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IAFOR Journal of Cultural Studies

Volume 6 – Special Issue

Law as/and Culture: Reconfiguring Human Rights and Justice

Edited by: John Nguyet Erni

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Toward a Juris-cultural Studies of Human Rights

John Nguyet Erni, Hong Kong Baptist University

Abstract

This special issue grew out of an advanced seminar on Cultural Studies that I guest-taught at the National University of Singapore in 2018, where there has been a long-time engagement with interdisciplinary teaching and learning in the field of Cultural Studies through NUS's Asian Research Institute (and more recently through the university's Department of Communication and New Media). The essays collected here represent a collection of sincere efforts to reframe political and ethical crises through a unified framework that can be called *juris-cultural studies of law and rights*. By "juris-cultural," I refer to a genre of critical cultural analysis that investigates the mutually constitutive nature of law and culture, through dissecting "law as culture" in which cultural signifying practices are traceable to the presence or absence of legal norms, as well as through "culture as law" in which the contested meanings of cultural communities, their practices and politics, can shape or even dictate social norms and regulations. It is both a political language and a method that avoids separating law and culture but confronts their uneasy entanglements. The essays are united by a common critical method of combining critical legal theory with a cultural critique of law. Each essay centers on a particular court case, and performs critical reading of the legal logics and reasoning alongside a broader attention to social and cultural ideologies and power relations that overdetermine the outcome of the court judgment. The insights produced by such a method will hopefully present to readers an innovative approach adequate to the task of bringing the problems of rights, legal subjectivities, and critical justice squarely to the doorsteps of Cultural Studies.

Keywords: law as culture as law, juris-cultural studies, human rights, conjunctural analysis of court cases

For a long time, human rights have been a persistent object of analysis by important social scientists and thinkers, such as Bryan Turner, Will Kymlicka, Armatya Sen, Boaventura de Sousa Santos, Martha Nussbaum, Jürgen Habermas, Janet Halley, Patricia Williams, Jack Donnelly, Malcolm Waters, and many others. Using institutional, discourse, and critical approaches, sociologists, political scientists, historians, anthropologists, international relations scholars, and of course many legal scholars, have critiqued the human rights enterprise (see, e.g., Claude and Weston, 1992; Donnelly, 1999; Downing and Kushner, 1988; Foweraker and Landman, 1997; Freeman, 2011; Ishay, 2007; Kymlicka, 2001. McCamant, 1981; Moyn, 2010; Turner, 1995; Vincent, 1986; Waters, 1996). Yet before the 1970s, almost all academic work on human rights was provided by legal scholars and lawyers, with most work appearing in law journals. Concurrently throughout the 1970s and 1980s, surveys on the teaching of human rights in universities found an overwhelming dominance of the legal perspective (Kennedy, 2002).

By contrast, the intervention of critical cultural theory into human rights theories and debates, especially through a critical engagement with law as a highly technical kind of cultural practice, has been relatively rare (see Coombe, 1998a, 1998b, 2001; Erni, 2012, 2019). In contemporary cultural studies, visible efforts have only recently been made. Two special collections, both published in *Cultural Studies*, come to mind. Sara Knox and Cristyn Davis's (2013) special issue "The Force of Meaning: Cultural Studies of Law" raised two central concerns about law: law as mythic and law as brute force, that is, law as explained as symbolic violence (as exemplified in the essays collected in the special issue on TV program *24*, in the film adaptation of *To Kill a Mockingbird*, in torture as entertainment) and law as peremptory blindness to explanation (as represented by essays on the indecency code, the torturing of Gul Rahman, rape laws, transphobia in law). But are these two themes, being themselves central to almost the entire apparatus of philosophical critique of law, from Fitzpatrick, Derrida, to Foucault and De Sousa Santos, germane to the field of cultural studies? In many ways, this edited collection is better understood as a culturalized study of law.[1] For a "Cultural Studies of law," we would need to attend to the specificity of how Cultural Studies conceives of the determinations of power and war of positions and how its own lukewarm reception of law as a field of force has left the legal determination of social totality unexamined and under-theorized. Seen in this way, this collection did not so much offer a meta-reflection of the relations between Cultural Studies and law, as to exemplify a series of well executed analyses of the culturalization of law.

Jaafar Aksikas and Sean Johnson Andrews (2014) add that the approach by Knox and Davis is firmly grounded in the culturalist tradition of Cultural Studies – indeed many of the essays cite Thompson, who – we agree – is essential to understanding the law as both cultural ideology and symbolic practice. The issue provides clear evidence of this process in the case of the way

[1] From the perspective of legal scholarship, Menachem Mautner (2011) lists nine types of entanglements between law and culture, including the historical school in seeing law as national culture, law as constitutive of social relations, the legal system as a distinct cultural system, the law and anthropology approach, the legal culture approach, the legal consciousness approach, the law and popular culture approach, intellectual property law, law and multiculturalism, legal branches/doctrines that constitute the law/culture nexus, law and development, and law as an autopoietic system (that considers law as a unique constructivist epistemology). To this list, one would add the law and literature approach, law and social movement approach, and law and Cultural Studies approach. Across these variants – which obviously overlap – scholars and commentators may take a normative, critical, or dialectical stance on the law/culture relation.

legal definitions (and court interpretations) of decency, rape and torture are interpenetrated by cultural discourses of race, gender, subjectivity and sovereignty. The methodologies deployed also reflect a complex interrelation between media representation, transnational social movements, historical context and the development of civil law, legal precedent and questionable forms of enforcement (pp. 754–755).

Aksikas and Andrews themselves edited another collection in 2014, also published in *Cultural Studies*, which was entitled "Cultural Studies and the juridical turn." They opened the collection by asserting that the whole concept of "the rule of law" (that ascribed that all of us, including the powerful and privileged, are equally bound by the law and the contracts we enter into) has been called into serious question by legal realists since the early twentieth century. They took the example of labour law and pointed out that "in order to uphold any sense of democratic freedom of choice – particularly in the case of labour contracts – [we need] to produce a legal theory that would look beyond equality in the letter of the law and try to look at how the law actually worked in practice. And this, in turn, required looking at the present distribution of wealth and power and the way the law helped reinforce and reproduce (and was reproduced by) both" (p. 747).

Agreeing with Knox and Davis, Aksikas and Andrews took a step further by forging "a theory of law and culture that can both describe and explain their interrelated efficacy in terms of what Raymond Williams called 'the real order of determinations'" (p. 754). By that they mean keeping a focus on the neoliberal conjuncture, where "the law has been assigned a peculiarly central place and given a special form of efficacy and potency, one which we call 'the juridical turn'" (p. 755). They deem this juridical turn as a hegemonic moment in U.S. culture, where "the law itself is seen as superior to other social bonds, especially those based on reciprocity, trust or common cultural belief" (p. 755). Their collection of essays was aimed at explaining the efficacy of the law despite and because of the cultural contradictions of neoliberal capitalism, in order to interrogate the ways in which laws "are all legitimated through cultural narratives and moral registers almost completely disconnected from the juridical claims and policy arrangements they help justify" (p. 756).

The two collections by Knox and Davis (2013) and Aksikas and Andrews (2014) are very good steps to enjoin Cultural Studies with the philosophical and critical theoretical focus on the "real order of determinations" (Aksikas and Andrews, p. 754), which would help the field to foreground as well as problematize the important questions of justice, freedom, legal determinations, rights, and so on. In this way, they also join scholars such as Balakrishnan Rajagopal, who is among a few who offer a detailed examination of the encounter between a new sensibility to reconstruct international law by legal practitioners in post-World War II times and the emergence of a new discourse of development-based social movement aimed at addressing issues of growth and poverty in the Global South (Rajagopal, 2003a, 2003b, 2005, 2006, 2007). Another important figure is Boaventura de Sousa Santos, a Marxist sociologist, whose analysis of the World Social Forum (WSF), among other things, utilizes left thinking linked to Latin American cultural theories, so as to rethink the organizational changes in the WSF to address global social justice concerns (de Sousa Santos, 2002, 2006, 2007a, 2007b, 2015, 2016). Finally, many of these exciting developments were captured in my recent book *Law and Cultural Studies: A Critical Rearticulation of Human Rights* (2019). At this point, it would be instructive to address more directly why a legal turn in Cultural Studies is increasingly needed to address the complexity of the law/culture entanglement.

Why does Law Matter for Cultural Studies?

It goes without saying that Cultural Studies and Human Rights practices have different genealogies. Whereas the former is grounded in anti-foundational philosophy, critical sociology, critical theory in the humanities, and interpretive social sciences, the latter is deeply influenced by Kantian philosophy, natural law, positive law traditions, and social movement literature. While there are philosophical incompatibilities between them, there are also intellectual and political synergies. To date, however, intellectual dialogue or interdisciplinary/institutional collaboration remain very rare across the divide.[2] Over the past ten years or so, I, along with other scholars such as the ones mentioned above, have begun to chart the ground for including legal discourse and power in the critical forms of contemporary cultural studies.

In many ways, there is a need to respond to the fact that many have expressed dissatisfaction about the relevance of Cultural Studies. The myriad forms of intellectual and political interventions that have been made under the broad rubric of Cultural Studies, it has been said, have promulgated at best a discourse of general dissent, but at worst a space for self-reproduction (see Grossberg, 2010, 2018). Whatever "success" there is for Cultural Studies in engendering new intellectual formations in and outside of universities, it is generally tainted by a nagging lack of clarity or ethical force. Joanna Zylinska (2002) puts it this way:

> [W]hile the more overtly articulated political questions shape the Cultural Studies agenda, ethics seems to be its hidden, unrecognised and uncalled-for other. Whenever ethics does make an appearance in Cultural Studies, it risks being reduced — even if mainly by press commentators and supporters of the traditional model of "excellence" in education — to either moralism or "victim recognition." (see also Zylinska, 2005)

As for me, the story I tell dates back thirty years ago, when I was profoundly struck by a lecture Stuart Hall gave at the 1990 Cultural Studies Now and in the Future conference in Illinois, when he talked about the marginality of critical intellectuals in "making real effects in the world" (1992, 284). At that time, Hall spoke in part in response to the HIV/AIDS crisis in the United States and worldwide. If the crisis, at its deeply despairing moment in 1990, both biomedically and politically speaking, ushered in Hall's own despair (when he said, "Against the urgency of people dying in the streets, what in God's name is the point of cultural studies?" (284)), then what are the choices for cultural studies today when confronted by all of the political violations we see in front of us? If Hall explicitly refuses to let Cultural Studies off the hook (of its political and theoretical obligations), this cannot be explained by any reluctance to recognize the innovations Cultural Studies has brought to the political field and the enterprise of theory, but it can be explained perhaps by the urgent need to metamorphose the very notion of Cultural Studies as a type of practice in the world. Put more explicitly, I think the problem is in part how to recharacterize Cultural Studies *after* the exuberant proliferation of its own spaces. In academic corridors at least, is Cultural Studies a newly remodelled humanities

[2] Perhaps, it is because of the elusiveness in law and culture that Rosemary Coombe (1998a) insists that "[t]he relationship between law and culture should not be defined … An exploration of the nexus between law and culture will not be fruitful unless it can transcend and transform its initial categories" (21) (see also Coombe, 2001).

discipline, a consciousness-raising flagship operation on behalf of politics in the streets, or a new form of applied research? Or can it be a reformulated type of discipline built on the advancement of pragmatic justice through a tripartite investment in critique, professional training, and public participation? I am certainly not the first person to ask this kind of question about Cultural Studies, but over the years I have been asking a specific question: In an era of increasing violence and injustice, whether state-based or perpetrated by private actors, how will Cultural Studies clear a space for a parallel intellectual and political engagement with human rights law as a global professional, interdisciplinary, and pragmatic humanitarian practice? My own personal experience and encounter with the intellectual and advocacy debates around human rights, which began in the late 1990s, has profoundly shaped my own rethinking of Cultural Studies and its theoretical as well as political import.[1]

Facing the problem of Cultural Studies' apparent lack of relevance, we may be compelled to ask what is *after* Cultural Studies as we know it today, by abandoning those elements of the field that lead to mere self-reproduction, thus relinquishing a certain barrier to other critical impulses. Larry Grossberg (2010, 2018) has continuously called for a necessary "relocation" of Cultural Studies in relation to the pressing conjunctural struggles. To do so, he argues, would require us to not only practice Cultural Studies conjuncturally but also reinventing Cultural Studies itself — its theories and its questions — in response to conjunctural conditions and demand. It is for this reason, I think, that Cultural Studies (along with many other critical paradigms and practices) needs to step up to the challenge of providing analyses of the very significant struggles and changes taking place within many national formations as well as on a transnational scale. Without an understanding of what is going on, Cultural Studies cannot contribute to envisioning other scenarios and outcomes, and the strategies that might take us down alternative pathways. This collection, and the larger project of legal-cultural articulation behind it, attempts to open up such a door for a new and engaging kind of scholarship to flow.

A Collection of Juris-Cultural Studies Works

This special issue mainly grew out of an advanced seminar on Cultural Studies that I guest-taught at the National University of Singapore in 2018, where there has been a long-time engagement with interdisciplinary teaching and learning in the field of Cultural Studies through NUS's Asian Research Institute (and more recently through the university's Department of Communication and New Media). The essays collected here also represents my own ongoing teaching effort of graduate students in my home department at Hong Kong Baptist University. It represents a collection of sincere efforts to reframe political and ethical crises through a unified framework that can be called *juris-cultural studies of law and rights*. They are united by a common critical method of combining critical legal theory with a cultural critique of law. Each essay centers on a particular court case, and performs critical reading of the legal logics and reasoning alongside a broader attention to social and cultural ideologies and power relations that overdetermine the outcome of the court judgment. The insights produced by such a method will hopefully present to readers an innovative approach adequate to the task of bringing the problems of rights, legal subjectivities, and critical justice squarely to the doorsteps of Cultural Studies.

No doubt it is important to keep a critical stance toward all restrictive forms of power that deny recognition of differences and promote an ideology of state neutrality. On this latter item, it is important to recognize that the kind of authority that can impose its own will on how social, economic, and cultural resources are distributed in society while claiming a transcendent position of neutrality is the kind of authority that must be demystified. Hei Ting Wong's essay,

precisely, attempts to demystify Singapore's Public Order Act that puts restrictions of "political assembly." She argues that to understand this law, and the specific discussion of it in the case of *Chee Soon Juan and others v Public Prosecutor* ([2012] SGHC 109), requires us to decipher the power struggle between the government and opposition through the politics of space. More specifically, the legal logic explicated in the court case turns out to reveal the underlying cultural logic of place-making and meaning-granting of particular spaces by a conflicting set of stakeholders.

Commonly, many of us share an understanding that law isn't the same as objectivity, objectivity isn't the same as neutrality, neutrality isn't the same as fairness, and fairness isn't the same as justice. Yet in liberal societies where many of us live, most people, as if in a permanent suspension of belief, accept the law as a more or less coherent process or protocol. Many of us are willing to risk our cultural security so as to trade for the possibility of justice and empowerment. What is the consequence of it? In "Killing with No Punishment," Angus Siu-cheong Li dissects the injustice inhered in police power in his critical reading of the Limbu Case that took place in 2009 in Hong Kong. The Limbu Case was about an ethnic Nepalese named Dil Bahadur Limbu who was shot dead by a police constable on a hillside, which resulted in controversies around issues such as the police's excessive use of force, discretionary policing, and racial profiling in Hong Kong. Framed in the objective, legalistic, and bureaucratic procedures of the coroner's inquest regarding Limbu's death, the killing of Limbu was defined as a permissible killing. Why was the killing "reasonable"? What legal subjectivity is displayed in the inquest, especially through shifting the law enforcement officer's legal positionality? This essay makes an especially strong contribution to analysing what is going on within legal institutions, something that Cultural Studies rarely approaches.

What is also important here is to recognize that the problem of doctrinalism — or the assumption that legal principles are the essence of law, or its only source of value — need to be replaced by an understanding of the radically contingent nature of legal interpretations in real court situations.[2] This connects with the tradition within critical legal studies in which it is argued that legal interpretivism is something *already* built into law itself (Erni, 2019). But what if this liberal notion goes awry? In her paper, Adhvaidha Kalidasan examines an incidence of an Islamophobic court interpretation of an Indian woman's religious conversion and marriage to a Muslim man. In her reading of the "Hadiya case," which was well known throughout India in 2016-2017, she reveals the fairly blatant mix of Islamophobic and patriarchal ideologies that infuse the current political conditions of India. At the time when India's diversity with regard to language, religion and ethnicity under the right-wing political regime has been put under question, human rights of women and religious minorities have been seriously attacked. The doctrine of Hindutva ideology spreads like wildfire from everyday practices to court interpretation of rights. Kalidasan's essay provides a conjunctural reading, also from within the courtroom.

It bears repetition that law is never lived as pure abstraction, although it must be possible for us to identify its conceptual specificity to be able to say anything about it at all. No doubt, law is text, speech, practices, system, ideology, institutions, and social order all at once. Indeed, it is simply preposterous to separate law and culture conceptually. Law is not something that is external to, and therefore inserted into, culture. Rather, law *is* a culture, a set of experiences, and a cluster of institutions and practices that cannot be detached from the wider formations from which they emerge. One of the influential areas of public cultural life that must be scrutinized carefully in relation to law is public opinion. Both Baey Shi Chen and Gao Xueying begin their investigations of their specific law cases by canvassing the public opinion that in

many ways provided a sort of pre-verdict to the human rights struggles concerned. Baey focuses on how ideological tensions arose between the law, politics, and public opinion in Singapore via a landmark 2014 ruling that upheld the constitutionality of Section 377A of the Penal Code. This law, which criminalizes sex between men in Singapore, has long demonstrated a kind of "tyranny of the majority," which in turn entwines a mix of conservative family and Judeo-Christian ideologies that not only reinforced longstanding prejudices against the LGBT community but also deprived them of their rights. The court case became a battleground for the split of public opinion between conservative and liberal pro-humanist camps, itself reflective of the forked social development in Singapore between pathways of traditionalism and modernization/liberalization. In this context, Baey asks how the LGBT minorities can possibly build "rights capital" for greater equity through challenging Western patriarchal notions of gender and kinship relations within Eurocentric knowledge construction. In a similar way, Gao wants to search for a more humanistic way of untangling women from legalistic restrictions over their bodily integrity. Like Baey, Gao points out the damaging power of public opinion on abortion rights in the U.S. through which, since legalization in 1973, many TRAP laws (Targeted Regulations of Abortion Provisions) have been enacted to impose burdensome restrictions of abortion clinics. Through her reading of the 2016 case *Whole Women's Health v. Hellerstedt,* Gao found that public opinion over reproductive right in the U.S. is closely related to religious culture and feminist activism, and the divided opinions are themselves reflective of intense ideological manipulation. Finding a way to loosen up the undue burden put on the providers of abortion, Gao argues, is not only a way to restore women's right to privacy, it can also help to redirect U.S. political culture toward more commitment to moral responsibility, however fragile the commitment may be.

