

Waldron sums up his position on the subject by stating, "*So: group dignity without identity – that is my slogan*."[46] The author would like to register a fundamental disagreement with the rationale

[39] *Id.,* at 83-4.
[40] It is to be noted that while Waldron uses the phrase "inherent group-dignity", the author is using the phrase "inherent dignity of groups" for the purposes of consistency and continuity.
[41] Waldron, supra note 33, at 83-4.
[42] *Id.*, at 84-5.
[43] *Id.*, at 84-5.
[44] *Id.*, at 84-5.
[45] *Id.*, at 84-5.
[46] *Id.*, at 90.

forwarded by Waldron for group dignity to not be employed as a basis for religious freedom or for ensuring socio-economic rights (Waldron's position also goes against Justice Sikri's theory of "communitarian dignity"). The mere fact of the ability of accommodation of both the rights within the traditional individualistic framework does not constitute as a rationale reasonable enough for group dignity to not be argued for the same purposes. Moreover, Waldron clearly fails to realize that religious identity of individuals begins as a form of group identity, flowing from the feeling of being a part of a religious group. Religious identity in this sense has historically been a group identity. An individualistic conception of religious identity is a Eurocentric notion which traces its origins in the liberal humanist framework of the Renaissance period.

What is more, the dichotomy created between 'intrinsic' and 'public' dignity is a false one and collapses when the dignity of an individual is derived from one's religious identity, which in turn is shaped by the community as much, if not more, by the religious community and its beliefs. The parallels drawn by Waldron between religious communities and political parties as groups are flawed with no grounding in real experiences of people. Religion has always been at the core of our identity and display of solidarity with our religious group has a much larger traction than that with our political affiliation. Waldron's is an escapist approach to discussing about group dignity in the context of religious communities, perhaps inevitably so, considering the deeply problematic turn that such an approach can take.

Notwithstanding the dangers, as Waldron also notes, group dignity needs to be talked about, especially in the context of religious communities. It is all the more essential to do so in order to safeguard and further the religious freedom of minority groups and religious denominations. We need to acknowledge that the fundamental nature of religious identity makes both 'group' and 'individual' dignity intrinsic, inseparable and indispensable parts of it. Group dignity is rendered meaningless without identity, as it is identity that registers the uniqueness of every group. It is identity of the group that each individual of the group identifies with and is proud of. The author would like to humbly submit that the content of group dignity is enriched and maximized in the context of religious communities and denominations, and without it these groups lay deprived of their identity and uniqueness, which sounds a death blow to all the abstract talk of pluralism.

A merger of this idea of groups having both public and intrinsic dignity leaves us with two approaches to tackle the Sabarimala controversy. First approach would be an individual advocating the ban on the basis of one's right to religious freedom being infringed, and thus amounting to a violation of one's dignity. The second one would be the Ayyapans representing

themselves as a religious denomination and claiming their right to exercise their religious liberty as an intrinsic part of their group dignity. Such an assertion would be well within the scope of the idea of communitarian dignity as propounded in the *Aadhaar* judgment as it does envisage group autonomy and community value which calls for overlapping consensus.

Besides, it upholds uniqueness, identity and plurality as parts of communitarian dignity which would be strong contestations in favour of the Ayyapans (disciples of Lord Ayyapa at the Sabarimala temple) as a religious denomination. It is in the context of the balance being struck between this intrinsic dignity of groups as a form of communitarian dignity and individual dignity, that reasonable restrictions be placed on individual dignity so as to lead to the free exercise of group dignity within the framework of communitarian dignity.

IV. COMMUNITARIAN DIGNITY VIS-À-VIS INDIVIDUAL DIGNITY

The author would like to contend that the content of the dignity of religious denominations should be determined on the basis of an evaluation of the 'essential practices' of that denomination. The essential practices doctrine was first propounded in a judgment delivered by a 7-judge bench of the Hon'ble Supreme Court of India in the *Shirur Mutt* case.[47] It was held that the doctrines of a religion need to be referred while ascertaining what constitutes the 'essential part' of a religion. It was further held that Article 25(2)(a) does not contemplate regulation by the State of religious practices. The freedom of such practices is guaranteed by the Constitution, except when they run counter to public order, health and morality. On the other hand, the court stated that Article 25(2)(a) intends to regulate activities which are of economic, commercial or political character though they are associated with religious practices.[48]

It was further observed that the Indian Constitution does not confine 'freedom of religion' only to 'religious beliefs'. The Constitution extends freedom of religion to 'religious practices' and subjects it to the restrictions enumerated in the Constitution.[49] Consequently, aside from these restrictions, a religious denomination or religious organization has complete immunity in the matter of deciding its rites and ceremonies (which are essential according to the tends of religion these denominations or organizations) under Article 26(*b*).[50] Therefore, no outside authority

[47] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt, (1954) SCR 1005 (India).
[48] *Id.,* at ¶ 20.
[49] *Id.*, at ¶ 23.
[50] *Id.*, at ¶ 23.

would have any jurisdiction to interfere with decisions of such denominations or organization in their religious matters.[51]

In light of the above, the dignity of religious denomination would flow from the upholding of the essential practices of the denomination. A violation of the latter would consequentially result in a violation of the former, and the members both individually and collectively (as the denomination) would be able to claim remedies and protection against such violations. Therefore, the balancing test should be derived from the essential practices test itself. In case of a claim of violation of an individual's dignity by an essential religious practice, the examination by the courts must be two-fold: firstly, whether the individual has a locus standi (read as maintainability of the claim; see Justice Indu Malhotra's dissenting opinion in the *Sabarimala* judgment[52]), which should be allowed only when the individual belongs to the denomination. If the first requirement is satisfied, then secondly, the court should examine whether the granting of protection from such a violation would result in a violation of the denomination's dignity, which would be considered violated only if any restriction is placed upon the essential practices of the denomination. In such a scenario, the denomination's dignity would have to be given preference over the individual's claims as its violation would affect the entire people of the denomination at large.

V. AYYAPANS AS A RELIGIOUS DENOMINATION

The last leg of the arguments in favour of the communitarian/group dignity of Ayyapans would be a two-fold exercise. The first would be to demonstrate that the Ayyapans, specifically the believers of Lord Ayyapa at the Sabarimala temple of Kerala, do indeed constitute a religious denomination and do meet the criteria for being qualified to be called as such. The second part would be to prove that the ban placed on the entry of women between the age group of 10-50 years does qualify as a legitimate one on the touchstone of the essential practices' doctrine. This would be done by showing that the ban is a part of their essential practices and thus is an integral part of their faith and can't be lifted or else it would amount to an unreasonable breach of the denomination's religious freedom, faith and conscience, and would thus be a violation of their community's dignity. However, establishing the same would be beyond the scope of this essay.

In arguendo, the author would also like to add that an argument could be made in favour of the dignity of the idol/deity being defined by the religious group's idea of what should constitute as

[51] *Id.*, at ¶ 23.
[52] Indian Young Lawyers Association & ors. (Sabarimala Temple, in re) v. State of Kerala & ors., (2019) 11 SCC 1 (India), ¶¶ 445-51.

its dignity and the content of the group's dignity being laid down with the dignity of the idol/deity as one of its facets. Thus, the dignity of the denomination would flow partly from the dignity of the religious idol as well.

VI. CONCLUSION

Religious denominations, just as individuals, have an intrinsic dignity of their own. The communitarian dignity of religious denominations is not just restricted to their intrinsic dignity, but is rather replenished by an idea of "public good" which tries to achieve the perfection and happiness of the entire community. Plurality calls for a celebration of difference and the balancing of competing interests to establish peace and harmony within the civilizational matrix. The paradigms of dignity are being reconceptualized and redefined, for the vision of a better, happier society. Religious liberty and freedom of denominations needs to be upheld in order to uphold their individual and collective dignity, as the identity and uniqueness of each denomination needs to be celebrated without any discrimination, and only that would be a way for the perfection of the individuals. The review petition of the *Sabarimala* judgment[53] has provided the apex court another opportunity to uphold the constitutional values of liberty, autonomy and dignity and thus flourish the plurality of India as a multi-cultural matrix.

[53] Kantaru Rajeevaru v. Indian Young Lawyer's Association Thr. Its General Secretary Ms. Bhakti Pasrija & Ors., Review Petition (Civil) No. 3358 of 2018 (India).

VALIDITY OF ABROGATION OF TRIPLE TALAQ - AN ANALYSIS FROM RONALD DWORKIN'S JURISPRUDENCE

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ABSTRACT

Every existing structure in this world has some entity which presides over the rest of its constituents. In India, judiciary holds the same position where the judgments pronounced by it are binding on its citizens. The judgment of the Shayara Bano case evidently reflected that judges hold revoking power which may nullify any law or custom if the same is beyond the ambit of just, fair and reasonable. This clearly lays down that judges in fact carry a huge power in bringing something into existence as indeed some entity should judiciously do. Dworkin's law of interpretation holds a clear distinction on how to use "law" in order to find the thin line which will comply with morality while bringing out the generality of the law which may be made applicable on all other similar cases. In order to find the one right answer, we have to be more specific, judges have to judiciously use law to eliminate the loopholes present in the preceding laws and judgments. This essay investigates how Dworkin's legal jurisprudence has been made applicable on the judgment of the Shayara Bano v. Union of India and how the abrogation of Triple Talaq was valid.

I. INTRODUCTION

The case of *Shayara Bano v. Union of India*[1] [***Shayara Bano* case**] is indeed a landmark case which abrogated the principle of Triple Talaq. The judgment was 3:2 in majority decision wherein Justice Joseph reasoned that since the adoption and practise of Triple Talaq has not been done within the basic tenets of Holy Quran, there was no necessity to follow such a rule. Judgment rendered by Justice Nariman and Justice Lalit held Triple Talaq to be unconstitutional and violative of Article 14 read with Article 13 (1). They stated that the practise although sanctioned under Muslim Personal Law (Shariat) Application Act, 1937 [**Shariat Law**] as a form of personal law was violative of Article 14 because any action which is arbitrary, must necessarily involve negation of equality and Triple Talaq practise reflected the same. Primarily, two contentions arose from this case, firstly, whether Talaq-e-Biddat is Islamic in nature and secondly, whether it came within the purview of protection under Article 25.

Article 25 of the Indian Constitution protects a citizen's choice of practicing religion and the state cannot take away a person's entitlement to religious practice unless it is hit by public order, morality or health.[2] Supreme Court in the case of *Durgah Committee Ajmer v. Syed Hussain Ali and Ors*[3], held that "*sometimes there are practices, even secular ones, usually considered as part of the religion, that might actually be superstitions and not essential to the religion, and hence excluded from the protection of the*

[1] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[2] INDIAN CONST. art. 25.
[3] Durgah Committee Ajmer v. Syed Hussain Ali and Ors, (1961) SC 1402 (India).

Constitution". This conveys that if a practice itself is arbitrary, unjust and not a cardinal religious practice, then the same can be hit by the exception as per Article 25.

Justice Nariman and Justice Lalit submitted that, 'Talaq-e-Biddat' has all along been irregular, patriarchal and even sinful. It was pointed out, that it is accepted by all schools – even of Sunni Muslims, that 'Talaq-e-Biddat' is "*bad in theology but good in law*".[4] Under the Article 32 of Indian Constitution, the judges discharged their constitutional responsibility of protector, enforcer, and guardian of citizens' rights under Articles 14, 15 and 21 of the Indian Constitution[5]. Finally owing to the fact that 'Talaq-e-Biddat' undermines fundamental rights and constitutional morality, the same was abrogated. Prima facie, the Triple Talaq practice led to overnight abandonment of the wife by the husband without any recourse. On contemplating this issue thoroughly, we find ourselves asking, "What is the fault? What do we want to abrogate – the utterance of 'Talaq talaq talaq' or the aftermath of the utterance?"

II. INTERPRETATION OF RIGHT ANSWER THESIS WITH RESPECT TO TRIPLE TALAQ

Before answering the matter of Triple Talaq, we need to understand Ronald Dworkin's jurisprudential inclination. In his book 'Taking rights seriously', Dworkin attempts to launch a general attack on positivism and specifically on H.L.A Hart's version of it.[6] According to him, positivism is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules.[7] Dworkin strategically coins the term 'Hard Cases' to explain the difficulty legal positivism has in solving certain cases in the legal framework.[8]

In case of practise of Triple Talaq, the Shariat Law made the followers bound to the rules without providing an opportunity to understand the standards for bringing that law and rules into existence. Cases like *Shayara Bano* can be placed under the category of hard cases where, there are neither precedents nor prior set rules (as required by legal positivists) which can assist in adjudicating the novel case perfectly. Even if a judge finds the same, the statute and/or case law rule carries the possibility of being vague, ambiguous resulting in a need to interpret the law, in order for it to be applicable to novel cases.

[4] Shayara Bano, *supra* note 1, ¶ 38.
[5] *Id.*
[6] RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 22 (Massachusetts: Harvard University Press, 1977).
[7] *Id.*
[8] Si Jin Oh, *Ronald Dworkin in the Liberal Jurisprudence Tradition: Focusing on Objectivity*, 2 Kor. U. L. Rev. 109 (2007).

Occasionally, the cases raise issues that are so novel that they cannot be decided even by stretching or reinterpreting existing rules.[9] Thus, positivist judges are compelled to cross the limit of their discretional powers and make new laws, thereby involuntarily acting as 'deputy legislators'.[10] *Per se* new laws and rules are not made but prevalent laws are put in the most 'right manner' to interpret the issue at hand. In the judgement of *Shayara Bano*, the judges similarly acted as deputy legislators and revoked the practise of Triple Talaq rule altogether. Soon after, India introduced The Muslim Women (Protection of Rights on Marriage) Act, 2019[11] to criminalize Triple Talaq, if practised further.