Speaking in genealogical terms that have become household ideas in Cultural Studies, Raymond Williams (1983) famously called culture "one of the two or three most complicated words in the English language" (87). Equally notably, Clifford Geertz (1988) added that "culture is a deeply compromised idea I cannot yet do without" (10). Being sensitive to contexts, signifying meanings, and practices, culture is essentially an ever-changing concept. The same can be said of law: it is complicated and deeply compromised. In Peter Fitzpatrick's (2005) words, law is "a moving horizon—the horizon both as a condition and quality of law's contained existence, and the horizon as opening onto all that lies beyond this existence" (9). Put in another way that would be more congenial to cultural applications, we can say law is at once determinate of social order and is in constant response to it. In Samra Irfan's essay, she faces the problem of the "complicated and deeply compromised" nature of culture and law squarely. Against the global outcry over the horrific case of gang rape in India, the case of *Mukesh & Another Vs State of NCT of Delhi and others* (also known as the *Nirbhaya* gang rape case), Irfan asks some very tough questions: what good social impact can capital punishment possibly bring, either to the rapist or to society at large? From a socio-legal and cultural perspective, does capital punishment for the rapist add to the safety measures for women in India? Taking a human rights approach, Irfan combs through the human rights jurisprudence in India as well as the international human rights laws, and traces arguments that return again and again to how the law should cover the right of the offenders, so as to prepare the ground for rethinking the controversy of capital punishment.

The essays included in this collection exemplify some important efforts that, I believe, can inject new energy into Cultural Studies and raise the latter's social and political relevance. In other words, they help to realize the importance of what can be called a "juris-cultural turn" in Cultural Studies. By "juris-cultural," I refer to a genre of critical cultural analysis that investigates the mutually constitutive nature of law and culture, through dissecting "law as

culture" in which cultural signifying practices are traceable to the presence or absence of legal norms, as well as through "culture as law" in which the contested meanings of cultural communities, their practices and politics, can shape or even dictate social norms and regulations. Similar to Naomi Mezey's (2003) "law as culture as law,"[3] the designation of the "juris-cultural" hopefully presents a language that avoids separating law and culture but confronts their uneasy entanglements. It is hoped that there is value in this theoretical jargon, as it is worth thinking about what this theorizing might mean for legal scholarship that undertakes the task of tackling the complexity of society, history, economics, and culture and worth asking what Cultural Studies might do for legal studies. A "juris-cultural studies" is possible, which can help to capture the varieties of critical research concerning social justice.

[3] Naomi Mezey (2003) uses the interesting phrase "law as culture as law" to emphasize "the mutuality and endless recycling between formal legal meaning-making and the signifying practices of culture, demonstrating that, despite their denials and antagonisms, these processes are always interdependent" (51).

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[1] I came into contact with human rights debates through an interdisciplinary program at Columbia University. In 1999, I held a Rockefeller Fellowship that enabled me to participate in Carol Vance's then newly established Program on Gender, Sexuality, Health, and Human Rights. The program was an intellectual enterprise established by Vance to engage with the multiple forms of social, political, cultural, and postcolonial wars against non-normative genders and sexualities. This enterprise culminated in the weekly seminars, which saw participation from feminists, representatives of community groups, critical- minded staff and graduate students, and human rights advocates, analysts, and practitioners. While very few of those participants directly allied themselves with Cultural Studies *per se*, the discussion in the weekly seminars intersected tacitly with it by means of a shared critical sensibility, a more or less common academic vocabulary drawn from a broad Marxist, feminist, subalternist, and postmodernist ethos, and finally, a crypto-critique of the relevance of Cultural Studies itself. As our discussion began to take shape around a complicated set of concerns brought about by theories of gender and sexuality, the various forms of public health practices that contoured international body politics, and the community-based activist-oriented critique, the discussion was also frequently dominated by a human rights legal perspective. A rights-based discourse in formal legalistic terms, as well as in the more informal terms of oppositional critique of law, was not only leading our discussion, it effectively colonized it. I mentioned earlier the presence of a crypto-critique of the relevance of Cultural Studies. The inadequacy of Cultural Studies, in using its analytical tools to speak about the problematics at hand, became a tacitly agreed-upon fact among the participants. The "shame," if you will, was subtly cast in the form of Cultural Studies' lack of institutional knowledge of, or strategic political capital in, either rights-based discourse or legal-based intervention. The tacit or hidden agreement about the seeming irrelevance of Cultural Studies, while not manifesting in any direct attack on Cultural Studies, nevertheless silenced it. To me, the experience was one of intellectual reinvigoration via a strange form of (self)silencing.

Mostly, I remember feeling very uneasy about a certain kind of self-assurance of political certainty. I felt that human rights were too easily taken as a rallying point to either express various modes of injury or to attack various forms of nationalism that inflict those injuries. Yet at the same time I was immensely seduced by the rights discourse and international law. I felt that those were clearly blind spots in Cultural Studies' whole theoretical apparatus for thinking through questions of power and politics. That a complicated engagement through an oscillation between scepticism and seduction was conducted via (self-)silencing, convinced me that Cultural Studies somehow must render itself more "relevant" without sacrificing its anti-reductionist stance.

[2] In his classic book that in my mind helped to inaugurate the "cultural turn" in legal scholarship, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999), Yale law professor Paul Khan explains an "epistemic crisis" dating back to the first half of the twentieth century in US legal studies, which seriously challenged the traditional doctrinal approach to law and the legitimacy of its knowledge claims. Khan's most important point is his observation of how quickly and successfully legal studies absorbed and co-opted the crisis. The legal realist movement, which broke the myth of the autonomy of law, introduced an epistemic crisis through the rise of a new empirical social science of law. The two major strands of legal realist practice, according to Khan, were the modern paradigms emerging from the law and economics movement and the critical legal studies movement. By attacking the knowledge claims of the doctrinalists – both judges and law academics – these two movements forced a new understanding of law through a different vocabulary and a different set of explanatory rules from those deployed by the practitioners themselves.

The Air-conditioned Nation under Global Warming – An Exploratory Study of the Speech and Assembly Freedom and Politics of Space in Singapore

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Abstract

Singapore is known to have a citizenry loyal to its one-party dominated government. Cherian George refers Singapore as the "Air-conditioned Nation," wherein free speech is sacrificed for economic stability in this metaphorical or virtual greenhouse and fostered a controlled and docile politic. Dissent from members of registered opposition parties or ordinary citizens, however, has been voiced during "illegal gatherings" in public places. Many of these attempts, both purposeful and accidental, challenge rules designed to limit the citizenry's ability to voice publicly. In this paper, I examine these civil disobedient acts under the framework of construction and politics of socially- and mentally-constructed space in connection to the laws of Singapore. Utilizing the ideas of space as defined by Henri Lefebvre and Michel Foucault, I analyze three separate accounts of assembly and/or procession. I identify the relevant laws of Singapore and examine how these laws are interpreted and applied by law enforcement, revealing a tension between space and the body politic. Politics of space is a concept usually connected to social class; yet, class consciousness is what the Singaporean government strives to eliminate through the control of ideology and by limiting the freedom of speech in public spaces. My contribution examines the relationship between space and politics, reflecting the conflicts between the government, which has the power over the use of places and citizens who would like to express ideas differently from governmental-led ideologies physically and publicly in these places, and the opposition's actions in this virtually-caged public space named Singapore.

Keywords: political assembly, public assembly, politics of space, public space, Singapore speech freedom

Introduction

Singapore is known to have a citizenry loyal to its one-party dominated government. Since 1959, which marked the beginning of self-governance, the People's Action Party ("PAP") has been the ruling party. The first generation of the PAP led Singapore to independence in 1965 and pushed for economic development, which brought the country "from third world to first" in the following decades. In hopes for a better living standard, the Singaporean public elected and re-elected the PAP, dominating the Parliament with its practical policies. This decades-long, one-party domination has been extensively researched. Chan Heng Chee[1] calls this "modern egalitarian political ideology," in which the ideas of patriotism and nation-oriented economic development are promoted to the citizens (1971). Chua Beng Huat reads the PAP ideology as communitarianism (1994, 1995, 2017). Communitarianism is an idea that advocates for a constructed ideological consensus implemented by the Singaporean government on its citizens and stating that, the society should embrace Asian traditional values (such as Confucian thought) and reject Western liberalism, while also placing national collective interests and responsibilities over those of the individuals' (Chua, 1994). The PAP utilized this "non-liberal communitarian democracy," especially during the early years of Singaporean independence when national economic growth and sociopolitical stabilities were the foremost goals (Chua, 1995; 2017). Because of the economic and political majority in Singaporean politics, the PAP has successfully managed to avert any threats to their political power.

The PAP has thus created a psychologically unchallengeable "Air-conditioned Nation."[2] Termed by Cherian George, "Air-conditioned Nation" literally means the government uses air-conditioning to control the temperature of a tropical nation (2000). But it has a further metaphorical meaning: "[A] society with a unique blend of comfort and central control, where people have mastered their environment, but at the cost of individual autonomy" (Ibid.). The invisible and psychological pressure to limit public discourse about governance and politics makes Singapore a political greenhouse, in which the one-party state has sustained its centralized control on all politically-related matters. Meanwhile, citizens, accustomed to their lack of autonomy, choose to be caged in such virtual greenhouse and not utilize their rights to voice for their (political) will. Therefore, oppositional voices are underrepresented. The boycotting of the 1968 general elections by the Barisan Socialis ("BS") led to the disappearance of any meaningful opposition in the Singapore Parliament until 1981 (National Library Board, 2014a).[3] Chan states that in a one-party state where political action is monopolized by a single party, opposition parties suffer from "structural disadvantages" (1976).

[1] Ethnic Chinese names are quoted here in the format of Christian name (if any)-last name-given name.

[2] There were political actions taken by the PAP government to detain "political criminals" such as the Operation Coldstore in 1963 and Operation Spectrum, better known as the Marxist Conspiracy, in 1987 (refer to Chan, 1975, 1976; Chua, 1995, 2017; Rodan, 1996; Chng et al., 2017). Besides taking political actions with the Internal Security Act in the above operations, there is a list of court cases of PAP members, who are/were mostly top-ranked government officials such as MPs and PMs including Lee Kuan Yew, Goh Chok Tong, and Lee Hsien Loong, suing members of the opposition (Thio, 2004 and Lydgate, 2003; cited in Chua, 2017).

[3] In 1996, there were 22 registered political opposition parties in Singapore, and only the Workers' Party ("the WP") and SDP ever won Parliament seats (Rodan, 1996). Singapore-elections.com shows that only 12 out of 35 registered parties (excluding PAP) are active; in 2018, only the WP has six contested and three non-constituency seats in Parliament. Cf. Mutalib (2003) for the overview over the four main opposition parties (the BS, WP, SDP, and Pertubuhan Kebangsaan Melayu Singapura).

Outside the institution and Parliament, the opposition and activists have attempted to break the walls of the virtual greenhouse to voice their opinions in various ways in public spaces. It has been a pattern of dissent that can be observed separate from the rest of the region's ongoing change in political climate, even with alternating parties rise to power in neighboring countries such as in Taiwan (2016) and Malaysia (2018).[4] As Singapore has been ruled by the same single party since its independence in 1965, will this wave of politically global warming boost the confidence of the opposition in Singapore, both in and out of the institution?

According to the video and report produced by the Human Rights Watch, "[p]eaceful public demonstrations and other assemblies are severely limited" as "any 'cause-related gathering,' no matter how small requires a police permit, which is rarely ever granted" (2017). It is easy to find a handful of news reporting "illegal assemblies" due to failures in securing a permit or attempts to challenge the laws. By conducting political assemblies/processions without a permit as civil disobedient acts, these law challengers can be considered as intentionally breaking the laws, sometimes even with the aim at being arrested, to test and fight for the unjust (interpretations of) laws for assembly and speech freedom. Therefore, in order to understand what the disadvantaged opposition can do in Singapore, I explore the issues within the framework of the construction and politics of space in connection to the laws of Singapore. Through exploring Henri Lefebvre's and Michel Foucault's ideas of space, I conduct an analysis of three accounts of assembly and/or procession, taking into account the different conditions and the laws applied to these spaces/cases. These examples include: 1. The permit-free protest space known as The Speakers' Corner; 2. The court case *Chee Soon Juan and others v Public Prosecutor* ([2012] SGHC 109), which concerns an event held by an opposition party in a public place without a permit; and, 3. An observation of spontaneous political gatherings at the State Court during the trial of an activist's solo performance in a public space without a permit. These examples help to identify which and how Singapore laws are interpreted and applied to the opposition by the authority in different circumstances. I investigate the struggles to create possible "political" dialogue within different spaces throughout Singapore, and how the opposition has been attempted to challenge existing laws, negotiate encounters with institutions of authority, and present the restrictions on speech freedom under the current set of laws. By examining the relationship between public space, politics, and the opposition minority, I argue that the voice of the opposition in relation to the power struggles between them and the government can be shown in the politics of space, particularly at a space named "Singapore" constructed by the PAP. Here, following research on Singapore politics or Singaporean society in general, such as Chan (1971, 1975, 1976), Chua (1994, 1995, 2017), and Simon Tay Seong Chee (2004), this paper will not place Singapore directly in the absolutist understanding of democracy or liberalism in the West.[5] In addition, "opposition" is defined as a spectrum that ranges from members of registered opposition parties to ordinary citizens holding different opinions from the government.

Space and Politics of Space in Singapore

George's metaphorical term – the "Air-conditioned Nation" – makes it clear that the Singaporean government has placed mental oppression on the citizens' rights of speech in public spaces. It is then necessary to examine the control of space as a means of suppression

[4] The 2018 election was the first time ever for Malaysia to change its ruling party, since it gained independence from the Great Britain in 1957.

[5] Moreover, Chua believes that "there are actually serious contradictions between democracy and liberalism" and "liberalism and democracy need not belong together" (Bosse & Sørensen, 2014).

of alternative opinions. This is done as if re-enforcing such mentality and ideology with a physical act on this piece of land named Singapore. To examine the situation of (controlling the use of) public space in Singapore, I first review models to study space. Stuart Elden references to Lefebvre's idea and offers a conceptual triad to understand space: physical, mental, and social (2007). While the study of Ryan Bishop, John Phillips, and Yeo Wei-Wei, offers another combination: geographical, visual, and knowledge generated historically (2004). Combining their models makes understanding space with three dimensions: physical/geographical, visual, and social/mental. I am aware of the differences between social and mental ways of interpreting a space. But in conceptualizing space as both an act of social construction and mental perception, I hope to reconcile these two dimensions. In doing so, I suggest that an externally and socially-constructed space inevitably connects to ones' internal reading and mental perception of that space. My discussion thus focuses on this social/mental dimension which leads to the discussion of politics of/in space. This demonstrates how the physical space of Singapore becomes socially- and mentally-constructed space of political tension and power struggles. These are not only reflected in theories, but are observed in the three examples.

Space is socially constructed with users' and/or owners' participations. Tay Tong, the managing director of TheatreWorks Singapore, states that space is continuously being re-invented; place-making is a continuous process that old and newly-generated meanings co-exist in one space even between life and death (2018). Chris Butler focuses on the mediation of everyday life that "because social space is the product of human agency, it in turn helps to shape social, economic, legal and political relations" and "[space] is both socially produced and an essential precondition for the reproduction of social relations" (2009). Elden also explains Lefebvre's idea of everyday life wherein capitalism "has always organized the working life, has greatly expanded its control over the private life […] often through an organization of space" (2007). Andrzej Zieleniec furthers this with the term "crucial battleground" as a nature of space (2018). He claims, "[s]pace is subject to conflict over ownership, over meanings, values, uses, etc. and thus a terrain in which social justice and equality are contested" (ibid.).

The above discussions on relations and conflicts in space are connected to social class. In addition to Lefebvre's well-known quote: "There is a politics of space because space is political" (1991[1974]), Butler explains,

> Lefebvre's definition[s] of social space are a recognition that the political dimensions of space extend beyond its management and use as a political tool by the state. Space is itself a site of political conflict in which the class struggle has increasingly been transformed into forms of conflict which are spatial as well as political and economic (2009).

Therefore, in Lefebvre's reading of space, it is not only a physical medium of struggle, but also "a political instrument that facilitates forms of social control" to maintain social order (Ibid.). Politics of space is, therefore, about place-making, which creates meanings of that particular space in the process. Moreover, class is an issue that the Singaporean government would like to eliminate. One such measures is by offering affordable housing (another kind of space) to

all citizens.[6] Thus, the conflicts and politics of space are between the government and some citizens who have different ideas from the governmental ideology.

The social-mental understanding of space is shown in Foucault's works. Miloje Grbin refers to Foucault's *Birth of the Clinic* (1973):

> Space [hospital] appears as the medium of articulation and implementation of the power/knowledge of the discourse. Using space in generation of knowledge is conducted not only by spatialization of internal mental imagination (in terms of classification and bordering of knowledge) but also through the production of external spatial configurations (2015).

Moreover, Foucault's well-known studies of the panopticon model of surveillance (1976), which "operates also on the principle of spatial isolation of the body" with prisoners in transparent cells, reveals that people would self-discipline themselves because of "self-internalization of implied norms" (Grbin, 2015).