Dworkin holds the view that for every case in law there is only one correct decision which will resolve the issue in the most ideal manner. Dworkin's main contention is this: a proposition of law may be asserted as true if it is more consistent with the legal theory that justifies its prior application than is its contrary.[12] For every hard case among the various propositions which could encapsulate the legal decision, one proposition is true, the others are false[13] and this proposition was later called as 'The Right Answer Thesis'. It is already evident that Dworkin is not a supporter of positivism but it is also noteworthy to know that he believes that law does not run out in hard cases.[14] In other words, he believes that there is a possibility of different recourse of law in hard case.

His criticism of rule-based models of adjudication made him introduce a principle based model.[15] If, after exhausting all application of laws and when there is no other provision of further addition of rules, principles underlying rules can be looked at. Any theory regarding the applicability of principles and policies will depend on proper understanding of our legal institutions and rights and the same depends on political institution. Dworkin believes in a liberal community that is ideally shaped by judges as they convert imperfect political values in best interpreted form.[16] The bedrock of Dworkin's idealized liberal community is the equality principle. In such communities, each citizen is accorded "*equal concern and respect*."[17] Every human being has their own moral right which gives birth to moral responsibility.

[9] Si Jin Oh, *supra* note 9, at 109.
[10] *Id.*
[11] The Muslim Women (Protection of Rights on Marriage) Act, 2017, Acts of Parliament, 2017 (India).
[12] Norman E. Bowie, *TAKING RIGHTS SERIOUSLY. By Ronald Dworkin. Massachusetts: Harvard University Press.* (1977).
[13] *Id.*
[14] Si Jin Oh, *supra* note 9, at 109.
[15] *Id.*
[16] Richard Nordahl, *The Place of Community in Dworkin's Jurisprudence*, 12 WINDSOR Y.B. ACCESS JUST. 265 (1992).
[17] *Id.*

Legal positivism is that school of jurisprudence whose advocates believe that the only legitimate sources of law are written rules, regulations and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution including administrative, executive, legislative, and judicial bodies.[18] However, law requires amendments with the change of time and evolution of society as the society and its needs are dynamic. Triple Talaq was indeed an age old custom prevalent in the society; however knowing its nature and the high degree of vice it carried, it is only appropriate that the custom had to be abrogated.

Customs which are immoral in nature and detrimental to the society should get removed since it becomes a direct violation of basic human rights. Triple Talaq provided an upper hand specifically to the Muslim men to oppress their wives, violating their fundamental rights, without any recourse under the pretence of custom. Muslim women were differentiated from the class of women since they were the only ones who received divorce in the most unconventional manner unlike others. As we already discussed that Dworkin had equality at heart in his every jurisprudential theory, Triple Talaq was violative of equality and also deviant to the fundamental rights provided under Indian Constitution.

Earlier in the cases of Triple Talaq, contrary to what the Constitution visualised, the divorce demeaned Muslim women. With the *Shayara Bano* case, the rights of the Muslim women were restored and the purpose for which Constitution came into effect was achieved. Dworkin's theory, an antithesis of Hart's legal positivism, provides grounds to abrogate the custom of Triple Talaq.

In the judgement of Triple Talaq, although theories of legal positivism were followed, the same was done in a haphazard manner. As per the requirement of positivists, two criteria are necessary: firstly, that all law must be written and secondly, judicial discretion must be reduced.[19] Judges examined the origin of the rule, that is, Shariat Law as per the first criteria but failed to comply with the second one. They judges ruling in favour of abrogation were aware of the fact that Section 2 of Shariat Law allowed the practice of Triple Talaq; nevertheless, Justice Nariman and Justice Lalit, held the Triple Talaq outside the confines of Article 25 and nature of the practise to be manifestly arbitrary.

Instead of legal positivism, Dworkin's constructive interpretation theory was applied. Constructive interpretation is to understand something by putting it in its 'best possible light' or,

[18] *Legal Positivism*, Law Library - American Law and Legal Information, https://law.jrank.org/pages/8154/Legal-Positivism.html.
[19] Si Jin Oh, *supra* note 9, at 110.

in other words, to consider it against the best possible example of what it is or aims to be.[20] Putting something in their best light can result into providing meaning.[21] However, practices like Triple Talaq can never result into anything meaningful because the objective, that is, divorce uttering the word 'Talaq' three times, does not change the purpose it serves. Triple Talaq cannot be read in best light because if through any means the same is done, then the purpose of Constitution and the rights that it bestows on its citizens will be defeated. Dworkin also puts forward a similar view; for instance, when we describe the injustices in society in order to persuade others of the need for reform, we attempt to show the injustice in its best possible light.[22] The loophole in verifying the validity of law gives Dworkin's theory an edge over the positivism school of jurisprudence.

As per Dworkin, in hard cases, it is not clear that whether if either 'common sense' or 'realism' supports the objection that there can be no right answer, but only a range of acceptable answers.[23] But he himself sternly believes that a genuinely hard case can have simply one right answer and other wrong answers.[24] However practically, it can be deduced that it is almost impossible to bring every person into consensus regarding an issue. If the issue revolves around religion or politics, then the probability of reaching a consensus reduces dramatically – there would be a section of minority who encapsulate conservative and orthodox thoughts. Triple Talaq fits perfectly as an example in the above case.

To consolidate Right Answer Thesis, Dworkin presented two levels of dimensions to arrive at the conclusion for Right Answer Thesis in hard cases – (i) the dimension of 'fit'; and (ii) the dimension of 'political morality'.[25] The dimension of fit supposes that there is always one theory that fits better to the case than the other. Contrary to immature legal systems with less settled rules, in a modem and complex system, Dworkin argues that the probability of a tie is very small.[26] However, since the probability of ties is anticipated, Dworkin develops another dimension, which is political morality. Accordingly, even if two theories or justifications provide an equivalently compatible fit, one may be able to provide a better justification if it is superior as a matter of political or moral theory.

[20] RONALD M. DWORKIN, LAW'S EMPIRE 52 (Massachusetts: Harvard University Press, 1986).
[21] *Id.*
[22] Simon Honeyball, *Dworkin, Best Light Arguments and Constructive Interpretation*, 35 B. L. J. 53 (2003).
[23] RONALD M. DWORKIN, *supra* note 6, at 290.
[24] *Id.*
[25] Si Jin Oh, *supra* note 9, at 117.
[26] *Id.*

Here, looking into the contemporary situation, the only viable and just answer holds out to be abrogation of Triple Talaq as it is deterrent to the integrity and status of women. Muslim women were categorized differently and oppressed by orthodox mentality. Any other answer beside abrogation would have resulted in legal rules and law trumping over basic human rights which would have demolished the Right Answer Thesis.

Right Answer Thesis was backed with four fundamental ideas which essentially became its foundation: *First,* in hard cases, moral arguments are indeed legal arguments. *Second,* in a situation of legal dispute or controversy, certainly one party carries in his favour a pre-existing right to decision. *Third,* sentences which express both legal and moral judgements are cognitive in nature. In simpler words it means, sentences as such in its core only assert the facts instead of expressing the speaker's objective of stating so. *Lastly,* the principle of bivalence.[27] Bivalence assists in interpreting a moral or legal sentence by understanding its underlying *right answer* present in it. Since both moral and legal sentence carries a varied number of interpretations with it, only a particular interpretaion has to be adopted which brings out the positivite factor of righteousness with respect to its counterparts. Judges being the interpreter here through the means of discretion incline towards a stronger right answer over the other alternatives.

As per the judgment of *Shayara Bano* case, Triple Talaq is now struck down owing to the fact that it contained traits of arbitrariness, violation of fundamental rights and was unconstitutional in nature. But does this pronouncement of judgement borne the potential to be rightfully called as 'the right answer'? For this particular case, yes. Right Answer Thesis demands that the answer which is right will, by default, make the rest of the alternatives to be the wrong answer. The practise of Triple Talaq, its principle, policy and its very nature was immoral. The continuation of the practise or any amendment to the practise would not have altered its nature. Furthermore, its inhumanely oppressive quality was immensely integrated into the practice making it violative of human rights altogether. This theory containing morality factor attempts to find the fine line which will safeguard the rights of women and the community in large while establishing the concern that rights should prevail over rules.

Rules in general are bought into existence to protect the individual's interest and rights and if the same are hampered due to any law, then the objective of bringing the law into effect is diminished. Surely the definition of right answer is dynamic. The right answer of today might not be the right answer of tomorrow but it is to be observed that the right answer is always thought

[27] Joshua R. Geller, *Truth, Objectivity, and Dworkin's Right Answer Thesis*, UCL JURIS. REV. 83 (1999).

of with respect to society's traditional and contemporary needs. Here the abrogation of Triple Talaq came out to be the right answer as it acknowledged the contemporary situation and needs while outweighing the vices that it carried in the past.

III. COMPLIANCE OF TRIPLE TALAQ JUDGEMENT WITH DWORKIN'S THEORY OF LAW AS INTEGRITY

Dworkin was concerned with questions of 'what is law' and 'what are legal rights' since he found the definitions provided by Platonists, realists and positivists to be not true. According to him, they all were searching for the criteria for the use of the word 'law' and 'rights'.[28] Since we all do not have a shared criteria for our use of legal words; the meaning of the words is to be found in the role they play in our lives, which will be different for different people.[29] However, the answers to the questions about law and rights can be found only when we interpret these concepts constructively.[30] This signifies that, we need to search for a medium which would promote what the law believes to be serving in the best light possible.

Dworkin strictly believed that since people of a state are in fraternal association of a community, it is the purpose of the law to uphold the obligations which are due to these people. Law can serve the community best when the past, present and the future are taken into consideration. Law is indeed a part of the political and moral life of the community and should take into account as to how the community acquired its value evolving from its tradition.[31] This reasoning portrayed as a foundation as to how law should work for a community; which later then led Dworkin to formulate the theory of 'Law as Integrity'.

It states that there are different ways of giving meaning to our practice of law, depending on what we think is the point of that practice. If the purpose of law is to express the concern of the community for each of its members, then the best way of serving that purpose is to see law as a living, evolving tradition.[32] On the same line of thought, we can see that, when we believe community as a person with principles we thereby become a constituent of fraternal association as well. We perceive others as equal to us who bears equal rights and respect for the well beings

[28] Anne Padley, *Law's Empire*, 1 RATIO JURIS 181 (1988).
[29] *Id.*
[30] Si Jin Oh, *supra* note 9, at 181.
[31] *Id.*
[32] Si Jin Oh, *supra* note 9, at 182.

of others. Being a fraternal association allows a moral justification for the state's monopoly of force; the obligations incurred by membership of such a group must be upheld by the state.[33]

Dworkin believes that integrity contributes to the efficiency of law. If people accept that they are governed not only by explicit rules laid down in past decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict.[34]

Judges being the most judicious beings are given the responsibility to interpret the law in a manner that will satisfy the morality, rights of constituents of the community while resolving conflicts. Decisions given by the judges should interpret the existence of law and legal rights in such a manner which will be most acceptable account of the community's traditional and present values, and thereby best furthers the purpose of law, is the correct one.[35]

On matters of rights, judges are the appropriate authoritative decision-makers. Questions of rights are to be decided on the basis of principle in accordance with the law.[36] According to this theory, the meaning of the law is not given by the words of the relevant documents nor revealed in the so-called original intent of the drafters; the meaning is always a matter of interpretation and thus often the subject of controversy.[37]

Analysing the practice of Triple Talaq under Muslim law with respect to Dworkin's Law of Integrity, we can observe how it did not abide by the theory. As per the Preamble of Indian Constitution,[38] fraternity is an ideal but in reality there is disparity among Muslim women and others. While Muslim women too belong to the same fraternal association of community but they are differentiated from Muslim men as it was only the men who carried power to divorce via Triple Talaq. The essence of fraternal association of community was lost when the cardinal 'equality' right was not available to Muslim women; in the sense, Triple Talaq was only performed on Muslim women while the other women of the community were not under this unethical procedure of divorce.

[33] Si Jin Oh, *supra* note 9, at 184.
[34] RONALD M. DWORKIN, *supra* note 20, at 188.
[35] Si Jin Oh, *supra* note 9, at 117.
[36] Richard Nordahl, *supra* note 16, at 272.
[37] *Id.*
[38] INDIAN CONST. Preamble.

Law as Integrity takes into consideration the duty to express the concern of the society and it is the State who bears a moral obligation to cater to the needs of the community. Throughout ages of tradition, Muslim women were oppressed by its members of community with no available methods of recourse. The purpose of law that Triple Talaq carried can never be read in best possible light because the flow of standard of law coming from its tradition was never in accordance to fundamental rights as provided by the Indian Constitution which is the lifeline of every community member. The judges of the *Shayara Bano* case interpreted the Triple Talaq law with morality and constitutionality by its side in order to improve the Muslim women's equality status. Before the judgement was propounded, Muslim women could be thought of members of another novel community which was exempted from the Constitutional remedies.