If I compare Foucault's "internal mental imagination" or "self-internalization of implied norms" to George's "Air-conditioned Nation," this can be understood as a political paradigm built upon historical fears. Besides, the "production of external spatial configurations" can be referred to either the one-party dominated government or the laws of Singapore as an institution. George's "Air-conditioned Nation" echoes this idea very well. That is, the air-conditioned greenhouse named Singapore. The exercise of power is, according to Grbin's words, a procedure to know, master, and control individuals in the established "presences and absences" (2015). I interpret this as the virtual presence (invisible surveillance) and physical or visual absences of rules or law enforcers in any constructed space.

A Permit-free Public Space: The Speakers' Corner at Hong Lim Park

The first example is the Speakers' Corner ("the Corner") of Hong Lim Park, which is an "exceptional" public space-in-law. It is the only permit-free public space for Singaporeans to hold public gatherings, with or without political aims. The power struggle of this space is first demonstrated in the establishment of the Corner, from carrying out the idea of building a free-speech zone to selecting the venue. While the National Library Board indicates that the idea of setting up the Corner, modelled from the one in Hyde Park, London, was initiated by Senior Minister Lee Kuan Yew in 1999 (2014b), *Straits Times* columnist Chua Lee Hoong points out that Chee Soon Juan ("Chee") was the first to mention this idea in 1998 (2000). Goh Chok Tong, the Prime Minister ("PM") at that time, however, told the media that the government did not have such a plan (Leong, 2000). From March 18th to about April 5th, 2000, there was quite a vigorous discussion in the *Straits Times* about the location and usage of the Corner. *Straits Times* launched a public online poll about the desirable location from the viewers,[7] and questioned if the soon-to-be-open Corner would become like the one in Hyde Park where only a certain type of people frequented.

[6] This historical ideology lasts till today. Deputy PM Tharman Shanmugaratnam states in a recent conference that, "[i]n fact, I would say that if you talk about our social culture, we are much less class-conscious than many other societies I am familiar with, partly because we are younger. We are at risk of becoming more class-conscious, and we must resist every tendency in that direction" ("The toilet attendant," 2018).

[7] *Straits Times* listed six locations in the poll, while Hong Lim Green (the former name of Hong Lim Park) scored the lowest with 3.7% of the 647 votes ("Your choice," 2000).

During the Parliament meeting on April 25th, 2000, the location of the Singapore's Speakers' Corner was announced: Hong Lim Park ("the Park"). The official announcement pointed to the location's historical significance, which may connect to the end of Lim Yew Hock's rule by the PAP ("The green," 2000; "No licence needed," 2000). However, Wong Samuel points out that the "real Speakers' Corner" should be Fullerton Square, where Lee Kuan Yew conducted many lunchtime rallies in the 1950s and 1960s (2001). One can imagine the Park's neighborhood with Wong's observations:

> If you are traveling from the direction of Outram [now Outram Park] MRT station, you will have to pass through Chinatown…[which] is considered to be a rundown part of the city area…. However, if one decides to approach Hong Lim Park from the direction of Raffles Place MRT station, the sight of modern Singapore would greet you.… But, the moment when you cross North Bridge Road, the crowds immediately disappear. Human traffic drops almost to nil as you entered into Chinatown (Ibid.).

From this description, it seems that this location was an abandoned, idle place where both business and people were not welcomed. Alternatively, the Park had been well-known as a (gay) beat for cruising in the 1970s and 1980s (Yue & Leung, 2017). The Parliament's choice to build the Corner in this location seemed aimed at renewing the area by assigning it a new function, but not because the space was suitable and user-friendly.

Related Laws

Singaporeans need not apply for a permit to speak at the Corner, but simply register at the nearby Police Post (refer to Figure 1), which was set up "to curb its notoriety in the 1990s" (Ibid.). This is stated in Rule 2(2) of the MOR, which declares Rule 2(1) shall not apply to:

> (g) any assembly or procession held wholly within the area in Hong Lim Park known as the Speakers' Corner (more particularly delineated in the Schedule) where –
>
> (i) the promoter or promoters of the assembly or procession are all citizens of Singapore; and
>
> (ii) the participants in the assembly or procession are all citizens or permanent residents of Singapore

Though no permit is required by laws, as stated by Lefebvre, all kinds of engagement with space demonstrate "a politics of space because space is political." At the Corner, this theory was made manifest by the Police, who, in a news release before its opening day, released a list of rules for how citizens may use the Corner. The following rules were issued:

> While speakers at the Speakers' Corner are exempted from having to obtain a Public Entertainment Licence under the Public Entertainments (Speakers' Corner) (Exemption) Order 2000, they are reminded that Singapore laws will still be in operation there (2000).

Figure 1: Hong Lim Park area [Source: Google Map]

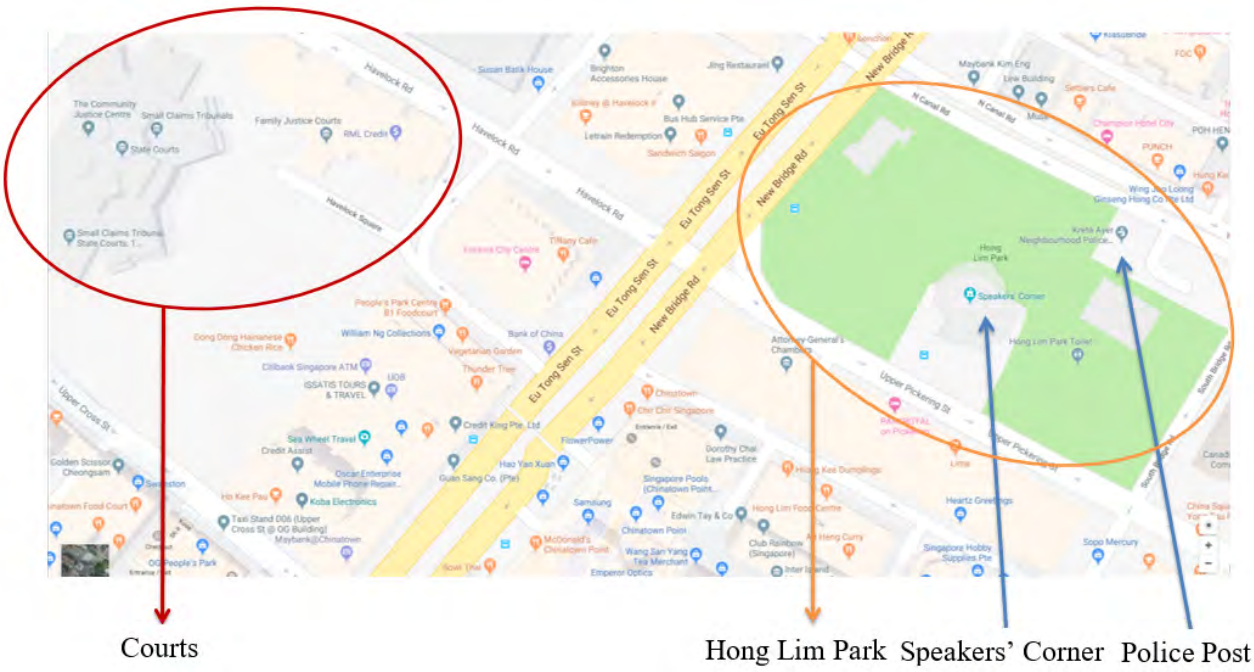
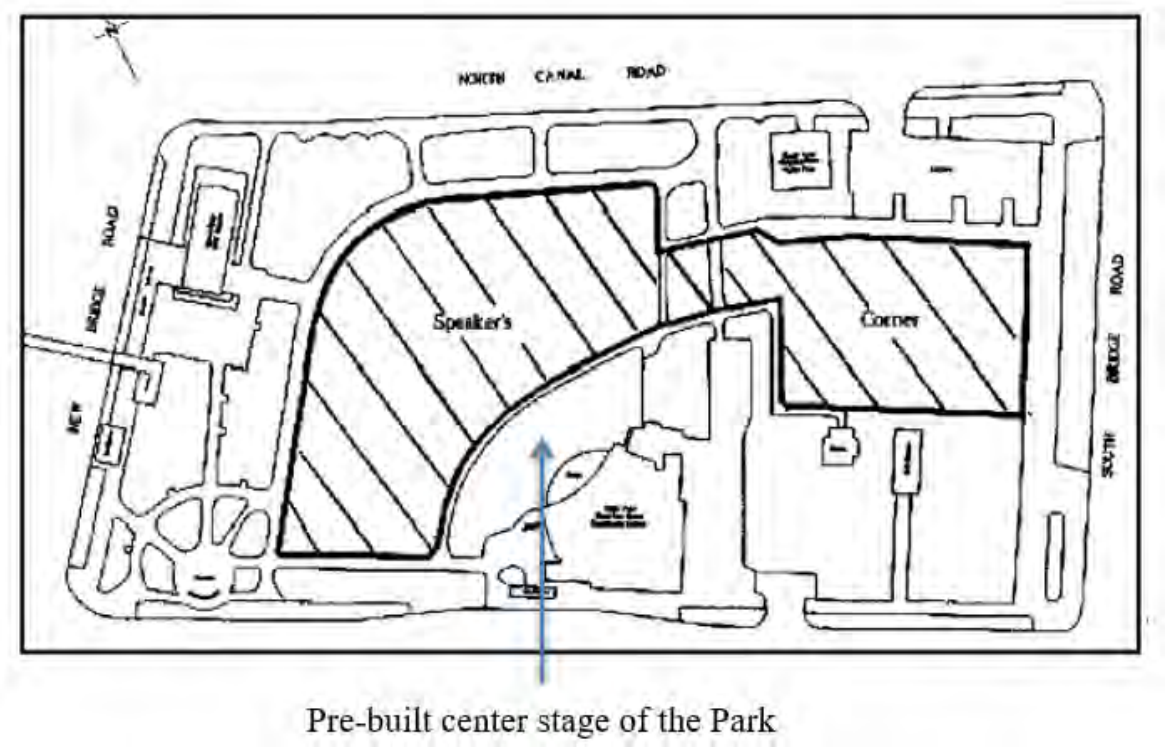


Figure 2: Premise of the Speakers' Corner in Hong Lim Park [Source: Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) (Amendment) Rules 2008)]



While the speakers and audiences at the Corner are responsible for obeying the laws and regulations, moreover, the politics of space is demonstrated out of the context of laws: The Police Post is located nearby, and the Park is now also fully equipped with CCTVs. Also, as

illustrated in Figure 1, the courts are located diagonally across the street. This spatial construction reminds the speakers that they need to be responsible for their speech under the laws and rules of Singapore. The mental and psychological pressure on the speakers are tremendous. As shown in Figure 2, the Corner is a relatively small, irregular space in the Park, where the pre-built center stage of the Park is not included. Speakers need to find their own way to stand out for delivering their ideas. Is this a matter of balancing speech freedom and law or merely prohibition? I believe Wong Kan Seng's, the Home Affairs Minister in 1994-2010, response in Parliament provides a hint. At that time, the opposition Member of Parliament ("MP") JB Jeyaretnam asked, "Is the government serious about promoting free speech in Singapore, or is this just another show?" Wong responded as, "The Speakers' Corner is symbolism in the sense that, yes, if you want a place, there is a place" ("No licence needed," 2000).

Under such a socially-constructed central-controlled space, one can see the struggles among citizens to take any actions regarding politics. Even at the permit-free Speakers' Corner, when one chooses to use this space to convey one's ideas to the others physically, one should realize that this is actually a virtually-caged space governed by the authority. While Yue and Leung state the Park "became the only symbolic and material site of democratic expression" (2017), I would like to extend this physical and social/mental construction to the rest of Singapore. But, what does that mean to live with symbolic freedom? Is the centralized control of air-conditioning still able to manage the "waves of global warming" caused by changes of political regime in the neighboring countries in the region?

A "Political Assembly" in a Public Space Without Permit: A Court Case Report Analysis

Outside of the Speakers' Corner, all public places in Singapore require a permit to host an assembly or a procession; yet, as mentioned above, such permits are rarely granted. Opposition groups, however, continue to conduct assemblies or processions despite their permit applications being rejected. The court case *Chee Soon Juan and others v Public Prosecutor* ([2012] SGHC 109) is one such case, wherein a political-related assembly was conducted in a public place without a permit.

This case ruled upon an event hosted by the Singapore Democratic Party ("SDP") that took place on August 9th, 2008, the national day of Singapore, at the walkway in front of Block 190 Toa Payoh Lorong 6, which originally involved 12 people. As no permit had been granted for this event, all participants were charged with having "committed an offence punishable under Rule 5 of the [Rules] read with section 5(1) of the [MOA]." They were promoting a campaign titled "Tak Boleh Tahan" in Malay, which can be translated as "cannot take it anymore" in English. This title appeared for the first time in a prior SDP event held on May 1st, 2008. While there were six appellants in this appeal, I focus on the first five appellants, including Chee and Seelan s/o Palay ("Palay"), for two reasons: 1. They were defended together by Chee; and, 2. They admitted that they had participated in an assembly. Hence, I attempt to reveal the conditions of holding assemblies in Singapore by Singaporeans who consciously and actively choose to participate in an assembly.

Related Laws in Discussions in the Court Case

As listed in the court report, the judge focused his discussion on specific laws and regulations of Singapore, including Rules 2(1) and 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules ("MOR") (Cap.184, R1, 2000 Rev Ed):

> Rule 2(1)
> …these Rules shall apply to any assembly or procession of 5 or more persons[8] in any public road, public place or place of public resort intended —
> (a) to demonstrate support for or opposition to the views or actions of any person;
> (b) to publicise a cause or campaign; or
> (c) to mark or commemorate any event.
>
> Rule 5
> Any person who participates in any assembly or procession in any public road, public place or place of public resort shall, if he knows or ought reasonably to have known that the assembly or procession is held without a permit, or in contravention of any term or condition of a permit, be guilty of an offence…

In which, according to Rule 2 of the Miscellaneous Offences (Public Order and Nuisance) Acts (Cap. 184, 1997 Rev Ed)[9] ("MOA"), the definition of public place is "any place or premises to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission" and "'public road' includes every road, street, passage, footway or square over which the public has a right of way." The judge stated these two rules of the MOR should be read together with Rule 5(1) of the MOA.[10]

In addition to those listed above, the Public Order Act ("POA") (No. S 487, 2009), another law related to assembly regulation that came into operation on October 9th, 2009, was not included in the judgement. The Public Order Regulations of the POA regulate assemblies not affiliated with election meetings in both parliamentary and presidential elections. The POA does not indicate if this applies to the assemblies or legal trials that occurred after its operation date. In this case, the event took place on August 9th, 2008, but the 12 people were not charged until July 7th, 2010. Despite the fact that they were prosecuted two years after the event was held, this case fell into a grey area of whether or not the POA should be applied. Yet, for the sake of conducting a comprehensive academic discussion, I also take Rule 8(1) of the POA, regarding public assemblies, into account, which, as stated, should be "imposed under section 8(2)," regarding public processions, on having a permit for a public procession with exactly the same six items listed in section 8(1).[11] There is no indication concerning number of participants in the POA, in other words, a prosecution can be made even there is only one host/participant.

Existing laws clearly delimit the rules regarding what constitutes a legal assembly, from whether one needs to apply for a permit for having an assembly in a defined public space, to whether one can obtain a permit and the restrictions of holding an assembly with a permit. However, the nature of assembly, either as a form of a cause, campaign, or commemoration as stated in Rule 2(1) of the MOR, is not clearly stated. But in Singapore laws governing the right to assembly are profoundly political. Although this may not be unique to Singapore, it

[8] Participants in assemblies/processions with less than five people were arrested on site ("TOC breaking news," 2007; "2 arrested," 2009; Han, 2018).

[9] I cite the 1997 version of the MOA here as the judge was using the 1997 revised version. However, there are subsequent amendments of the MOA from 2005 onwards.

[10] Rule 5(1) of the MOA can be referred to:
https://sso.agc.gov.sg/Act/MOPONA1906/Historical/20050610?ProvIds=pr5-#pr5-

[11] Rule 8(1) and 8(2) of the POA can be found here: https://sso.agc.gov.sg/SL/POA2009-S487-2009/Historical/20091009?ProvIds=pr8-#pr8-. I refer to the 2009 version here for the sake of discussing the original prosecution in July 2010. There are no differences in the wordings of Rule 8(1) in the 2009 version with amendments from 2010 onwards.

represents departure from democratic countries. If so, then the definition of politics/political aim also needs to be defined under the Singaporean context, which will be further discussed at the end of the section.

Logic of the Judge

Here, I focus on the logic of the judge in dismissing the five appellants' appeal against their conviction and sentence. Referencing the laws and rules as listed above and the previous court report (*Public Prosecutor v Chee Soon Juan and 8 Ors* ([2011] SGDC 13)), the judge arrived at the consensus that to hold an assembly with more than five people in a public space, and with a political aim on the national day, requires the application and approval of a permit, and therefore the charge was undisputed.

The judge moved on to the discussion of *mens rea* requirements – their intentions in violating the laws. First, it is about the application of a permit. According to Chee, his judgement to apply for the permit for the event on August 9th, 2008, was related to a previous event of SDP held on May 1st, 2008. This was clearly stated by the judge in the report:

> …Chee was not arguing that he did not know that a permit was required per se. Rather, his belief, forming the basis of his defence was that no permit was required for the National Day incident [August 9th] because the Police had assessed the May Day incident [May 1st] to be legal in so far as the MOA was concerned.

Chee submitted an application for the permit for the event on May 1st and the application was rejected, but he and other people continued to hold/join the event on that day. The judge argued that Chee submitted an application for a permit for the event on May 1st, so he must have known that he needed to apply for a permit for the latter one. He continued on to state that, "[g]iven the defendants' contention that both the events of 9 August 2008 and 1 May 2008 were exactly the same, they must have been aware that the event of 9 August 2008 likewise required a permit." But, this can be seen as an attempt of Chee and the participants to challenge the laws, as they continued to conduct the assemblies of similar nature twice with no permit.

Second, the judge focused on the purpose of the event. Here the judge seemed to disagree with the Police's position about the event on May 1st. The judge referred to the *Today Newspaper* on May 2nd and the record proceedings of Superintendent Deep Singh in the previous trial on February 15th, 2011. He quoted the police as stating in the article:

> Chee did not stage an unlawful assembly or an illegal outdoor demonstration;
> He was however peddling his books and T-shirts without a hawker's permit;
> As this may be a case of illegal hawking, the Police has referred the matter to the National Environment [Agency].

These phrases clearly show that the Police did not agree that the SDP event on May 1st matched the requirements as an assembly and as listed in the related rules of MOR. The judge commented on this article as,

> [the] Prosecution had accepted that the article had carried an accurate quote of the Police's position on the incident. This was not just anybody giving an opinion or advice; this was the very body to which applications were made and who issued the requisite permits if approval was given.

However, the judge later stated in the report that, "[w]hat I found troubling was that it was the Police who had publicly stated that the May Day incident did not constitute 'an unlawful assembly or an illegal outdoor demonstration,'" and "the article reporting the statement of the Police was not capable of constituting a waiver of the requirement at law to procure a permit prior to conducting an assembly in a public space." These statements are contradictory. If the two events are similar in nature, according to the Police, what Chee needed to apply for as the organizer was not a permit for assembly, but instead a hawker's permit. If so, this event was not an assembly and the participants (the other appellants) of the "assembly" are not participants but co-sellers of Chee. If this is true and if the judge follows the Police's testimony, then this appeal should be judged by a different set of laws and rules.

Superintendent Singh testified regarding the two events. The most interesting point in the testimony is that the Police did not only state that there was neither an unlawful assembly nor an illegal outdoor demonstration, but "there was no assembly there." As I have no way to trace the reasons why the permit application for the May 1st event was rejected, I am curious if the Police did not consider that to be an assembly from the beginning or did the Police not expect, or further question, if the event was connected to a political purpose. Also, the testimony connects back to the question about the nature of assembly. The judge agreed that there were no material differences between the two "assemblies" after reviewing Singh's testimony and the video recordings of both assemblies tendered by the Prosecution and the Defence. The differences were the result of the additional information the Police had in order to understand the nature of SDP's campaign, which had a political-related aim.

The appellants' appeal was dismissed with the judge's further discussion of Rule 5 of the MOA with the nature of assembly. He stated,

> …[to fall] within the ambit of r 5 is whether the assembly or procession was one that was designed to attract public attention to a cause as may give rise to a public disturbance or nuisance. Assemblies and processions with political or popular causes are more likely to fall within this category.

And,

> …The test is whether the organisers and participants intended to attract public attention, not whether they had succeeded or not. Rule 5 being pre-emptive leaves the assessment of risks to the permit issuer.

Here, the permit issuer, which is the Police, actually did not state clearly if the "assembly" on August 9th violated any rules or not.

This is a return to the issue of the definition of politics/political aim of assemblies; the nature of politics should be read with the culture, time, and space. As the five appellants in this case are either members/supporters of SDP or activists who frequently appear in various socio-political events and discussions, their prosecution, to a certain extent, is connected to their relatively "provocative" political stance. However, from this following counter-example, a permit is only required for assembly with political purposes identified in the Singaporean context. In 2009, there was an assembly-procession on Orchard Road, which is a public place, by a group of about 40 teenage fans of the Korean popular music group 2PM, who aimed to show their solidarity for a dispute between a member of 2PM and his management company. They did apply for a permit for the event, but the Police replied that no permit was required as

it was "not 'political' in nature" (Chua, 2012). In this case, the politicization of popular culture was not the concern of the Singapore Police with their interpretation of the laws. Thus, this shows that there is room for legal interpretation because of social norms and the socio-political conditions.[12]

A One-Man Political Procession Outside of the Speakers' Corner: His Act and Supporters' Reactions During the Trial at the State Court

The previous two examples clearly state that any political assemblies with more than five people in a public space, outside of the Corner, in Singapore requires a permit; however, still, there are exceptions. There are a handful of cases where some activists, both intentionally and unintentionally, challenge the laws by having a "political-in-nature" assembly or procession with less than five people in a public space without a permit, or even just wearing a t-shirt with "political-in-nature" words to participate in a non-political event. People involved were arrested, but, even multi-arrestments, did not stop their actions; Chee and Palay are well-known in the politics or arts circles for this.

In October 2017, Palay committed another act, intentionally or unintentionally, to test the interpretation of the laws. According to the report on *Straits Times,* he obtained a permit to conduct his solo arts performance "32 Years: The Interrogation of a Mirror" commemorating political prisoner Chia Thye Poh's imprisonment under the Internal Security Act ("the ISA," which allows detaining anyone without trial) at the Corner (Stolarchuk, 2018). He was prosecuted because he continued his performance while walking away from the Park towards the National Gallery and Parliament without a permit: "He was convicted and fined $2,500 under the POA…but he refused to pay. This triggered a default sentence of a two-week jail term" after a two-day trial (Koh, 2018). In this case, he either led a spontaneous procession after his performance in the Corner, or purposely did not apply for a permit for his procession outside of the Corner. It is notable, too, that he was prosecuted under the POA, but not the MOA or MOR, which does not share the more-than-five-participants rule. Therefore, whether Palay's act had or had not attracted any public attention for spontaneous gathering outside of the Corner, does not affect the prosecution.

The first day of trial was held on September 26th, 2018, at the State Court. I could not enter the court room because of limited seating; instead, I observed the reactions of his supporters, mainly from the arts and activists' community, along the corridor and the sitting area outside the court during the trial. The State Court is not a public space, but a place filled with visual and physical surveillance and law enforcers – this group of activists-supporters were still voicing their concerns and attempting to challenge the laws under such pressurized atmosphere. Because the trial was held in a small court room, the activists first raised the concern by gathering outside of the court room and "making noise": they routinely opened the court room door, stepped in, peeked into the room, and came back out for multiple times. A staff of the court came out and the two parties somewhat had a negotiation:

> Staff: The court is full, please stay outside.
> Supporter A: Is the judge aware of this situation and is it possible to change a court?
> Staff: The judge is aware of this. But all other courts are in use, so we cannot change to another court.
> (Supporter B, whispered: Last time they changed the court.)

[12] Cf. Chapter 1 of Barak (2005) for different types of legal interpretations.

Supporter C: Can the [court] door be opened?
Staff: No, the door should be closed.
Supporter A: Isn't it an open hearing?
Staff: Yes, but the door needs to be closed.

The staff then walked back in and locked the door. The supporters could only peek through the small glass window on the door from time to time; no sounds in the court room could be heard, even though there was just a door of separation. In a few minutes, while a few guards walked past several times, a police officer came, broke into the crowd, and stood right in front of the court door. Then, the supporters moved to the nearby sitting area. The sitting area became a temporary discussion space of Palay's case, Singapore laws, how other related assembly/procession cases with "political" metaphors were treated, and the arrangement for note-taking in the two-day trials for Palay. More than one discussion, in intimate private group settings or rather publicly-opened, with less/more than five people, occurred at the same time. Though police officers and guards kept walking around and seemed to check on the group frequently, the supporters demonstrated no fears and continued their spontaneous "political assemblies" in the State Court. This time, no permit was held and no supporters were arrested—and assembly persisted.

Conclusion

The above examples demonstrate the power struggles between the opposition and the government reflected in the laws of space. The tension between politics and politics of space in connection with the interpretation of laws is obvious in Singapore. In Singapore, specifically, politics/political aim is related to social norms and the socio-political context established by the one-party dominated government since 1959. The rules for having legal assemblies and processions in any public places in Singapore are inscribed in Rule 2(1) and Rule 5 of the MOR, Rule 2 and Rule 5(1) of the MOA, and Rule 8 of the POA. In summary, a permit must be obtained in advance, regardless of the number of participants, in any public places of Singapore. The number of participants is no longer a main factor of prosecution as shown by the court case *Chee Soon Juan and others v Public Prosecutor* ([2012] SGHC 109) as well as many more cases. Instead, prosecution is often reserved for cases in which a challenge, perceived or real, is made to the ruling party's authority. These also show some Singaporeans' eagerness for such attempts to challenge existing laws and ideology. Each attempt is an experiment to test whether the nature of politics and/or interpretation of laws have shifted. Moreover, as Lefebvre suggests, every space is the venue of power struggle and can be political.

The mental-psychological pressure to voice socio-political opinions has been cultivated and built across generations of Singaporeans in this social-physical space. This is reflected by various political operations to detain people with an opposite political stance under the ISA, and the zero to low portion of elected MPs who are members of political parties other than the PAP's since 1968. In addition to historical events, current laws and physical public spaces in Singapore should also be taken into account. Speaking in the nation's one-and-only permit-free Corner may not be that free: The Police Post and Courts located nearby place significant mental burdens on speakers. To extend this idea physically (to the rest of Singapore islandwide) and ideologically (to all Singaporeans), the symbolic representation or underrepresentation of the freedom of speech and the freedom of assembly depends on how laws are interpreted and how "political" acts are carried out in this constructed space called Singapore.

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Killing with No Punishment: Police Violence and Judicial (In)justice

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Abstract

This article offers a critical reading of the Limbu Case that took place in 2009 in Hong Kong. The Limbu Case was about an ethnic Nepalese named Dil Bahadur Limbu who was shot dead by a police constable on a hillside, which resulted in controversies around issues such as excessive police use of force and discretionary policing in Hong Kong. In the coroner's inquest (court case no.: CCDI298/2009) regarding Limbu's death, a verdict of lawful killing was reached by a jury of five. In other words, the killing was defined as a permissible killing. Drawing attention to the process of questioning "reasonableness" of the killing, I attempt to shed light on the ambiguities of the coronial system in Hong Kong which results in a missed opportunity to prevent future deaths. In other words, this article uncovers how the state is unable to live up to its promise to protect people's right to life.

Keywords: Coroner's court, lawful killing; police use of force, policing, right to life

> "It's my first time to realize that our society condones violence as long as the victims are not considered to be valuable people. If you are a homeless person, a person who is marginalized, in fact, our society allows violence to happen to you. No matter how violent it is to take a life, we remain silent,"[1] said Fermi Wong[2]. (translated by the author)
>
> (Lai, 2017, p. 361)

Introduction: The Limbu Shooting (林寶案)

It was the afternoon of 17th March 2009 when the police received a complaint from a woman that a man was urinating at a hillside in Ho Man Tin, opposite to Lok Man Sun Chuen. According to newspaper coverage, a police constable arrived shortly after he had been assigned to handle the nuisance complaint on his own (Lee, 2009a; Lo & Tsang, 2009). The police constable met the man the complainant had described, Limbu Dil Bahadur (林寶), at the hillside, a Nepalese. Only later would the newspapers reveal that he had actually been born and raised in Hong Kong (Lee, 2009b; Lo, 2009). Ka-ki Hui, the police constable, stopped Limbu and requested him to present identification, but Limbu answered "No" to Hui and started leaving ("Gun cop tells of failed attempts to subdue attacker," 2009). The police constable claimed that he put his hand on Limbu's shoulder, but Limbu hit the police constable in the face and knocked his sunglasses off his face (Chiu, 2009; "Gun cop tells of failed attempts to subdue attacker," 2009). The police constable tried to subdue the deceased by withdrawing his baton to guard against Limbu, and the fighting continued (Chiu, 2009). Yet, the police constable argued that using the baton had no effect on subduing Limbu and pulled his pepper spray to subdue the deceased. After allegedly using almost the whole of the spray can (the inquest revealed that there was half of a bottle of pepper spray left), only a small amount got into the deceased eyes, and the deceased used some water to wash the pepper spray off his eyes ("Gun cop tells of failed attempts to subdue attacker," 2009). Meanwhile, Limbu picked up a wooden chair and started attacking Hui again. "Let go of the weapon," Hui shouted several times, but Limbu smashed the wooden chair against a tree, and the chair broke into pieces ("Gun cop tells of failed attempts to subdue attacker," 2009; Man, 2009). The police constable then forwent his baton and pulled his gun out of the holster because he feared that he would be killed (Lau, 2009; Tsang, 2009). "Police, do not move, or else I will shoot," Hui warned Limbu in Cantonese (Lau, 2009; Lee, 2009c). The police constable tried to keep a distance from Limbu, but then the police constable fell into a "U shape drainage ditch" which caused him pain and a numb feeling (Tsang, 2009). However, Limbu did not stop attacking Hui with the broken chair even after he had fallen down. At the same time, Hui felt his life "was threatened," and he fired a shot into Limbu's direction (Lau, 2009; Tsang, 2009). They were both frozen for around two seconds. However, after that, the attacker started attacking the police constable again, according to the police constable when he testified in court (Lau, 2009; Tsang, 2009). The police constable felt that he could not avoid the attack, so he fired a second shot (Lau, 2009). While the police constable's arm and back were injured, the bullet entered Limbu's head, and he was consequently sent to hospital. Six hours after the shooting, in the evening on the same day, Limbu passed away at Queen Elizabeth Hospital (Lee, 2009a; Lo & Tsang, 2009).

[1] Original text in Chinese:「我首次意識到，原來我們的社會縱容暴力，只要受害者不被認為是有價值的人。如果你是露宿者，一些被視為邊緣人士的人，其實我們的社會允許暴力在你的身上發生，哪管奪走一個生命是非常暴力的事，我們依然保持緘默。」

[2] Fermi Wong is the founder of Hong Kong Unison, a non-government organization serving ethnic minorities in Hong Kong. She offered assistance to the family of the deceased in the aftermath of the shooting.

The Limbu Shooting is a controversial incident in Hong Kong. One of the reasons is because it is a police shoot-to-kill incident. In Hong Kong, it is not every day that police need to pull their guns to assist them in discharging their duties. In the four years before the Limbu Shooting, five cases of police opening fire were recorded, and two out of the five resulted in casualties of the suspects ("Being Attacked with a Chair", *Ming Pao*, 2009). On top of that, the shooting provoked the hitherto most intensive street protest in Hong Kong, composed of its ethnic minority community , demanding an apology and an impartial investigation into the shooting (Lai, 2017; Lam, 2009; A. Wong, 2009). This reflects the worry about whether the Hong Kong Police Force can uphold the principle of impartiality since a person they identified as a part of the community was killed by a policeman's gun.

All in all, the Limbu Shooting is a controversial case in the context of Hong Kong, in particular, concerning the politics of inter-ethnic relations in Hong Kong, human rights (the right to life in this case), and policing in Hong Kong. To my knowledge, there has not been any in-depth academic analysis of the shooting. I genuinely believe that this academically undiscussed case is worth looking into in regard to different concepts and forces were intertwined in tension in it. Moreover, by interrogating this police killing incident, I hope it can raise questions which people in Hong Kong feel relevant. Especially since June 2019, the city has been experiencing a challenging time triggered by the Hong Kong SAR Government's attempt to introduce the Extradition Bill, since then having been passed. The elements of human rights and policing, especially police use of force, in the Limbu Shooting case can shed light on what we might be facing in today's Hong Kong.

Legal doctrine has always occupied a hegemonic position in the discursive process in our society (R. Coombe, 2001; R. J. Coombe, 2010; Erni, 2010, 2019). While we pay attention to the verdict of a court case, we seldom look into what happens in the courtroom. However, it appears that sometimes we defer to the legal doctrine without thinking. In the Limbu inquest, the verdict of lawful killing was reached, justifying the police officer's use of lethal force. People who have been following the incident might feel uncomfortable about a life taken lawfully, without any consequence. The Limbu Shooting offers an opportunity to review our right to life and how it is protected as promised by the state. By therefore taking a closer look at the dynamics in the courtrooms, I believe this will give us more insight into how the right to life is protected in reality.

I am here discussing an ambiguity in the coronial system. The ambiguity rests on the purpose of the inquest and the coronial system's understanding of the state's obligation to the people's right to life. The ambiguity, I argue, leads to a missed opportunity for the state to review what can be done to prevent future deaths. Last but not least, I suggest that the accountability construction through ambiguity helps us to comprehend the maintenance of legitimacy.

The Limbu Shooting in Courtrooms

There were three court cases regarding the *Limbu Shooting* in the coroner's court (CCDI 298/2009), high court (HCAL 85/2010) and district court (DCPI 570/2012) respectively. In this article, the coroner's court case and the high court case will be discussed. The reason for having the district court case excluded from this article for analysis is that it did not go through trial. The case is a personal injuries action (DCPI) case, in which the widow of the deceased, Sony Rai, sought compensation for the deceased's death from the police commissioner and the police officer who had killed the deceased. However, according to the lawyer who represented the widow's party, the parties reached an out-of-court settlement, which explains why the case

was not heard in the courtroom. For this reason, only the coroner's inquest summing-up and the judicial review judgment are analysed regarding the juridical response to the Limbu shooting.

With the direction given by the coroner, upon applying the necessity and proportionality tests, the jury of five reached a verdict of lawful killing after 76 days of inquest. It dismissed the other two verdict options of manslaughter and open verdict. Yet, the widow was unsatisfied with the outcome of the inquest. Thus, she applied for a judicial review (HCAL85/2010), aiming to quash the verdict of the coroner's court. The judicial review application, however, was dismissed by the judge in the high court. After the failure in the high court, the widow's party went for a personal injury action case in district court (DCPI570/2012).

I was able to obtain a) the summing-up of the coroner's inquest delivered by the coroner to direct the jury to come up with a verdict and b) the judgment made by the judge in high court and the reasoning behind why the application filed by the widow's party failed. The coroner's inquest looked into the details causing the death of Limbu. The judicial review application in the High Court was an attempt to quash the verdict of lawful killing made by the jury at the end of the coroner's inquest. Her counsel challenged the coroner's inquest based on three points, that the Coroner was wrongly

1. "refusing to order the Commissioner to disclose documents or parts of documents in respect of which the Commissioner had claimed public interest immunity;"
2. "refusing to require the jury to make a narrative (as opposed to short form) verdict; and,"
3. "refusing to exclude evidence of Limbu's previous convictions for violent offences from the jury"
   (Rai v. William Ng, Esq., The Coroner of Hong Kong and Others, 2010, para. 12)

Narratives of the two documents will now be further examined in order to enter the intertwined discussion of human rights, law and policing.