The Preamble, Articles 14, 15, 21, 51A which promote equality, dignity and status, non-discrimination and prevention of any derogatory practises against women, are some provisions which generally brings everyone to equal footing, was absent from these lives of Muslim women. Abandonment of a Muslim wife became regular news to society. An instance like, 'Women divorced over a telephonic call' was ordinary to the ears. Police report put forward the details in this case stated: A Muslim women who was already under in-laws pressurization to meet the dowry demand was thrown out of the house after she gave birth to two girl child twins. Enraged about such occurrence the in-laws abetted the husband to divorce her. Following this, the husband uttered "Talaq Talaq Talaq" over the phone's loudspeaker and in a span of overnight the divorced woman had no shelter for her new born babies and herself.[39] Cases like these are evidence of immorality and unethical laws where Muslim men violate the fundamental rights of Muslim women.

Abrogation of the practice of Triple Talaq put an end to the age-old immoral practice of Triple Talaq. The practice of Triple Talaq is morally wrong as it makes the position of women vulnerable and hence, it nowhere fits the legal materials and showcases the very purposes of the constitution in bad light. Therefore, according to Dworkin's theory of law as integrity, this practice should no longer be allowed to be carried out and that is what the judges in this case exactly did. Law as integrity considers law as a rational phenomenon and not a set of individually separate decision. Judges are required to justify in entirety to the law in question that is considered to have its own inherent life.

[39] Web desk, *Case against Saudi-based husband for triple talaq over phone, his father held*, THE WEEK (Apr. 23, 2020), https://www.theweek.in/news/india/2019/08/05/Case-against-Saudi-based-husband-for-triple-talaq-over-phone-his-father-held.html.

From the *Shayara Bano* case, we can observe that under Article 25(1) of the Constitution, the citizens are allowed to profess and propagate one's religion which thus makes it morally correct; to let the followers of Muslim religion do so too. But the very instant when Muslim women are deprived of their basic rights or when their dignity is undermined, the essence of Constitution is also violated. It is obvious in these circumstances that the better fit of the law would be to protect the fundamental rights and dignity of women, as it safeguards the interest of the community instead of those who were responsible of violating others' fundamental rights. This appropriate interpretation by the judges was adopted in this case after which women became entitled to their due rights.

IV. INDIA'S CONTEMPORARY SITUATION WITH MUSLIM DIVORCES

With the practice of Triple Talaq getting rectified in many Islamic states, India too has started making amendments, resulting into the government effectively passing Muslim Women (Protection of Rights on Marriage) Act 2019 **[the Act].** The preamble of Act says that "*This Act to protect the rights of married Muslim and prohibits divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto*".[40] Though on face this Act looks promising but under the veil this Act bears disparities.

Here, Muslim men are treated in a discriminatory manner in comparison to men belonging to other religions as they solely are put in the realm of criminalizing activity. Viewing from Right Answer Thesis perspective, this Act can be one of the acceptable answers but definitely not the right answer as the Act leaves scope for loopholes. *Firstly*, Dworkin's ideology of rights over rules is defeated as men become unable to practice their own defence via rights. *Secondly*, protecting women from the aftermath of utterance of Talaq does not bring any good to the victims of the marriage as they still remain in a vulnerable position. The society still views and responds to the woman as the guilty one. Society thinks that it is woman's fault that she could not keep the family together.

Constitutional morality needs to act in such situations to revive the status and dignity of divorced women by assisting in de-stigmatizing the mind-set of the society. Time and again when conflict between traditional and contemporary human rights arose, constitutional morality provided the community with the right answer; for instance, Section 377 of Indian Penal Code was struck down to decriminalise homosexuality.[41] The judiciary and legislature both with the assistance of

[40] The Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019.
[41] Navtej Singh Johar and Others v. Union of India, (2018) 10 SCC 1 (India).

Constitutional morality can bring provisions stringent enough to provide divorced women with mandatory maintenance and alimony. Lastly, the fraternal association in the community is obliterated, as the term 'divorce' becomes unequal to all the equal members of community.

Dworkin states that, when interpreting law, it should be seen in its best moral light.[42] Now this moral idea does not necessarily have to be the 'best' but rather put in such particular way which allows it to be comprehended in a better manner than others.[43] Hence, undoubtedly morality by default exists and runs indispensable everywhere. We citizens of India are in fraternity with each other provides us the right to live life in our own terms provided that other people are not affected. Citizens have been favoured by providing the freedom of choice, therefore for fundamental freedoms like freedom of religious commitment, freedom of expression, access to the widest available literature and other forms of art, freedom of personal, social and intimate association, and also freedom of non-expression in the form of freedom from surveillance, there has to be certain protection.

V. CONCLUSION

Rights are indispensable to one's life. A society or community can excel when the collective interest are reserved and fuelled with procedures to rectify the wrongs. The error in the custom of 'Triple Talaq' was not in uttering the words three times but the aftermath of the utterance. The custom contributed negative value to the word 'Talaq'. Every individual is entitled to freedom of speech till the time it is not inimical and hostile against others. The utterance was an immediate withdrawal of status of Muslim women which left them withered from society and as well as from their fundamental rights.

Judges being at the pinnacle amongst all other constituents of community have the power of discretion but as per Dworkin's dimension of 'fit', that discretionary power is restrictive in nature as we could only find number of limited answers for a proper fit. Additionally, when Right Answer thesis is considered, it is believed that only one right answer exists. So the question remains unanswered, does the judges have the ability of discretion at all if they are only bound to find one right answer? If India, the largest democratic country, cannot establish the notion of communal benefit then equality is lost. Judges make law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own.[44] But if

[42] Simon Honeyball, *supra* note 22, at 53.
[43] *Id.*
[44] Ronald Dworkin, *Hard Cases*, 88 H.L Rev. 1058 (1975).

the case at hand is a hard case, when no settled rule dictates a decision either way, then the decision could be generated by either policy or principle.[45]

Analysing The Muslim Women (Protection of Rights on Marriage) Act, 2019 from the lenses of Dworkin's Right Answer Thesis, the Act is not entirely right. The Act and its purpose is right till the extent it declares utterance of 'talaq' by Muslim men as void and illegal. It was indeed a necessity and a pressing issue to eliminate the function of Triple Talaq altogether and the Act by doing so maintains the sanctity of its existence. The juncture where it misses out to be the right answer is when the Act exhibits traits of inequality towards the Muslim men. It is now only the Muslim men who will face imprisonment of upto 3 years with fine while men of other religions do not face the same; as per Hindu Marriage Act, the husbands face merely an imprisonment of up to one year.

Additionally, under this Act, the offence is cognizable and the Muslim men have no available means of recourse whatsoever. With the husband in the jail, and the in-laws being hostile to the wife for putting the husband behind bars, the wife becomes vulnerable and burdened with the responsibility to live for herself. The Act does not provide for any remedial provisions with respect to rights in divorce to the victimised wife. If the Act had pondered upon such inaccuracies and amended accordingly, then this Act could have almost achieved the 'the right answer'.

[45] *Id.* at 1060.