The European Convention of Human Rights Article 2

The occurrence of the coroner's inquest in the aftermath of state killing cases like the Limbu Shooting is a realization of the state's obligation to the European Convention of Human Rights Article 2 (hereafter "ECHR Article 2"). The state is obliged to use an independent inquiry body to investigate deaths that state agents took part in. It is an effort made by the state to uphold its promise to safeguard its citizen's right to life. ECHR Article 2 states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ECHR Article 2 is known as the "right to life article", which is specially dedicated to the protection of people's right to life – a foundational right granted to make the enjoyment of other rights possible in the first place. Section 2 of the article identifies situations in which action resulting in loss of life, whether or not death is intended, can be justified and considered to be lawful (Crawshaw, 1991; Jachec-Neale, 2010). In other words, although it is the spirit that our right to life has to be safeguarded, there are exceptions to the right to life, meaning that the right to life is not absolute (Wicks, 2010). As a result, the state has an obligation to protect our right to life, to make sure that our lives will not be taken away arbitrarily. In Hong Kong, the elements of ECHR Article 2 are included in Basic Law Article 28[3] and the Hong Kong Bill of Rights Article 2(1)[4]. Therefore, the state has the obligation to protect our people's right to life in Hong Kong.

The state's obligation to protect the right to life can be divided into negative obligations and positive obligations (Mavronicola, 2017; A. R. Mowbray, 2004; Van Der Wilt & Lyngdorf, 2009; Wicks, 2010). For the negative obligation of the state, state actions are not allowed to use lethal force except in circumstances narrowly defined by ECHR Article 2(2), in which, the "absolute necessity" is the key in determining whether a life is taken arbitrarily or not. For positive obligation, it is the state's promise to offer a redress after learning a lesson by reviewing a case of state killing and to make an effort in preventing future deaths (Baker, 2016a, 2016b; Mavronicola, 2017). Thus, the coroner's court is an arena which an in-depth investigation can take place to look into the facts causing such deaths, which is also known as the "procedural obligation" of the state in accordance with ECHR Article 2:

> "…to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the [substantive] obligations has been, or may have been, violated and it appears that agents of states are, or may be, in some way implicated"
>
> (R (Middleton) v. West Somerset Coroner, 2004, para. 2)

In other words, the coroner's inquest acts as an independent body to look into whether the loss of the right to life (in which the state has a role to play) is justified or not. More precisely, the Coroners Ordinance (cap. 504) section 27 lists the purpose of a coroner's inquest:

> **27. Purpose of inquest**
> The purpose of an inquest into the death of a person shall be to inquire into the cause of and the circumstances connected with the death and, for that purpose, the proceedings and evidence at the inquest shall be directed to ascertaining the following matters in so far as they may be ascertained—
> (a) the identity of the person;
> (b) how, when and where the person came by his death;

[3] The Basic Law Art. 28 states that the right to life is granted: "The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited."

[4] The Hong Kong Bill of Rights Ordinance Art. 2(1) states that the right to life is granted: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life."

(c) the particulars for the time being required by the Births and Deaths Registration Ordinance (Cap. 174) to be registered concerning the death; and
(d) the conclusion of—
(i) where the inquest was held without a jury, the coroner who held the inquest;
(ii) in any other case, the jury concerned, as to the death.

Section 27 informs us of the procedures of a coroner's inquest, which is an inquest searching for factual information on a death. The purpose of going through these procedures is finding the cause and circumstances of death. Hence, as stated clearly, the responsibility of a coroner's inquest is to tease out the factual puzzles pieces to gain a fuller picture of how a death occurred. Not all deaths have to go through a hearing in the coroner's court. The coroner may call an inquest when a person dies under these circumstances: "suddenly; by accident or violence; under suspicious circumstances; or, when the dead body of a person is found in or brought into Hong Kong," and an inquest must be held when "a person dies whilst in official custody, for example, in a prison or a police cell; or upon the request of the Secretary for Justice" (Hong Kong Judiciary, 2018). Hence, by revealing how ECHR Article 2 is localized in the Hong Kong judiciary, this explains why the Limbu Shooting was heard in the coroner's court and how it is related to the greater discourse of the right to life, as defined by ECHR Article 2.

Coroner's *Inquest*, Not Coroner's Trial

The distinction between a coroner's inquest and a trial has to be emphasized, due to the fact that this influences the goal of a proceeding, as well as our expectation from said proceeding. Namely, a coroner's inquest is not an adversarial proceeding, but an inquisitorial proceeding.

Although the coroner's court is within the body of the judiciary, it is different from other courts in terms of how the proceedings take place. One of the most prominent characteristics of a coroner's inquest is the fact that it is an *inquest*, but not a trial. A coroner's inquest is an inquiry into the cause of and the circumstances connected with a death. The purpose of the inquest is to find out the identity of the person, how, when and where the person died, and also to find out the particulars regarding the Births and Death Registration Ordinance (Cap. 174) which needs to register the person's death. In other words, a coroner's inquest is a fact-finding process, instead of a fault-finding process (Dowd, 1991; McKeough, 1983; Moskoff & Young, 1988; Scott Bray, 2010; Thurston, 1962). By putting it as fact-finding instead of fault-finding, it appears that the compromise to the fact-finding principle sets limitations to coronial proceedings. For a fact-finding proceeding, one can imagine that the proceeding looks into the facts supported by medical evidence, witnesses' testimonies and other relevant evidence which guides us to the "how" in the coroner's court. Yet, for a fault-finding proceeding, it does not stop at the fact level but goes beyond it to look for responsibility, namely the goal of criminal trials and civil trials. To compare the nature of an inquisitorial proceeding and that of an adversarial proceeding, I would like to borrow the table drawn up by the Warwick Inquest Group (1985, p. 46).

Inquisitorial Proceeding	Adversarial Proceeding
Official and thorough inquiry • Own motion initiates proceedings • No parties • Inquisitor summonses witnesses • Emphasis upon fresh evidence • Participants have dossier before trial • Accused may be interrogated in court • Confession inconclusive, inquiry continues	Contest • Trial instigated by prosecuting party • Two (usually) parties • Parties select witnesses • Emphasis upon oral evidence, witnesses coached • Ambush and surprise acceptable • Accused may choose not to give evidence • Confession and guilty plea conclusive
Adjudicator as director • Adjudicator is active • Evidence predominantly adduced by adjudicator • Accused's circumstances and evidence known before trial • Merger of fact finding and prosecution responsibilities • Lay element integrated with legal adjudicators	Adjudicator as umpire • Adjudicator is passive • Evidence predominantly adduced by parties • No prior knowledge of the case or character of the accused • Division of fact finding and prosecution responsibilities • Fact finding responsibility devolved to jury
Discretion oriented hearing • Logical relevance principle of evidence • Documentary evidence acceptable • Tendency to underlawyering • Free flowing, uninterrupted questioning	Rule restricted procedure • Admissibility basis of evidence • Documentary evidence restricted • Tendency to overlawyering • Interruption and objections from parties

Table 1 *Essential Features of Inquisitorial Proceeding and Adversarial Proceeding.* Reprinted from "The Inquest as a Theatre for Police Tragedy: The Davey Case", by Warwick Inquest Group, 1985, *Journal of Law and Society*, 12(1), p. 46.

One should be able to differentiate the characteristics of an adversarial proceeding from those of an inquisitorial proceeding. The dynamics of, and the roles played by adjudicators, goals, and outcomes between an inquest and a trial are different, as shown in Table 1. However, the distinctions are not there merely because of some undocumented ritual. Instead, the features of an inquisitorial proceeding bring about a verdict composed of facts and a more substantial impact on the public's understanding of death and the right to life, as the former Attorney General for New South Wales, John Dowd put in a piece which reflects upon the role of coroners:

> I think the basic function of coronial inquiries is to reassure the public that murders and arsons are not going undetected. It is also to reassure the public that people in positions of control over others, such as doctors in hospitals or police holding people in custody, are not abusing their positions by neglecting people in their care or actively causing them harm.
>
> (Dowd, 1991, p. 54)

Dowd here makes a statement on the purpose of the coroner's court and the importance of the coroner in reassuring the public that their right to life is safeguarded, despite unequal power held between people in the society. Yet, he goes on to remind readers how coroners should behave, as framed by the inquisitorial nature of coronial proceedings:

> Coroners do not conduct criminal trials. If the coroner forms the opinion that the evidence establishes a *prima facie* case, it is not up to the coroner to deal with that person for that offence. Many people expect the coronial system to punish people who might be thought, reasonably or unreasonably, to be responsible for the death of someone they knew. This expectation is often based on a combination of emotion and a misunderstanding of the coroner's role. Coroners cannot convict people or commit them for trial.
>
> (Dowd, 1991, p. 54)

It is clear that the existence of the coroner's court has an ideological effect – that is, to reinforce people's belief in the guarantee of the right to life, that people's lives would not be taken arbitrarily. Nevertheless, Dowd (1991) also points out that coroners are expected to be emotionless (compared to trials), as he asserts "…expectation is often based on a combination of emotion and a misunderstanding of the coroner's role"; coroners are expected to be emotion-free and have a full understanding of their role. Literature has pointed out how the medical evidence occupies a high position among the other kinds of evidence in the hierarchy in a coroner's courtroom (Green, 1992; Hanzlick & Combs, 1998). In addition to science being put at a higher priority in the proceeding, the requirements of coroners reflects the enormous demand for the notion of "rationality" in a coroner's inquest. In other words, only facts (more accurately, scientific, thus more reliable facts) are admissible in the inquest, and human factors, such as emotions, are excluded, which differentiates it from adversarial trials. Hence, this defines coronial jurisdiction as facts speak for themselves and the deceased.

Ignoring State Liability: Is It Still An Inquest?

Although the coroner's inquest of Limbu's death is an inquisitorial proceeding, which is supposed to be limited to the exploration of facts in relation to the death of the deceased, the commitment to the spirit of "fact only" appears to have wavered in the inquest. If we follow through, the foundational reason for the existence of the coroner's court in today's world is ECHR Article 2, which suggests the state's responsibility in protecting people's right to life. That is to say: if there is a violation of the right to life, it is on the state. The aim of a coroner's inquest investigating the facts leading to someone's death, therefore, is to examine the state's liability in the death and to work out what the state can do to prevent a similar incident from happening again (Affleck, 1965; Baker, 2016a; Mavronicola, 2017; A. Mowbray, 2002).

Unfortunately, rather than restraining itself to the limitation the inquisitorial principle sets for the coronial proceeding, the coroner's inquest of Limbu's death crossed the line to looking into the police officer's liability. As uncovered above, the inquest ended with a verdict of lawful killing. Yet, when we look at the process of how the coroner directed the jury before reaching a verdict, it is more likely that the coroner stimulated the jury to decide upon whether the police officer has a responsibility in it. Moreover, if the coroner's inquest is expected to carry out its function as making sure that the state is under the negative obligation of ECHR Article 2, the stringent regulation should be treated as the focus of interrogation in the inquest, as suggested in *McCann and Others v. United Kingdom*:

> In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c).
>
> (McCann and Others v. United Kingdom, 1995, para. 149)

McCann was the first case heard by the court involving ECHR Article 2, which requested the court to clarify that the state has a positive duty to protect its people's right to life, and that law enforcement has to provide sufficient training in and strict guidelines for deploying lethal force (A. R. Mowbray, 2004). The quoted paragraph upholds the "absolutely necessary" threshold set for the exceptional circumstances which taking people's lives would be lawful and justified. Also, the requirement stated in ECHR Article 2 demands a "stricter and more compelling" test than articles concerning other rights. Therefore, the deployment of lethal force should be under stringent regulation of absolute necessity and be considered as a last resort. On top of that, the absolute necessity only counts when there is a "palpable threat to life or bodily integrity" (Mavronicola, 2017, p. 1030) to justify the use of deadly force to repel such a threat. If a lethal force is deployed in other circumstances, the deployment of force would be considered as excessive use of force, and the victim's right to life would be seen as having been taken away arbitrarily.

Returning to the Limbu case, the direction given by the coroner was, to some extent, directing the jury to beyond what ECHR Article 2 suggests. The coroner instructed the jury that the key consideration was to determine whether the police officer *honestly believed* that there was an imminent life threat before he opened fire. The following is a quote from the summing-up of the coroner's inquest to show how the coroner narrated the main consideration the jury had to take before reaching a verdict in the inquest:

> Therefore, you must bear in mind that you have to judge police constable Hui's action *based on what he believed the danger was*. You also have to remember that *you cannot expect a person to measure precisely the level of force to be applied when he is situated in the heat of the moment* when he needs to protect himself. If the attack faced by him is severe, his position would be more *hard-pressed*. If you determine that the person being attacked *believes or might truly believe* that he has to protect himself, and his act does not exceed what he *truly and instinctively believes*, then these would be very strong evidence—in showing that his use of force is reasonable in terms of proportionality.[5]
>
> (Limbu Dilbahadur, 2009, emphases added) (translated by the author)

[5] Original text in Chinese: 所以你哋要謹記，你哋必須憑許警員真心相信佢有乜嘢危險，你判斷佢嘅行動。你哋亦要謹記唔可以期望一個人喺保護自己嘅激動時刻當中，仲可以精確咁樣衡量需要幾多武力才足以自衛，如果佢受到嘅襲擊係愈嚴重嘅，佢嘅處境就會變得係愈窘迫，如果你哋判斷受襲嘅人相信或者可能真心相信佢係必須保護自己嘅，而佢所做嘅亦唔超出佢真心和本能被認為係佢須要做嘅嘢，咁樣呢啲就係一個非常有力嘅證據，嚟顯示佢所用嘅武力喺程度上係合理嘅。

The emphasis I want to put here is on the "true belief" that the coroner guided the jury to test in judging whether the deceased was killed arbitrarily or not (i.e. the main concern of ECHR Article 2). However, one should not forget that the basis of the coroner's inquest is this ECHR Article 2, which has a stringent regulation on the deprivation of the right to life. The only circumstance for the deployment of lethal force is when it is "absolutely necessary". Moreover, the European Court of Human Rights noted that the intentional test "would hardly be consistent with the object and purpose of the Convention or with a strict interpretation of the general obligation to protect the right to life" (Stewart v. United Kingdom, 1984, para. 15) and the "absolute necessity" as stated in ECHR Article 2 is the only exception to the right to life (Hessbruegge, 2017). In other words, the "honest belief" test is rather irrelevant in the arena of coroner's court, if one is strictly following the criteria set out by ECHR Article 2.

Hence, the "honest belief" test points to the argument of *mens rea* (i.e., intention), imposing a criminal law style onto the supposedly inquisitorial proceeding. The "honest belief" test applies not only to the determination of the threat at issue by the state agent but also to their option of response (Mavronicola, 2017). Therefore, it plays a determining role not only in evaluating the need to use force to repel an attack on one of the grounds specified in Article 2(2), but also in the absolute necessity of using lethal force – which allows force to be both appropriate and strictly proportionate to the danger at issue. To give an example, the "honest belief" contended by the state agent is understood as a "good reason" if the jury chooses to trust the agent. Even if the threat is "mistakenly believed" by the person, such a belief will still be considered a legitimate belief and thus the actions to follow will be perceived as justified (Jackson, 2003). The measurement of necessity to repel via assessing the truthfulness of the perception of threat has gone nowhere close to the objective measurement as required by ECHR Article 2.

As a consequence, rather than guiding the jury to guess what the police constable was thinking in that altercation, an objective examination of the "absolute necessity" requirement is needed so as to be loyal to ECHR Article 2. The court should approach the case differently – by differentiating state liability from individual liability in order to avoid the inquisitorial proceeding from becoming an adversarial one (Mavronicola, 2017; Scott Bray & Martin, 2016). The approach is entirely out of the scope set out by ECHR Article 2, but the coroner's inquest took place in the name of Article 2. In other words, the goal of Article 2 was never fulfilled – not looking into state liability, and hence no redress could be produced. All in all, because of the incompatible approach utilized in the Limbu case, accountability was not claimed. A man died, and no lesson was learned. The dead soul left us nothing but a missed opportunity to consolidate our right to life.

An Ambiguous System

The main idea of holding a coroner's inquest is to fulfill the state's obligation to ECHR Article 2. A coroner's inquest provides space to allow a public, independent and somewhat transparent investigation to take place to look into the cause of death, including deaths after police contact. In other words, members of the public expect state agents and other parties involved to be held accountable for their actions by going through this judicial process (Baker, 2016a, 2016b; Scott Bray & Martin, 2016; Urpeth, 2010). Although the coroner's court is different from other courts where adversarial trials take place, it provides a venue to disclose documents related to the death and make witnesses available for the inquest, as required by the ECHR (Matthews,

2007). Thus, the coroner's court was the only officially established independent body to adjudicate the death after police contact in the aftermath of the Limbu Shooting.[6]

However, by taking a closer look at the Limbu inquest, one might start feeling confused by the role of the coroner's court. David Baker (2016a) studies death after police contact in England and Wales. Baker puts forward that the coronial system is "ambiguous, discretionary and arbitrary" (Baker, 2016a, Chapter 3). The coroner directed the jury to reach a verdict by emphasizing the *mens rea* of the police who shot the person involved to death. This violates the negative obligation to the Article 2, which "absolute necessity" should be treated as the only acceptable criterion in determining whether a life is taken lawfully or not (Mavronicola, 2017; A. R. Mowbray, 2004). On top of that, one of the controversial issues surrounding the coroner's inquest is the ambiguous definition of the purpose of inquest. In the Limbu case, the primary concern of the case is "how" the deceased came to his death. As in "how", it is one of the reasons why the widow attempted to quash the verdict of lawful killing reached in the coroner's inquest.

The extent of "how" in the case determines other components of the inquest. If the court is sticking to ECHR Article 2, the primary goal of it should be examining the state liability in causing the death. And for the positive obligation of the state, in particular, redress has to be made to prevent future deaths from happening. Yet, before arriving at such a suggestion, the inquest has to determine how the person came to his death. The "how", however, can be interpreted in a narrow or a broad sense (Dorries, 2004). For instance, a death caused by anatomical failures can be explained narrowly by specific organs failed or what medical procedures went wrong. Therefore, in inquests examining state killing, the "how" question occasionally becomes the "why" question, in which it deals with the cause of death at an organization level, different from the acts and negligence of state agents (Baker, 2016a; Dorries, 2004). This, in other words, determines whether the inquest stays in line with the spirit of ECHR Article 2—to explore the state liability. In the Limbu case, unfortunately, the individual liability was emphasized, and the state liability was not prioritized. The inquest, therefore, did not perform the function expected by ECHR Article 2, the article which gives life to the coroner's court in today's world.

The coroner's court, however, does not have a consistent interpretation of the purpose of the inquest. Namely, the House of Lords in *Middleton* unanimously holds that such a limited understanding of the role of the Coroner could not in all situations satisfy ECHR criteria:

> Only one change is in our opinion needed: to interpret "how" in section 11(5)(b)(ii) of the Act and rule 36 (1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply "by what means" but "by what means and in what circumstances".
>
> (R (Middleton) v. West Somerset Coroner, 2004, para. 35)

Therefore, the interpretation of "how" is much more than austerely looking into by what means, but the circumstances have to be taken into account as well in order to fulfil the obligation to

[6] The Independent Police Complaints Council is another independent body that investigates complaints made against the police in Hong Kong. However, it was not a statutory body until 1st June 2009. Therefore, the coroner's court was the only official independent body to investigate the death of Limbu at that time (see Chan, 2014; Independent Police Complaints Council, 2020; Wong, 2010)

ECHR Article 2. At the same time, in the Judicial Review regarding Limbu's coroner's inquest, the Hon judge J Reyes also cited the standard adopted by J Hartmann in *Dr. Gilbert Tien v. William Lam Esq.*, Coroner [2004] HKLRD 719, that a narrow "how" should be the purpose of the coroner's inquest in examining the cause of death:

> I am satisfied that this obligation has brought no change to either the earlier legislative regime or the established practice in terms of which *the question to be decided is a limited factual question of the means by which the person came by his death and not in what broad circumstances* he did so.
>
> (Para. 13, emphases added)

Here, the narrow understanding of "how" is adopted. This deflects that there exists such a space of interpretation in terms of the purpose of inquest. Different understanding of the purpose of the inquest brings consequences to the kinds of evidence to be admitted to the court. As we can see from the Limbu case, the coroner had a high degree of discretion in determining what evidence to admit and what not. In the coroner's court, the deceased's prior conviction was admitted to the court and it created an effect of characterization of the deceased in the proceeding which requested the jury to reach a verdict based on the jury's belief in the police officer's *mens rea*. Meanwhile, in the process of searching for "means" and "circumstances" of Limbu's death, the coroner used his discretion to dismiss the request for admitting the teaching materials of the police force, as cited in the Judicial Review:

> With respect, it is also very difficult for me to see why from one particular incident we can see whether there is a problem or not in the police's system in teaching the students…In my view, we cannot say that these documents are not relevant to this case, but as a matter of degree, they are only of peripheral relevance…
>
> (Rai v. William Ng, Esq., The Coroner of Hong Kong and Others, 2010, para. 46)

The coroner's discretion determines what evidence is considered relevant and what is not. Therefore, the pieces of the puzzle made available to the jury largely influenced the process of reconstructing the story, which, as a result influenced their verdict in considering the cause of Limbu's death. The scope of the inquest was based upon the discretion of the coroner. However, other than the coroner, no one has an idea of the broadness of the investigation, i.e., what area of examination is regarded as relevant in this case. While the deceased's prior conviction is seen as relevant, details of police training are treated as "peripheral[ly] relevant". The lack of transparency combined with the ambiguity of the purpose of inquest thus does not guarantee a consistent expectation of the function of the coroner's court following the principle of ECHR Article 2.

On the whole, there is a lack of clarity in the coroner's court. The state does not provide the coroner's court with clear instructions to carry out investigations with consistent criteria to protect its people's right to life. Thus, it is inevitable to have audiences dissatisfied by the performance of the regulatory body.

Discussion and Conclusion

The law holds a hegemonic position in discursive processes (R. J. Coombe, 2010; Erni, 2010). On the one hand, we are shocked by the fact that a man was shot dead by a police officer, and we might have an inkling that there is something wrong with it. On the other, I believe we should become acquainted with how the incident is scrutinized in courtrooms, where abundant resources are granted to carry out in-depth investigations and debates about the shooting.

I have devoted a part of the article to introduce the features of the coroner's court. By highlighting the inquisitorial characteristic of the court, it reminds us of the fact that the coroner's court is not a place where justice can be served by finding an individual to blame. Instead, taking ECHR Article 2 as principle, the primary goal of the inquest is to act as a balancing body to regulate deaths that the state might have had a role in.

Nonetheless, the arbitrariness and ambiguity of the inquest create obstacles for us to use death as an opportunity to enhance the protection of the right to life. In the Limbu inquest, individual liability became the focus instead of the state liability which is stated in ECHR Article 2. Moreover, there is always an ambiguous purpose in an inquest since the scrutiny concerns the possibility of blame and liability, coupled with the high degree of coroner discretion in the court, which as a result, creates a high degree of uncertainty if one has high expectations from the state to put the effort into enhancing the protection of one's right to life. Thus, I argue that the coroner's inquest on Limbu's death is a missed opportunity, which echoes Scott Bray's contention that:

> …law is wholly lived and experienced in the expectation of 'justice', and we cannot regard coronial findings and their constituent statements of fact as if they have no consequence.
>
> (Bray, 2010, p. 587)

Sharing Scott Bray's viewpoint in this article, by uncovering the details of what happened in the court, the cause of such a disappointment of "no consequence" or no change is revealed. This, I argue, is the tragedy of the arbitrary and ambiguous coronial system – a system that we rely on to claim justice for our right to life.

As a whole, the judicial interrogation process of Limbu's death is discussed in this article. It examined the procedural aspect of the judiciary on how the state commits itself to protect its people's right to life in reality. Ironically, the coroner's court, as representative of ECHR Article 2, here did not function loyally in relation to the stringent requirements set out by the article. Instead, it is full of ambiguity in interpreting the purpose of an inquest and in the guidance to the jury by the coroner.

On the one hand, we perceive the coroner's court as an area in which the state (including state agents) is to be held accountable for actions alleged to be violating its people's right to life. On the other, in reality, it is shown that the construction of accountability is based on an ambiguous procedural operation in the judiciary – an arena that enjoys a hegemonic position in our society. More ironically, it is the mechanism (i.e., the obligation to ECHR Article 2) that is supposed to protect our right to life that activates this ambiguous and unconvincing process of accountability construction. This process of construction of accountability in the ambiguous legal process sheds light on the broader issue of the maintenance of legitimacy of the state. Here, in particular, the legitimacy of police use of (lethal) force.

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The Hadiya Case: Human Rights Violations and State Islamophobic Propaganda in India

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Abstract

This paper examines the "Hadiya case" which in the years 2016 and 2017 was well known throughout India and revolved around a woman, named Hadiya, her conversion from Hinduism to Islam and her marriage to a Muslim man. It caught the attention of the entire nation through intense coverage by the national media. The decision of Hadiya, who is an adult with her own conscience, to practice the religion of her choice and marry the person with whom she wishes to share her life, instigated a public legal debate. Hadiya's case, which evoked Islamophobic and patriarchal ideologies, should be placed within the current political conditions of India. With regard to language, religion and ethnicity, India's diversity under a right-wing political regime has been questioned, while the human rights of women, religious minorities like Muslims and Christians, *dalits* (lower caste people) and indigenous people from tribal communities have been violated. Paying close attention to the legal and logical reasoning of the Indian High Court during the year-long trial, this paper also evokes a critical perspective on the understanding of growing Islamophobia, hatred politics against Muslims and the violation of women's rights, particularly of those from minority religious communities and lower castes in. Indian society is facing cultural dominance under the Hindutva ideology – an ideology that is intent on the dominance of Hindus and Hinduism. Such a cultural and ideological dominance can be seen in the everyday life of Indians, in legal systems, media institutions and other formal and informal organizations. As will become clear, such cultural politics were disguised in the form of legality in the Hadiya case.

Keywords: culture, gender injustice, human rights; Islamophobia, right wing politics

Introduction

This paper examines the "Hadiya case", which from 2016 to 2017 was well known throughout India. It revolved around Hadiya's conversion to Islam and her marriage with a Muslim man. It caught the attention of the entire nation as the national media often focused on it. Some of the popular national media outlets like *India Today*, *Times Now and News18* reported on it case, often with Islamophobic tendencies. Hadiya's decision, the decision of an adult with her own conscience, to practice the religion of her choice and marry the person with whom she wished to share her life, became the founding incident for a public debate. Importantly, Hadiya's conversion and marriage was seen as "Love Jihad".[1]

At the time, Hadiya was a 24 year old woman and a homeopathic medicine student from the Sivaraj Homeopathy College, Salem, Tamil Nadu. She had officially converted to Islam from being a Hindu (from the Ezhava community) and married a Muslim man named Shafin Jahan. Before her conversion, her name was Akhila. She hailed from the Indian state of Kerala, from a town named Vaikom. In 2016, her father, K. M. Ashokan, had filed a writ petition in the High Court of Kerala, suspecting that she was going to be taken out of the country. Only in the later parts of the court case document is the specificity of Ashokan's complaint evident. He was alleging that certain Islamic organizations had forced her to convert to Islam and wanted to move her out of India to indulge in the activities of the IS (Islamic State). He suspected these Islamic organizations to be practicing and preaching a radical form of Islam in India. After more than a year-long trial, on May 2017, Kerala High Court annulled her marriage with Shafin Jahan by declaring that the Islamic organizations had supported her conversion to become radical in her beliefs and practices. However, upon appeal, in March 2018, Hadiya's marriage with Shafin Jahan was declared to be valid by the Supreme Court of India. In October 2018, as per reports submitted by the NIA (National Investigation Authority), the Supreme Court of India declared that there was no involvement of "Love Jihad" in this case. This made clear that the organizations that supported her conversion and marriage did not practice this radical form of Islam. The decision to convert and marry had also been Hadiya's own will.

To understand this case, one needs to place it within the current political atmosphere in India. Since 2014, India has been under right wing ideological influence which is based on the hegemony of Hinduism and Hindu-Nationalism. The dominance exerted based on this ideology puts the diversity of the nation with regards to language, religion and ethnicity under question. Under a governance with such an ideological backing, human rights of women, religious minorities like Muslims and Christians, *dalits* (lower caste people) and indigenous people from tribal communities have at times been violated.[2]

[1] The term "Love Jihad" was first used in the Indian state of Kerala around 2007 and later in the Indian state of Karnataka in 2009. Catholic church bodies in Kerala and Hindu groups in Karnataka claimed that women from their communities were lured by Muslim men to get married by converting to Islam. But in 2012, after order from the Kerala High Court, the police declared that there was "no substance" to the claims that "Love Jihad" was taking place. The term, however, is widely used even today, mostly by Hindu right-wing groups. Thus, the term was used by BJP, during the 2017 Uttar Pradesh elections to polarise the people of the Indian state (Khalid, 2017). Gupta (2009) contends that there is no evidence to prove the existence of "Love Jihad". She says that it is a way to control women by creating bogeyman imagery of and hatred towards Muslims in India.

[2] There have been many instances of violence during the current political regime in India. In 2015, Mohammad Aklaq, a Muslim man from Uttar Pardesh, was murdered as he was suspected to have stored beef in his fridge. In 2016, in Gujarat, seven Dalit young men were humiliated and beaten in public for skinning a dead cow. This incident was also videoed and circulated on social media. The Dalits have been historically charged with the removal of human and animal waste. In 2017, Junaid, a 17-year old Muslim youth was lynched on a local train in Haryana while having a clash over a seat. On police investigation, Hashim, his companion on the train, stated

While being politicized, the Hadiya case, centrally revolves around fundamental questions of religion and gender. Therefore, it becomes crucial to take up the perspectives of culture and human rights while making sense of this case. This text offers a close reading of the legal reasoning of the court, and it does so in order to understand the larger cultural politics that influence certain legal decisions of the court. Indian society is facing cultural dominance under the Hindutva ideology and such a cultural dominance can be seen in the everyday life of Indians, in legal systems, media institutions and other formal and informal organizations.

Crucially, it is argued that these cultural politics were disguised in the form of legal discussions in Hadiya's case. I argue that the discussions made in a legalistic manner regarding the validity of Hadiya's conversion, her marriage and the organization that supported her, hide the cultural politics of Islamophobia and gender injustice. Erni (2012) argues for a convergence of Cultural Studies and human rights law, in order to make the latter open to the diverse voices or the different kind of rights to be reclaimed by a society that faces different kinds of historical subjugation. He contends that "multiple legal consciousnesses" played a crucial role in the origination of universal laws (p. 187). While recognizing that universal laws are the manifestations of historical social struggle for recognition from different societies, he does not ignore the fact that the universal legal documents are not absolutely inclusive by addressing the arising social disparities. While reading the legal reasoning behind Hadiya's case, one should also see that the larger cultural politics of the political regime within which it existed and realize the influential power of such a politics. This particular approach towards Hadiya's issue is similar to Erni's proposal for the role of Cultural Studies as an intellectual tool to re-shape legal understanding and debates.

Logical Reasoning Behind the Case: Following the Trajectory of the Case

It is crucial to closely read the court case document of Hadiya's case in order to understand the Kerala High Court's logical reasoning at various crucial junctures of the process. This document is a judgement based on the writ petition filed by Hadiya's father on 16 August 2016.

Firstly, judges K. Surendra Mohan and K. Abraham Mathew refuse to accept that Hadiya is "already a Muslim". The judges keep using her name before conversion, "Akhila", throughout. Hadiya had undergone several formal procedures to practice, understand, and convert to Islam. The judges show proof that Hadiya had gone to "Tharbiyathul Islam Sabha" in 2015 to register and understand Islam. Therefore, her decision for embracing Islam was not a sudden decision, as she had been working towards understanding the religion for some time already. In spite of producing the justifying reasons for her conversion the court dismissed her decision for conversion as invalid.

The High Court judgement starts off by tracing the history of the case. It mentions that the previous case was concluded by declaring that Hadiya was not under any "illegal confinement" and therefore she can stay with SaiNaba. SaiNaba had supported her and guided in enrolling

that the murderers had called them "beef-eaters", "traitors" and had asked them to "go to Pakistan" among many other insults. Asifa, an eight year old Muslim girl from a nomadic tribe community, was tortured in Kashmir, gang raped and murdered in 2017 by a group of men in a temple (a priest, men from the police force, a juvenile). In 2018, Pradeep Rathod, a 21 year old Dalit man from Gujarat, was murdered by upper caste men for riding on a horse, as it was considered to be an act of power and pride. These incidents show the hatred against Muslims and many such instances still remain un(der)reported.

her into an Islamic institution (Sathyasarani Educational and Charitable Trust) to embrace the teaching and tenets of the religion. Hadiya had approached her, as there had been no support from her family to practice Islam (*Hadiya*, 2017, p. 9). The court further declared that Hadiya was not forced into conversion as it was out of her own free will that she chose to embrace Islam. If the court meant that Hadiya was not under any "illegal confinement", it should have ideally meant that SaiNaba, with whom Hadiya stayed and the organizations that SaiNaba was interacting with, were not practicing and teaching any radical form of Islam by illegally forcing people to practice or convert. Only at this point did the court ask them to produce income certificates to prove that SaiNaba can support Hadiya, while it should have been done in the previous investigation. If the court had mentioned that Hadiya was not under any "illegal confinement", it should have said so, possibly after a thorough verification of the investigations. In spite of such a clear declaration, the court kept bringing up its apprehensions towards the concerned organisations, in the year-long trial after Ashokan's second petition on 16 August 2016. The one year long engagement with the case ideally gave space to often take up the names of the involved organizations in order to further raise questions about the nature of the religion they preached.

Ashokan had filed a petition stating that his daughter might be transported to Syria suspecting that the main purpose of shifting her outside India would be to indulge in radical practices of Islam. But this particular suspicion behind his petition is made clear only on page 67 of the document of the Court Judgement. Before that, the document only briefly mentioned that Ashokan was suspecting that Hadiya would be taken to Syria but there is no mention of the reasons behind his suspicion. The court's order for investigation related to Ashokan's petition is irrelevant. The court's order to search for Hadiya, right after the petition was filed, seems logical. But after she appeared in court by herself and only accompanied by SaiNaba (on 25 August 2016), the court with no valid reason ordered her to stay in a hostel and not with SaiNaba. The reason given was that in spite of constant persuasion to stay with her parents, Hadiya had refused to go back home. This reason was then cited by the court for ordering Hadiya to stay in a hostel and it is problematic. Instead of analysing why Hadiya refused to go back to her parents and the difficulties that she was facing at home in practicing the religion that she chose to follow, the court was constantly intending to send Hadiya back there. At this point, though, questions should be raised – such as: Why should Hadiya, a 24 year old woman, with her own conscience, be persuaded to stay with her parents against her will? Or, What was the problem if Hadiya constantly displayed her interest to stay with SaiNaba whom she trusts (and also the court already proved that staying with her cannot be considered illegal)? – the larger question remains unanswered, which was "Why didn't the court directly probe Ashokan's suspicion of 'Hadiya's shifting to Syria' but diverted the investigation trajectory by making her stay in a hostel?"

Hadiya's statement on her seclusion in a hostel with no communication with outsiders for 35 days proved that the court was complicating the case at every instance, as an immediate probe into "Hadiya's shifting to Syria" would nullify Ashokan's suspicion and fears and prove this case to be foolproof. This mode of investigation shows the court's intention of grabbing the public's attention by problematising the Hadiya's case by engaging with it through irrelevant matters.