CONCEPTION OF CONSENT UNDER ABORTION LAWS

BHASKAR KUMAR*

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ABSTRACT

In this essay, I have argued that the understanding of consent under the abortion laws is conceptually flawed and favours the patriarchal traditional norms. The feminist conception of consent stipulates that in order to give consent one should be in position to exercise one's choice among the given options. The right to abortion is the essence of every woman's right to own her body. As right to terminate pregnancy falls in the domain of equality, right to privacy and self-determination, the consideration of spousal consent in terminating pregnancy hinders the realization of constitutionally guaranteed rights to women. Further imposition of time limit for abortion also forces women to carry fetuses without their consent also signifies the disproportionate power dynamics between citizen and state. The laws restricting abortion force women to continue pregnancy beyond a certain time limit are a manifestation of patriarchal assumption of motherhood. Hence, it is argued that the time limit for abortion must be lifted in interests of women except for the cases where it will have adverse consequences on the mother.

I. INTRODUCTION

"There is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process... The real sexual revolution is the emergence of women from passivity, from nothingness, to full self-determination, to full dignity."[1]

Recently, a petition was filed in the Supreme Court of India challenging the validity of the provisions of Medical termination of Pregnancy Act, 1971 [**MTP Act**] which criminalizes abortion.[2] It was alleged in the petition that Sections 3(2), 3(4) and 5 of the said Act are violative of personal liberty and body autonomy. The legal developments and critiques regarding abortion must be understood in the context of feminist revolutions and increasing dimensions of epistemology regarding female sexuality and agency. Evolving feminist theory has ferociously attacked patriarchal legal constructions and as a result of this political movement, constitutions across the globe have started taking their viewpoints into account. The advocacy of agency and choice for women gained momentum and made a place for itself in policy making and court rulings.

This essay outlines the conception of consent within the MTP Act. The essay argues that the conception of consent under MTP Act reflects patriarchal notions and endorses gender stereotypes which often find place in the judgments of the Supreme Court and of various High Courts.

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[1] Betty Friedan, President, National Organization for Women, *Abortion: A Woman's Civil Right,* ADDRESS AT THE FIRST NATIONAL CONFERENCE ON ABORTION LAWS (Feb. 1969).

[2] Press Release, *SC Issues Notice on PIL Seeking Decriminalization of Abortion,* LIVELAW (Jul. 15, 2019), https://www.livelaw.in/top-stories/sc-issues-notice-on-pil-seeking-decriminalization-of-abortion-146377.

II. AN OVERVIEW OF CONSENT PARADIGM IN INDIAN ABORTION LAWS

Section 3(4)[3] of the MTP Act stipulates:

> *(a) No pregnancy of a woman, who has not attained the age of 18 years, or, who, having attained the age of 18 years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.*
>
> *(b) Save as otherwise provided in (a), no pregnancy shall be terminated except with the consent of the pregnant woman.*

Although the language employed in the section unambiguously dictates that the consent of a pregnant women is required for terminating her pregnancy, and that her guardian's consent is required only in some circumstances, however, the interpretation of courts have had an adverse impact on women. In the case of *Samar Ghosh v. Jaya Ghosh,* the Supreme Court ruled that if a wife terminates pregnancy without the consent of her husband, it will be a ground for divorce.[4] Although the judgment does not interfere with the statutory requirement of consent under section 3(4) but there have been a number of cases which followed the suit and entertained arguments of cruelty as a ground of divorce where the consent of spouse was not taken. The decision has potential to impact woman who wish to have abortion. Although the judgment does not abridge the requirement of consent directly, it is sufficient to invoke a fear of legal repercussions. In the celebrated case of *Suchitra Srivastava v. Chandigarh Administration*[5] [***Suchitra Srivastava***], although the court unequivocally held that a woman has a right to privacy, dignity, and bodily integrity but at the same time, it ruled against termination. Further the time limit of 20 weeks which has been sought to extended by four weeks in selected circumstances[6] force women to continue their pregnancy without their consent. The construction of law along with several judgments like *Suchitra Srivastava* has an anti-abortion intonation.

III. EQUAL RIGHTS AND ABORTION ANALYSIS

Prohibiting abortion reduces women to potential mothers, thus perpetuating gender-based stereotypes.[7] Nigel Rodley, when speaking about Irish abortion laws, says that our abortion law sends the message that a woman is 'a vessel and nothing more'. [8] The idea of a ban on abortion seems problematic when the State in the guise of protecting potential life enforces the traditional

[3] Medical Termination of Pregnancy Act, No. 34 of 1971.
[4] Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 (India).
[5] Suchita Srivastava v Chandigarh Administration, (2009) 9 SCC 1 (India).
[6] *The Medical Termination of Pregnancy (Amendment) Bill, 2020*, PRS INDIA, https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020.
[7] UN HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF IRELAND, CCPR/C/IRL/CO/4 (Aug. 19, 2014).
[8] Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 817–22 (2007).

gender role stereotypes about sex, care-giving or decision-making around motherhood. In *Planned Parenthood v. Casey* (U.S.A.), the court reflected on the detrimental impact of abortion laws on women as a class.[9] If it remains unchecked, given the myriad ways of unwanted pregnancy, the participation of women as equals in the society shall be burdened. In its rulings on abortion, the Court recognized that "*the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives*,"[10] The burden on men and women is not commensurable in the context of child bearing and the choice of abortion.

In *Joseph Shine v. Union of India*,[11] Justice Chandrachud observed that the notion of substantive equality enshrined in our Constitution is directed at eliminating the systemic and institutional discrimination against disadvantaged groups so that they could achieve equal social, economic and political participation. There is a pressing need to move away from formalistic notion of equality which disregard social realities. The court emphasized that "*The primary enquiry to be undertaken by the Court towards the realization of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals*."[12]

Article 15(1) of the Constitution of India prohibits any kind of discrimination on the ground of sex. Any provision discriminating women on the basis of class stereotypes or patriarchal conception of women's agency will violate the right protected under Article 15(1).[13] Justice Chandrachud further stressed that it is the duty of the court to break these gender stereotypes and promote a society where equality in all spheres of life is provided to women without any prejudice.[14] The legal system still consists of certain norms and provisions which considers the historical subordination of women beyond any reproach and remedy. That aspect is laws related to family affairs.[15] The laws on marriage, divorce, succession and abortion have long been contributed in subordination of women by depriving them of equal rights in personal affairs.