The court ordered Hadiya to remain in the hostel (while her father would "escort" her to the Medical college and hostel) by advising her to complete her House Surgeoncy. Apart from this, by setting up a serious surveillance of Hadiya's whereabouts, the court did not just display

patriarchal tendencies but also created a further panic regarding the organisation and the religion behind it in the public's mind.

On 21 December 2016 Hadiya appeared in the next court session with her husband Shafin Jahan. Anyone, even those with no legal background, would understand Hadiya's move. The court's constant interference in this case by not approving SaiNaba as her guardian, made her choose a legal guardian who would ideally be the person whom she gets married to. According to the court case document, on April, 2016 Hadiya had registered on a matrimonial site, "Way to Nikkah". When an offer from Shafin Jahan came to her, she spoke with him and found him to be the right person to get married to. On 19 December 2016, they married in SaiNaba's house according to Islamic Shariat Law in the presence of a Khazi (Islmaic spiritual leader) of Puthoor Juma Masjid. They produced a marriage proof certificate from Thanveerul Islam Sangham of the Malapuram district. Although the above mentioned details about the marriage are stated in the court document, the court did not consider any of the legal and logical dimensions. Instead, it decided to question the background of Shafin Jahan and suspected the authenticity of the marriage, as the overall intention of the court while investigating this case, was more set on questioning the "nature" of Islam in the case. Moreover, it is clear from the details of the marriage that it happened as per Hadiya's will. But the court chose to disagree with this.

Already during the emergence of this case, the court had been pointing at the religious organizations that supported Hadiya. It neither respected Hadiya's decisions nor chose to include her as a respondent in this case. When Ashokan had filed the second writ petition, Hadiya appeared in the court requesting the court to include her as a respondent in the case. But the court chose to include SaiNaba (7th respondent) and Sathyasarani Educational and Charitable Trust (6th respondent) in this case. The court did not just deprive Hadiya of her agency but it also projected the case to be a case of a Hindu individual (Ashokan) and "influential" Islamic organizations. In fact, Ashokan's voice and his further opinions seems to be invisible as the case now took on a new direction. The court claimed that it did not want to interfere in Hadiya's religious faith, the court revealed its anxiety from time to time towards the organizational backing in this case. The court did not see the organizational backing as a support system for religious minorities, instead it portrayed it as a "threat" to the rest of society. In many instances the court had used the term "radical" but failed to show any proof to support this claim. Further, without providing logical reason, the court kept criminalizing Shafin Jahan. To put forth this claim, the court used very weak evidences. The court kept bringing up his social media activities as a proof of his social background. It was mentioned in the judgment that Shafin Jahan was a part of the WhatsApp group SDPI (Social Democratic Party of India), Keralam, of which Mansy Buraqui, who had been arrested on the allegation of his association with IS (Islamic State), was also a member. However, at a later time, Mansy Buraqui was removed from the WhatsApp group. The document mentions that Shafin Jahan had an association with Mansy Buraqui to further criminalize him (p. 85). But it neither provided valid evidence for the claim nor mentioned the nature of such an association between them. The court clearly mentioned that Mansy Buraqui had been removed from the group. If the court still had suspicions, it should have ideally extended its investigations beyond WhatsApp in order to understand the nature of their association. Arshed, Jantan and Abiodun (2018) critically review the issues involved in producing digital technologies as forensic evidences in court. They specifically looked into the usage of social media as evidence, and argued that investigators tended to use social media as evidence because of its ubiquity and ease of access. But they contended that it cannot be "self-authenticating". They mention that social media evidence should be backed by other circumstantial evidences. They argue that it is imperative to also

produce the way in which the data was retrieved. Lastly, they view the investigations based on social media evidence with caution as it also invades the rights of "constitutional privacy" of the person under suspicion.

In the above, I simply point out the weak and irrelevant ground of the court's investigation. But let me stress again that the court's reasoning cannot be isolated from the larger political conditions in India. A Cultural Studies approach would contend that the very nature of the court's legal reasoning lies within the dominant cultural politics of the country. The fact that Hadiya's case is now made complicated forces one not to just see it as freedom of choice being generally neglected, which would be bad enough, but that a woman's freedom of choice is at stake to embrace a particular religion, here Islam. Erni (2012) invites a "symbiotic convergence of political and legal practices", for he argues that the legal apparatuses that are in place are conceived from historical struggles. Therefore, the alliance with a Cultural Studies framework will lead to a better understanding of the ideological biases of the state structures, which in turn intensify the socio-political struggles especially for women and religious minorities.

A Critical Constitutional Consideration

The court trial made no reference to the Constitution of India at any point of the trail. Naturally, the human rights of the different actors of this case come into light via this negligence. The following section tries to understand the case by placing it parallel to the Human Rights Law of the Indian Constitution and International Laws.

This case was not seen as simple case as a right of an individual to convert to a particular religion, practice it and marry a person from the same religion. This case was made complex because of a particular religion that one chose to embrace. At the time, here was a growing Islamophobic tendency in Indian society to be noticed. The scenario started escalating under the current right-wing political regime. Therefore, it might be argued, did the court choose to problematize the case. The fact that a woman chose to convert to and practice Islam became a convenient factor for the court to further oppose the religion. In Indian society, many still believe that a woman does not possess the capacity to think and decide things on her own. Therefore, the court while ridiculing the woman's decisions and choice, eventually targeted her religion. It was convenient for the court to reduce and disrespect her decisions by focusing particularly on factors like her intellect, income and social support. Article 25 of the Indian Constitution and Article 18 of the International Covenant on Civil and Political Rights (ICCPR) both declare that everyone has the right to freedom of thought, conscience and free profession, practice and propagation of religion.[3] These articles deliver a clear message that practice of a religion of one's own choice is a basic right of an individual. But by intervening into Hadiya's decision and by questioning it, the court undermined this right. The court devalued the crucial human quality of conscience. In this case, Hadiya was not seen as a "normal human being" with the ability to think. Her interest in a religion was reduced to a lack of reasoning.

Okin (1998) offers a useful re-reading and re-interpretation of Article 18 of ICCPR. She does this when trying to understand how women's rights are often violated within the private sphere of family and that such acts are often justified by appeals to cultural and religious norms. She argues that although the ICCPR acknowledges that the right to freedom of conscience, thought

[3] Article 25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (Constitution of India)

and religion for "everyone" are fundamental by nature, the ICCPR remains restrictive, as it emphasizes that "the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own conviction". Therefore, Okin points out that according to ICCPR, children are not a part of an "everyone" who has the right to choose and change their beliefs and they must conform to their parents' values and beliefs. Unfortunately, in this case, by devaluing her thoughts and forcing her to conform to her parents' opinions, Hadiya was treated as a child.

Article 14 and 15(i) of the Indian Constitution mentions that women are equal before the law and that the state shall not discriminate any citizen on the grounds of sex.[4] Similarly, Article 3 of ICCPR emphasizes that women and men have the right to enjoy their civil and political rights.[5] The fact that this appears in both domestic and international law shows the importance of women's rights. But the court that should be protecting their rights ended up violating them. It violated her rights by completely isolating her during forced hostel and home stays. After the final hearing on 24 May 2017, Hadiya was forcefully separated from her husband. She was made to stay with her parents. She was not allowed to talk to any outsiders, even over the phone. She was under constant surveillance; she was allowed to go to her college only under police surveillance. These orders executed by the court were against the Indian Constitution, as Article 19(d) proclaims that everyone has the right of free movement across Indian Territory.[6] Further, the series of treatments of Hadiya by the court proved that the court refused to see her as a 24 year old adult but regarded her as a child who needs constant care and who should often be watched.

Further, the court gave the picture that Hadiya's self-interest should be within her family values. The Kerala High Court often mentioned that it found the need to interfere in this case because it was strange for a young girl to refuse to go with her parents. Sen (1990) contends that family values influence individual perceptions and stop one from thinking for oneself. Okin (1998) argues that family as an environment for shared interest and altruism dominates the self-interest of an individual. More importantly, women are often made to hold the "status" of a community (the community can be based on religion, race, ethnicity, caste and class) in order to preserve the "purity" of the community (Abraham, 2014; Chowdhary, 1997). It would not have been the same if it had been a Hindu man converting to Islam. Even though "Love Jihad" is propaganda by the Hindu forces, they chose to speak about Hindu women within their definition of the term. Under the current political scenario, while this case was seen as a communal issue between Hindus and Muslims, the fact that a woman chose to transcend the religious boundaries created a "moral panic" within Hindu patriarchal society. That is also the reason why the court never wanted to accept that "Akhila" is not "Hadiya" and did not recognize her as a Muslim. In a way, this even showed that they "claimed ownership" over the woman by not just not recognizing but also ignoring her decisions. She did not see herself as a

[4] Article 14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. (Constitution of India)
Article 15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (Constitution of India)
[5] Article 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. (ICCPR)
[6] 19. (1) All citizens shall have the right– (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) omitted (g) to practise any profession, or to carry on any occupation, trade or business.

Hindu and had gotten the certification of proof for her conversion to Islam. The fact that none of these formal, logical and reasonable procedures mattered to the court clearly points to the patriarchal tendency of the court.

Erni (2012) argues that a Cultural Studies approach to the legal frameworks of an issue breaks the notion of legal essentialism by breaking the assumption that there is a universal distinction between legal and non-legal practices. In Hadiya's case, though the rights to practice a religion and choose a person on her own to marry are protected by law, the court chose to ignore them. Islamophobia is not just a strategy of Indian political propaganda but it a propaganda tool of global politics. Lean (2012) and Kumar (2012) present a holistic and historical picture of US Islamophobic tendencies. This could be looked at to understand the Indian scenario. Lean metaphorically calls Islamophobia an "industry" that manufactures fear of Muslims and Islam through a network of "tight-knit and interconnected confederation of right-wing fear merchants" that are largely comprised of media houses and government bodies. Kumar debunks five stereotypes from the global anti-Islam discourse-Islam as a monolithic religion; as uniquely sexist; as alien to reason and rationality; as inherently violent; and as incompatible with democracy. She argues that, historically, these stereotypes have often been presented as "common sense" of society for the imperialistic agendas of the world power. The "divide and rule" strategy set up by British rule created the "us" versus "them" mindset amongst the Hindus towards the Muslims. This orientalism of Hindu India continued even after colonisation. The "divide and rule" strategy of colonial times is one of the reasons of continued internalized Islamophobia in Indian public life (Breckenridge and Veer, 1993). In post-colonial times, the idea of "native Hindu and outsider Muslim" has become a political construct. In India, as a "geographical and political nation" started emerging, Hindu majoritarianism also emerged. India has a parliamentary democratic constitution that enabled constitutional liberal democracy. Constitutional liberal democracy does not only enable a political system by free and fair elections but also enables the "rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion and property" (Zakria, 2004). But the Hindu Majoritarian political system has been seeing the political majority as an identity-based majority and not as a democratic majority (Anand, 2011).

Eventually, the wide gap between the constitutional theory and political practice can be seen in India through the violation of Muslim rights. As a diverse society, India has several religious minorities (Christians, Budhdhists, Sikhs, Jains) among which Muslims are the largest in population. Indian Muslims have been facing conflicting experiences even since pre-independence times, as India has always had Hindu political leaders from dominant castes (Chopra, 2013; Thomas and Jaffrelot, 2012; Sabarwal and Hasan, 1991). The state- supported atrocities on the Muslims of Kashmir, the demolition of Babri Masjid and the killing of Muslims after the death of 59 Hindus in Godhra, Gujarat grasped the attention of National and International Human Rights bodies (Majid, 2017). Since 2014, Indian society has become highly insecure for Muslims. The U.S. Commission on International Religious Freedom mentions that in the recent times "religious freedom violations" had increased and "religious tolerance" had decreased in India. For the past five years, "issue-based violence" has increased, which includes violence on Muslims and Dalits for "possessing and/or transporting beef; violence for not expressing patriotism and refusing to say 'Bharat Mata Ki Jai' (Hail Mother India); violence following accusation that a Christian or Muslim had converted a Hindu to their faith; violence against Muslim men falling in love with Hindu women, which was termed 'Love Jihad', etc." (report by the Alliance for Justice and Accountability, 2017).

The violation of human rights of various actors in Hadiya's case should be seen within this context. Through Article 30, and Article 27 of ICCPR the Constitution of India declares that the minority communities have the rights to support themselves by establishing organisations for educational purposes.[7] Further, Article 26 of the Indian Constitution mentions that every religion has the right to manage religious affairs by establishing institutions for religious and charitable purposes.[8] Indian law allows associations in the name of religion because it is a multi-religious and multi-ethnic country. Every religious community has the right to teach and practice religious values as long as it is maintaining public order. The emphasis on these rights will be favourable for religious minority groups to practice their religious beliefs in a peaceful manner.

Hadiya chose to follow Islamic principles and was given support by other Muslims in the fraternity and the relevant organisations. But the supportive organisational backing bestowed upon her was seen as a threat by the court. It showed a similar anxiety towards Shafin Jahan by villainizing him just because he was a Muslim. While Article 15 of the Indian constitution prohibits discrimination based on religion, the court discriminated him throughout the trial by labelling him as a criminal without proper investigation and valid proof. It has become clear that the case was problematized and politicized in order to propagate Islamophobia within Indian society and therefore violation of human rights of a Muslim individual in this case should be seen as discrimination of the entire Indian Muslim community and therefore a violation of their right to dignity.

Conclusion

In the aforesaid it has becomes clear that in this particular case the court did not seem to need proof to spread "hatred" against the Indian Muslims but it just needed the "time" and "space" to spread Islamophobic tendencies within the consciousness of Indian society. In other words, by directing the case in illogical ways, the court ended up engaging with it for a longer time and in turn leading to its extensive engagement in the public space. The media played a vital role in discussing and debating Hadiya's case as a national issue. Some of the popular national media reiterated the court's tendencies that demeaned Hadiya's moral sense to eventually forge hatred against Indian Muslims. In its 27 November 2017 issue, *Times Now*, a popular national media channel, traced the history of Hadiya's case, and kept projecting Hadiya as a woman with low mental capacities. It presented her as "poor student" since high school days, as "ignorant" to the "Love Jihad" environment "prevalent in the country" and as an "arrogant woman who kept defending her act of embracing Islam." *India Today*, a media house, telecast news sessions and published news reports supporting the Kerala High Court's decisions. The news sessions and news articles were presenting this alleged "Love Jihad" as a reality. The media houses went on to call it a "national security issue". Yogi Adityanath, the Chief Minister of Uttar Pradesh, often noted as his party's firebrand to propagate Hindutva ideologies, condemned Kerala's Left-centric Kerala's state government (Communist Party of India

[7] Article 30: Right of minorities to establish and administer educational institutions.- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice (Constitution of India Article 27). In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. (ICCPR)

[8] Article 26: Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-5 (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion. (c) To own and acquire movable and immovable property; and (d) To administer such property in accordance with the law.

(Marxist)- CPI(M) Kerala) for not taking action against the "dangerous trend" of "Love Jihad". Shafin Jahan's lawyer in Supreme Court condemned *Jana Raksha Kerala Yatra* – a rally organized by the ruling party which happened on October 2017 in Malapuram district of Kerala – the district with a Muslim majority where the ruling party Chief Amit Shah and Yogi Adityanath took up Hadiya's case in their speech for their political propaganda. During the *Yatra,* Rajasekaran, Kerala State BJP President, accused Kerala's state government of turning a soft corner towards "anti-national forces" with regards to Hadiya's case. Therefore, the atmosphere that was created parallel to this long trial further fanned the already existing anti-Islam ideologies. Politicizing this case became a strategy for the ruling party's political agenda to enter the state of Kerala which has the strong presence of electorate of CPI (M).

Erni (2012) argues that a Cultural Studies approach is crucial to theorize "questions of rights, intersubjective claim-making, the performativity of the legal subject in judicial processes and most importantly to theorize the attainment of justice within a formalized institutional setting". Apart from centrally ruling the country, BJP is also in power in 12 Indian states, and Union Territories in total and is in coalitions with other parties in six states (out of 29 states and seven Union Territories). Since then, its emergence and after defeating the fifty years of governance by the Indian National Congress party, the *Hindutva* ideology has been mediated across Indian society. This is accompanied by the violation of the rights of any community not considered part of mainstream Hindu society (dalits, women, tribal communities, Christians and Muslims). The violation of human rights through the current political regime's cultural politics, and through the notions of religion, gender and caste, is becoming more severe day by day. These basic but crucial rights are often at stake in the name of religion and caste. In fact, taking up religion and caste becomes a convenient way to mobilize a society and getting away with inefficient governance. Politicization of Hadiya's case mainly in the name of religion goes hand in hand with the violation of minority rights and women's rights.

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Challenging the Constitutionality of Section 377A in Singapore: Towards a More Humanist Treatment of Homosexuality in Singapore Law

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Abstract

This paper examines the tensions between the law, politics and public opinion in Singapore via a landmark 2014 ruling that upheld the constitutionality of Section 377A of the Penal Code criminalising sex between men. It argues that the ruling dealt a serious blow to the human rights project for minority groups in Singapore due to complex socio-political biases towards homosexuals and a narrow legal logic that is overly deferential to the legislature. This "tyranny of the majority" not only reinforces longstanding prejudices against the Lesbian, Gay, Bisexual and Transgender (LGBT) community and deprives them of their rights, but potentially results in the graver consequence of compromising the integrity of the Singapore Constitution and the country's democratic ideals. The paper also illustrates how the court of public opinion, split between conservative and liberal pro-humanist camps, not only keeps this issue at an impasse through opposing representations of homosexuality but also reflects an important ideological juncture that Singapore currently finds itself at as it navigates the path to modernisation and liberalisation. It urges a humanistic re-imagination of the law where the formulation and instrumentalisation of laws are constantly renegotiated and reworked to become more responsive as historical contexts and social relations between various parties beyond the State and its apparatus evolve. It also ventures that decriminalising homosexuality presents Singapore with the opportunity to define a new Asian post-colonial modernity and that the concept of "rights capital" can introduce greater equity and dignity within society.