The equal-rights argument makes the case that women cannot be equal to men as long as the consequences of sexual activity and of childbearing are differentially distributed between women and men. The right to choose, then, is an attempt to rebalance these differential consequences. In this argument the conflict of rights is shifted from the woman fetus conflict to a gender conflict. The bounds of liberal individualism are broken by formulating equality in terms of

[9] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
[10] *Id.* at 2809.
[11] Joseph Shine v. Union of India, (2018) SC 1676 (India).
[12] *Id.*, at ¶38.
[13] INDIA CONST., art. 15 cl. 1.
[14] *Supra* note 11.
[15] *Id.*

social groups, a claim established by demonstrating that one cornerstone of male domination, enacted through institutions such as church and state, has been in control of women's sexuality and reproductive capacity.[16]

IV. SOCIO-LEGAL ASPECT OF ABORTION

The sociological aspect of abortion is against the goal of transformative constitutionalism which seeks to rise above the stereotypes and biases inherent in our society and social institutions. As long as women are socially disadvantaged by their childbearing capacity and the gendered roles entrenched in Indian society, it remains impossible for most Indian women to make free and un-coerced decisions concerning reproduction. Male control of female sexuality is always expressed and legitimized in men's desire of having a large family (sometimes small too) which is prevalent in Indian societies. Reproductive justice cannot be guaranteed without looking into the unequal circumstance which pregnant women face in the present case. This reshaping of women's sexual and reproductive goals may be pursued in the name of furthering gender equality and women's rights, and freeing women from patriarchal control. Nonetheless, the entire project appears misogynist, as it seeks to make women's sexuality more like men's in effect, in the sense of being unburdened by the possibility of pregnancy, and being modeled after the more unattractive forms of male sexual practice.[17]

The woman's choice to have sex, become pregnant and then terminate pregnancy, is shaped by multiple inequalities existing in social institutions which enforce the traditional stereotypes of gender discrimination.[18] The notion of substantive equality in this respect requires a complex and intersectional understanding of female subordination on the basis gender race and class. Rather than an assertion of women's moral agency the abortion legislation reflects on the manifestation of socio-economic inequalities in women's lives.[19]

India has an obligation to facilitate the progress of women's social position by modifying 'social and cultural patterns' of bias in order to eliminate gendered prejudices and stereotypes. Although in the Indian society, the disadvantage to females as a class is not as visible as the disadvantage to the lower castes; however, the disadvantage runs deep into the structure which is more acute in case women of lower class. The eradication of this discrimination and disadvantage is the key message of the constitution and the goal of transformation. The goal of transformation cannot

[16] GERDA LERNER, THE CREATION OF PATRIARCHY 3-6 (New York: Oxford University Press, 1986).
[17] Sidney Callahan, *Abortion & the Sexual Agenda*, Commonweal 232 (1986).
[18] Joanna Birenbaum, *Contextualising Choice: Abortion, Equality and Decisions concerning Reproduction*, 12 S. AFR. J. HUM. RTS. 485 (1996).
[19] June Cope, *A Matter of Choice: Abortion Law Reform in Apartheid South Africa*, 7 S. AFR. J. CRIM. JUST. 382 (1994).

be attained where pregnant women have to face disproportionate consequences in order to maintain the stereotypical status quo. The aim of social and sexual equality will only be achieved when they will exercise reproductive autonomy under equal conditions which doesn't preclude choice.[20]

The formal equality doctrine also fails to capture the essence of subordination perpetuated by abortion laws. Under formal equality framework the abortion rights will lose its case as there are no pregnant men hence equal protection theory cannot be applied.[21] Law is unable to detect the discrimination in practices which doesn't involve men because gender equality can only be assessed if there are similarly situated men who are treated differently.[22]

The ability to equally participate in social and economic affairs of the nation can only be facilitated by their ability to control their reproductive lives.[23] The burdens of motherhood and fatherhood in the society are horribly disparate, so the law needs to focus on changing structures. The right to abortion provides the women a way out of the oppressive patriarchal structure of gendered roles and obligation by not choosing the motherhood.[24] The restrictions of reproductive choices turn the reproductive capacities of women for use and in control of others which is a disability not parallelly imposed on men.[25] Basically the restrictive abortion laws stem from constitutionally unacceptable stereotypes.

The policing of women's body and behavior is essential to preserve the patriarchal structure. Every act of a woman is under social scrutiny which operates through peer policing and consequentially resulting into conformity on the part of women and violence, excluding ridicule on the instance of non-conformity.[26] The constant fear of surveillance and consequences of non-conformity results in self-censorship.[27] In this context right to privacy judgment recognizes heterogeneity as intrinsic value and respects an individual's choice to stand alone and against the tide of conformity. These values are essential to preserve the plurality and diversity of our culture.[28]

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[20] Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).
[21] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).
[22] *Supra* note 11.
[23] *Supra* note 8.
[24] *Id.*
[25] Cass Sunstein, *Neutrality in Constitutional Law (With Special reference to Pornography, Abortion and Surrogacy)*, 1 COLUM. L. REV. 92 (1992).
[26] Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013).
[27] Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001).
[28] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCALE 1 (India).

The founding fathers of the constitution had profound respect towards toward the liberty of an individual and hence they placed the right of personal liberty on the highest pedestal. The right to personal liberty ensures autonomy of an individual in his private life unless the state has a compelling interest in intruding that. The debate which sacralizes pregnancy to motherhood transition always suppresses the possibility for women making choices regarding their reproductive capabilities.[29] The biblical influence on the conception of abortion has been apparent as the ecclesiastical debate regarding 'personhood' or 'ensoulment' of fetus has been pervasively manifest in abortion.[30] It is a widely held belief in Roman Catholics that soul is gift of god given at conception. Hence abortion at any stage would simply imply the taking of human life and that too against the will of god. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the womb. In balancing the evils, the notion held by latter is that the evils lying in destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.[31] Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "*moral predilections must not be allowed to influence our minds in settling legal distinctions*."[32] The view on moral status of fetus depends largely upon one's own religious beliefs and the religious conception of sins profanity.[33] As there is no precedent which confers the right to life on the unborn child, the fundamental right of mothers should not yield to the societal notions of morality.

In addition to individual rights framework which protects the privacy, dignity and bodily integrity of an individual the issue of abortion must be looked at from the perspective of transformation of women's lives form the social conservatism. The abortion rights will emancipate the women from the traditionally ascribed role of motherhood imposed on them and thus will bring the transformation of society. The laws prohibiting abortion beyond 24 weeks are compelling examples of women alienated from their body, sexuality and agency and perpetuating the gendered power imbalances.[34] The laws on abortions must uphold the desire of pregnant women and should not succumb to social stereotypes and notions. Moreover, the abortions in India are doctor centric with doctors having the ultimate discretion over the women's body and choice.

[29] Janet R. Jakobsen*, Struggles for Women's Bodily Integrity in the United States and the Limits of Liberal Legal Theory,* Vol. 11, No. 2 JOURNAL OF FEMINIST STUDIES IN RELIGION 5-26 (1995).
[30] *Id.*
[31] *Meeting of the Ass'n for the Study of Abortion, Hot Springs, Va. On Nov. 18, 1968*, N.Y. Times, 77, col. 1 (Nov. 24, 1968).
[32] O. W. HOLMES, THE COMMON LAW (1881).
[33] Glanwille Williams, *The Law of Abortion,* Vol. 5 (1) CURRENT LEGAL PROBLEMS 128–147 (Jan. 1, 1952).
[34] CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 35-36 (Harvard University Press, 1988).

The only condition of medical risks to terminate pregnancy beyond 20 week doesn't take into account various socio-economic and psychological and personal considerations. Hence, the women are forced to carry the child in their womb against their will. Recognition of women's ability to choose implies that they have moral agency with regard to their course of life which threatens the naturalization of traditional gendered division of labor that are based on assumptions regarding motherhood etc.[35] Hence, when women will choose to abort then it will attack the patriarchal family set-up by altering the roles played by males and females in social affairs. To move towards a sexually egalitarian society it is important to recognize women's right over their respective bodies in matters of pregnancy and child bearing. Control over women's sexuality is the key patriarchal assumption that underlies family and marriage. In remedying injustices, the Court cannot shy away from delving into the 'personal', and as a consequence, the 'public'. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the court is not taking on a paternalistic role and "granting" rights.[36] Therefore in light of advances in medical technology which has rendered process of abortion safer and more secure, the time limit of abortion must be lifted barring the cases where women could face health risks.

V. THE IDEA OF CONSENT

In this essay, two prongs of consent in the context of abortion have been discussed. The first aspect covered cases where court ruled in favor of spousal interest in matter of abortion indirectly.[37] The second aspect covered the time limit beyond which abortion is not possible which forces women to continue pregnancy against their wish. In considering unilateral termination of pregnancy as a ground for divorce as a lot of cases have, women have been robbed of their ability to consent freely.[38] Moreover a number of studies show that doctors ask for a husband's signature before carrying out pregnancies even in case of unmarried woman.[39] In a study on the process of informed consent in sterilization services in Chennai done by this author, 73 per cent of the clients reported that third party signatures were procured, of which 53 per cent were from husbands.[40] The judicial pronouncements validating spousal consent as a

[35] BEVERLY W. HARRISON, OUR RIGHT TO CHOOSE: TOWARDS A NEW ETHIC IN ABORTION 119 (Beacon Press, 1983).
[36] Planned Parenthood, *supra* note 11, at ¶¶51-2.
[37] Samar Ghosh, *supra* note 4.
[38] *Id.*
[39] UNDERSTANDING INDUCED ABORTION: FINDINGS FROM A PROGRAMME OF RESEARCH IN RAJASTHAN, INDIA, POPULATION COUNCIL (New Delhi, 2004).
[40] Rajalakshmi. *Informed consent in sterilisation services: evidence from public and private health care institutions in Chennai,* Working Paper No. 4 POPULATION COUNCIL (New Delhi, 2007).

prerequisite for abortion assumes the stake of husband in women's reproductive choice. On the other hand the time limit imposed on termination of pregnancy is reflective of patriarchal notions embedded in law prohibiting termination of pregnancy beyond 20 weeks. These both instances are sufficient to show how the element of consent on which individual autonomy rests is skewed in favour of perpetuation of a patriarchal structure.

As per feminist theories, consent can be said to exist when a choice is made without being influenced by any kind of express or implicit extraneous force.[41] Consent has been associated with the autonomy of an individual. When discussed specifically in the context of sexual activities, it usually determines the 'rightness' or 'wrongness' of other's sexual advances to oneself. Therefore, consent can be understood as a line that an individual draws while exercising the right to sexual autonomy. According to feminist legal theory, the legal subject is not an abstract, gender neutral creature of the traditional legal imagination but an ideological construct, endowed with attributes that vary according to context. She thinks the crime of rape focuses more centrally on what men define as sexuality than on women's experience of their sexual being, hence violation. The tool of subordination, or the means by which inequality between men and women is perpetuated, is sexuality. Heterosexuality as the prevailing sexual practice in society involves the sexual dominance of one, the man, and submission of the other, the woman. It is this sexual paradigm that gives meaning to gender. In every law, socially constructed relations between the interacting parties are always a secondary focus.[42] In the life of inequality, much routine sad resignation or worse passes for "voluntariness" in the sexual setting.

Consent covers multitudinous forms of A's hegemony that are typically so elided as not to be seen to infect or inflect, far less vitiate, B's freedom.[43] Steven Lukes broaches this aspect of the inequality analysis when he observes that, "*A may exercise power over B by getting him to do what he does not want to do, but he also exercises power over him by influencing, shaping or determining his very wants.*"[44] One effective method of exerting this kind of power over the will, apart from socialization to gendered identity, is to be in the position to determine the alternatives and their consequences. In a similar hierarchy, the consenting parties to government in eighteenth century English liberalism were not the state's equal, although they (generally not including women) were considered equals among themselves, and the power of the state they created by their consent

[41] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,* 8(4) FEMINIST THEORY 635 (1983).
[42] *Id.*
[43] *Id.*
[44] STEVEN LUKES, POWER: A RADICAL VIEW 27 (Palgrave Macmillan, 2nd ed. 2005).

was not unrestrained or unlimited.[45] The consent paradigm under abortion law is manifestation of power of dominant groups over subordinated women by instrumentality of law. His word is her law as the saying goes. The purpose of consent is to attribute and justify the obedience of the powerless to the rule of the powerful, her obeisance to him, specifically in the present context, to what he does to her sexually. It is about compliance, compliance of the compliant presumptively legitimizing otherwise illegitimate acts of power.[46] The traditional notion of womanhood is perpetuated by enactment of laws which are enacted by men to govern women.

VI. CONCLUSION

In this essay the right to abortion has been discussed in the light numerous judicial pronouncements withholding right to equality and privacy of an individual. It has been argued that women have fundamental right to reproductive choice and her choice to carry or terminate pregnancy is an element of decisional autonomy. However certain judgments have ruled in favor of granting divorce in cases where women terminated the pregnancy. As the judgment *Samar Ghosh v. Jaya Ghosh* shows, men have also accused women of terminating non-existent pregnancies to substantiate fake cruelty charges in divorce matters. Since the courts have consistently recognized the women's right to terminate pregnancy within the framework of right to bodily integrity, privacy, equality and self-determination, the hindrance due to spousal consent must be weeded out of the abortion paradigm. The decision regarding termination of continuation of pregnancy must solely be taken by women themselves. Any kind of legal hindrance like outlined in this essay will rob the women of autonomy. Hence doing away with the element of spousal consent in termination of pregnancy will go a long way in ensuring the realization of women's right to decisional autonomy. Further the time limit is reflection of patriarchal notion manifested in law. The forced continuation of pregnancy where there are not health risks in termination is state's attempt to rob the consent of its subject and the same should be done away with.

[45] HACKETT, ON THE SOCIAL CONTRACT (Donald A. Cress ed. & trans., 1987).
[46] KATE MILLETT, SEXUAL POLITICS 25 (1970).

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