Keywords: decolonisation, decriminalising, formulation of law, homosexuality, human rights, liberalisation, rights capital

Introduction

Homosexuality is a fraught and divisive issue in Singapore, and Section 377A[1] of the Penal Code (1871) lies at the heart of this rift. With roots that can be traced back to Section 377 of the Indian Penal Code (1860), it is a statute left over from Singapore's colonial history. Although it has rarely been enforced since its inception in 1938, it criminalises sex between men even as other countries such as Hong Kong and Australia have adopted more progressive attitudes towards homosexuality by legalising it or granting more rights to Lesbian, Gay, Bisexual and Transgender (LGBT) individuals. Given that Singaporeans are increasingly exposed to global trends and liberal thought through higher levels of education and easy access to the Internet, it is counter-intuitive to many left-leaning citizens that basic rights continue to be denied to the LGBT community, with Section 377A the symbolic manifestation of this dissonance. This is exacerbated by other laws and regulations constraining the options that same-sex couples can explore in Singapore, with a ban on same-sex marriage and restrictions governing the ownership of public property and assisted reproduction (Rajeswari, 2017).

While attempts have been made over the years to challenge the constitutionality of Section 377A, they have all been dismissed. The first legal bid was made by Tan Eng Hong, who was charged for having oral sex with a man in a public toilet in 2010. Two years later, gay couple Lim Meng Suang and Kenneth Chee Mun-Leon pursued a similar challenge. Both cases were heard separately and dismissed by the High Court, which led the appellants to bring their appeals to the Apex Court in July 2014 (Ng, 2014). However, the Supreme Court upheld the legitimacy of Section 377A in the Singapore Constitution, ruling that the contested Articles 9 and 12, which state respectively that "no person shall be deprived of his life or personal liberty save in accordance with law and article" and "all persons are equal before the law and entitled to the equal protection of the law" (Constitution of the Republic of Singapore, 1965), were not in violation.

The following is an analysis of the above appeal, *Lim Meng Suang and Another v Attorney-General and Another Appeal and Another Matter*, and will critique the Supreme Court ruling based on its problematic justifications of the statute. It will examine the tensions between the law, politics and public opinion in Singapore via this case and the possibility of minority rights being granted in the long run based on this constellation of forces. It argues that the landmark 2014 ruling dealt a serious blow to the human rights project for minority groups in Singapore and that complex socio-political biases towards homosexuals and a narrow legal logic that is overly deferential to the legislature led to this outcome. Not only does the ruling reinforce longstanding prejudices against the LGBT community, but the denial of minority rights can lead to the graver consequence of compromising the integrity of the Singapore Constitution. It also illustrates how the court of public opinion, split between conservative and liberal pro-humanist camps, not only keeps this issue at an impasse but also reflects an important ideological juncture where Singapore currently finds itself as it navigates the path to modernisation and liberalisation.

[1] Penal Code. (1871). Section 377A ("Outrages on Decency") states that "any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."

An Issue of Words: Problems with the Ruling

At first glance, the appeal appeared incontrovertible. After all, both Articles 9 and 12 proclaim that all are entitled to the right to life, individual freedom and equal protection by the law. These are human rights congruent with those that have been enshrined and widely-ratified in international documents such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1976a) and the International Covenant on Economic, Social and Cultural Rights (1976b). Nonetheless, the Supreme Court ruling revealed a consistent adherence to narrow legal parameters and a reluctance to challenge the human rights violations that result from upholding Section 377A.

Firstly, the judges' assertions that "only legal arguments are relevant" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 32) and that the courts are "distinct and separate from the legislature" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 28) reflect the refusal to delve into the socio-political and ethical implications of the ruling. This is problematic because it reveals the judiciary's deferential approach to the legislature, which Jack Tsen-Ta Lee (2014) argues has less to do with bias than "a judicial attitude of giving political branches much leeway, assuming that action taken by the executive or legislation passed by Parliament is constitutional unless such acts are completely absurd or arbitrary" (p. 1). Even so, this makes little sense given that the interpretation of human rights is inherently political and that the legislature needs to be constantly challenged to ensure rights and dignity are granted to all as times change. Moreover, as rulings are broad expressions of constitutional law, the way that personal liberty and equality are interpreted will send strong signals about what the Constitution means and how it is applied. Thus, such limitations can compromise the dignity and liberty of the LGBT community.

Additionally, the judges' pursuit of this reasoning reflects the iron grip of the ruling People's Action Party (PAP), which has been in power since Singapore attained independence in 1965 and has a vested interest in retaining its dominance through the forceful enforcement of law. Echoing Antonio Gramsci's theory of cultural hegemony, the powerful manufacture 'spontaneous' mass 'consent' through cultural and ideological means that frame their worldview and the socio-economic structures that embody it as just, legitimate and universally beneficial even though these structures may only benefit themselves (Hoare & Nowell-Smith, 1971). In this case, the suppression of homosexuals via the PAP's use of the rule of law is legitimised by the consent of a conservative but vocal bourgeois majority concerned with the apparent threat that homosexuality poses to religious and family values.

Tied closely to the notion of preserving traditional values and cultural roots, the ideal of the nuclear family lies at the core of the critique of homosexuality. It also arose from Singapore's economic realities as a country with no natural resources and a need to assert and preserve its competitive edge. Post-Independence, citizens were encouraged to restrict their family size in order to pursue the goal of rapid economic development, and laws such as the Abortion Act of 1969 sanctioned abortion on non-medical grounds with approval by the Singapore Family Planning and Population Board (Smith, 1980). Such intervention led to Singaporeans idealising the nuclear family and growing accustomed to the State's paternalistic approach to family life. Stella Quah (1998) explains: "Singaporeans are inclined towards social discipline…[and] are likely to have a higher level of tolerance for government intervention in family matters" (p. 118). She also elaborates that, "in the face of serious dangers to the community's well-being, the collective consensus may determine that the common good takes precedence over individual preferences" (p. 121).

Arguably, this has cultivated a defensive mindset and the readiness to make strong appeals for government protection whenever majority values appear to be threatened by the LGBT community. Complicated by their persistent misrecognition and reification (Fraser, 2000) of homosexuals as deviant second-class citizens, the conservative majority's virulent devaluation of the LGBT community through the media and religious institutions includes defending the sanctity of family values and condemning pro-LGBT movements. One example is the "We. Wear. White" campaign initiated by Christian pastor Lawrence Khong to champion the "Natural Family" (LoveSingapore, 2016) and push back on the annual practice of donning pink clothing at the Pink Dot rally. Others include social media drives by anti-LGBT groups to boycott pro-LGBT brands (Teng, 2017). Vehemently opposed to granting same-sex couples the same legal parenting rights for fear that they would pass themselves off as single parents, they warn that the government will "lose the support of the majority of Singaporeans who are conservative" (u/[deleted], 2017) if it gives way to the LGBT community. However, the most overt expression of hostility towards the LGBT community came in the form of a FaceBook status update written by Bryan Lim: "I am a Singaporean citizen. I am a N[ational] S[ervice] man. I am a father. And I swore to protect my nation. Give me the opportunity to open fire. I would like to see these £@€$^*s die for their causes" (Zannia, 2016). Although Lim subsequently apologised for the comment and was fined for making it, his behaviour was symptomatic of the resistance shown towards the LGBT community in Singapore.

If representation is the production of meaning through language, which uses signs to reference objects, people and events in a way that might only be partially truthful if they are presented in the media from a particular ideological perspective (Hall et al, 2013), then these negative representations work by reinforcing the heteronormative identity of the conservative majority by fuelling the court of public opinion with the apparent deviance of homosexuality. The local LGBT community has fought back through events like Pink Dot, where crowds gather at Hong Lim Park annually to openly advocate and affirm the freedom to love. For the LGBT community, Pink Dot symbolises the need for shame to "be heard, to be borne by another, to find a witness [as it] seeks to be allowed the very conditions denied it in its rupture—recognition by another" (Biddle, 2010, p. 113). The organisers of Pink Dot have also implemented community outreach initiatives (Pink Dot SG, 2009b) through their website and set up a YouTube channel to raise awareness about LGBT issues in Singapore (Pink Dot SG, 2009a). In 2013, they roped in celebrated local singer and LGBT supporter Dick Lee, to challenge the ideal of the nuclear family by producing a music video constructed with vignettes about LGBT individuals. More significantly, it features Lee singing the beloved national song he composed, "Home" (Pink Dot SG, 2013), but the music video failed to make ripples despite its compelling message of inclusivity and unity. Instead, the court of public opinion and the legislature's continued reluctance to grant more rights to the homosexuals have proven more successful in dominating public discourse about the LGBT community. Following Prime Minister Lee Hsien Loong's conservative stance in 2007 when he maintained "…there are restraints and we do not approve of [homosexuals] actively promoting their lifestyles to others or setting the tone for mainstream society" ("Full parliamentary speech," 2007), the LGBT position has been further undermined when copies of *And Tango Makes Three*, a children's book that features a male penguin couple, were relocated to the adults book section in the national library, following complaints that it contained homosexual themes (Tan, 2014). More recently, pro-LGBT companies such as FaceBook, Apple and Visa were prohibited from sponsoring Pink Dot as this was construed as interference (Yuen, 2016).

All these confirm the "tyranny of the majority" that the appellants asserted, citing Section 377A as a violation of the minority's constitutional rights and the right to equality under Article 12(1)

(*Lim Meng Suang and Another v Attorney-General,* 2014, p. 83). It is also plausible that these biased perceptions have resulted in the judiciary's rigid adherence to narrow definitions of the Articles. If so, this puts the impartiality of the judiciary in doubt and also calls the PAP's right to rule into question. As Andrew Altman and Christopher Heath Wellman argue, "…rights that are connected in the appropriate way to a decent human life are the rights that form the measure of political legitimacy" (cited in Zoana, 2011, p. 198). David Luban also emphasises the importance of taking a humanist approach in exercising law, asserting that "hardly anything lawyers might do assaults human dignity more drastically than providing legal cover for torture and degradation" (cited in Zoana, 2011, p. 197). By suppressing the appellants' narratives and burying them under the impersonal needs of the legal system, the law has failed in its fundamental duty to preserve human dignity. It is thus unsatisfactory that the judges claim that "the courts had no mandate whatsoever to create or amend laws in a manner which permitted recourse to extra-legal factors as well as considerations and could not amend or modify statutes based on its own personal preference or fiat" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 28), effectively reducing its function to an executive extension of the legislature.

Next, the judges presumed the constitutionality of Section 377A by employing the "reasonable classification" test. Under the test, a differentiating statute is constitutional if the classification is based on an "intelligible differentia", which means a distinguishing feature that is discernible, if those distinguishing features bear a rational relationship to the objective of the law (Low, 2019). While they maintained that "the classification prescribed by Section 377A was based on an intelligible differentia because there was little difficulty in determining who fell within and without the provision" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 28), their narrow interpretation of the Articles reflects the refusal to question the clear limitations of the statute.

The ruling rests primarily on two key contentions made in relation to the Articles in question. Firstly, while Lim and Chee's defense lawyer Deborah Barker argued that Article 9 should include "a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being" (*Lim Meng Suang and Another v Attorney-General*, 2014*,* p. 43), the judges stated that the statute does not violate the right to life and liberty – as stipulated in Article 9 – "as this referred only to the personal liberty of a person from unlawful incarceration or detention" (*Lim Meng Suang and Another v Attorney-General*, 2014*,* p. 43) and not the right of privacy and personal autonomy. They further asserted that the framers of Article 21 [of] the Indian Constitution – upon which Article 9 of the Singapore Constitution was based – only sought as its particular focus to protect India's citizenry against unlawful detention and "consciously rejected the wider formulation of 'without due process of law' in the Fifth and Fourteenth Amendments to the US Constitution, and did not intend to impute an expansive meaning into the phrase 'life or personal liberty'" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 27). In other words, both the Indian and Singaporean Constitutions are severely limited in ensuring basic personal freedoms. Secondly, the judges also maintained that the guarantee of equal protection under the law as enshrined in Article 12(2) touched only on issues relating to religion, race, place of birth and descent, and not gender, sex and sexual orientation, thereby rendering the arguments that homosexuals are included in its provisions void. In justifying this, the judges compared Article 12(2) with constitutional provisions by other countries such as Malaysia, India, Canada and South Africa that "expressly prohibit discrimination on the grounds of 'sex', 'sexual orientation' or 'gender'" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 62) in order to show that the protection of any specific attribute is only valid if it is already included

in the respective statutes of each country, whereas provisions for LGBT individuals are not included in the Singapore Constitution and therefore it cannot be utilised to defend LGBT rights.

Furthermore, while Barker pointed out that Section 377A was intended to suppress the specific "problem" of male prostitution, not penetrative sex, the judges declared otherwise, claiming that "…the available objective evidence demonstrated that Section 377A was intended to be of general application and was not intended to be merely confined only or mainly to the specific problem of male prostitution" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 28). This pronouncement of male homosexual sex as indecent and punishable shames and silences the homosexual subject, who is "reduced to an object only for the other's jurisdiction. Sentenced without trial, shame judges, ridicules, terrorises whatever pretense we might hold of being autonomous, successful, self-determining subjects" (Biddle, 2010, p. 113). Even more damaging is how homosexuals are compelled to invalidate their fundamental personhood, and in this case, their very bodies, as shame is "experienced less as about what the self has done but what the self *is*" (Biddle, 2010, p. 115). Thus, in upholding 377A, shame not only works alongside the law as a torturous disciplining practice that forcibly keeps the LGBT community subordinate, it is simultaneously legitimised and institutionalised.

The ruling also reduced Article 12 to a matter of contextual origin, with the judges maintaining that it was formulated due to Singapore's "multi-racial, multi-cultural and multi-religious composition" to form an "impregnable shield against racial communalism and religious bigotry" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 59). Certainly, this is understandable given Singapore's diverse multi-cultural society, where the traumatic memory of the 1964 race riots was pivotal in formulating policies centred on multi-racialism. Nonetheless, to base the ruling on what the Article does not provide for – specifically one's sexual orientation does not recognise that it is lacking in the provision of equal rights and reflects the argument – made by Ben Golder (1998) that laws are inherently incomplete. Taking his cue from Michel Foucault's work and his position that "power and its application [are] subjected to constant change and alteration" (p. 751), Golder argues that the formulation and instrumentalisation of laws need to be constantly renegotiated to become more responsive as historical contexts and the social relations between the various parties beyond the State and its apparatus evolve, lest it falls into a "phase of juridical regression" characterised by "the growing importance assumed by the action of the norm, at the expense of the juridical system of the law" (p. 759). Nonetheless, Golder's re-imagining of law is precisely what was lacking in this instance, where the interpretation of legal language as positivistic and determinate and a reluctance to explore the extra-legal implications of the case invalidated the law's self-rejuvenating capacity.

Furthermore, the judges' contention that homosexuality is not a natural and immutable attribute *(Lim Meng Suang and Another v Attorney-General*, 2014, p. 38) added a layer of complexity that effectively denied the fundamental humanity of the LGBT community. Indeed, while Tan's defense lawyer, M. Ravi, argued that the statute was "vague, arbitrary and absurd" in the way it criminalised a minority of citizens based on an aspect of their identity that was "either unchangeable or suppressible only at a great personal cost" (*Lim Meng Suang and Another v Attorney-General*, 2014, p. 45), the judges' defense ultimately sidestepped the egregious problem of exclusion. Instead, they contended that "Section 377A prohibited, at its core, sexual acts between males. Section 377A was not absurd: in so far as the supposed immutability of a person's sexual orientation was concerned, the conflicting scientific views on this issue suggested that there was, at present, no definitive conclusion" (*Lim Meng Suang and Another*

v Attorney-General, 2014, p. 27). This line of reasoning renders the LGBT community invisible and dehumanised in Singapore's society.

The lack of humanistic consideration in the ruling is clear. Indeed, until one is regarded as human in the eyes of the law, one is not entitled to legal protection. As John Erni (2019) asserts, "no human rights theory can afford to ignore the question of 'the human,' and the constellation of discursive constructions around it, including that of identity, subjectivity, the legal personality, individuality versus collectivity, multiplicity, 'the inhuman'" (pp. 23–24). Yet, these different constructions were disregarded in this case, the humans in question judged in a manner completely divorced from the socio-political contexts inextricably associated with these constructions. In doing so, the ruling ignores the increasing global concern for safeguarding LGBT rights, reflected in the creation and ratification of international declarations such as The Yogyakarta Principles (2007) and the United Nations Resolution on Human Rights, Sexual Orientation, and Gender Identity (2014), which were drafted to protect the rights of the LGBT community. The former notably prioritises the "universal enjoyment of human rights," "the rights to equality and non-discrimination," "the right to recognition before the law" and "the right to privacy" among its first six declarations (pp. 10–14). The latter, fashioned in similar language to the Universal Declaration of Human Rights (1948), "express[es] grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity," and "welcome[s] positive developments at the international, regional and national levels in the fight against violence and discrimination based on sexual orientation and gender identity" (p. 1). Of course, Singapore is not a party to either of these resolutions, but that only reveals that, deliberately or otherwise, it is out of step with international developments in relation to LGBT issues. This is somewhat ironic, given that anti-discrimination based on religion, race, descent or place of birth is enshrined in Article 12 – the very statute that is in question in this particular case – , is a cornerstone of the Singapore Constitution and a point of pride in a national narrative that promotes high inclusivity and harmony. Instead, it reinforces the vested interest the ruling party has in prioritising domestic stability and preserving its political power rather than seeking full alignment with international sentiments that have a strong humanistic rationale.

Repercussions Beyond the Case

Aside from the ruling's problematic reasoning, larger concerns such as the integrity of the Constitution of Singapore and the political legitimacy of the PAP are at stake. Leaving aside the debatable violations of the Constitution in this case, the fact that Section 377A has not been actively enforced (Rakin, 2018) merely uncovers more uncomfortable questions about the legislature and the much-vaunted rule of law in Singapore.

The ruling also reveals a hesitance to relinquish an archaic colonial statute that has been abolished in many countries and carries deeper implications about Singapore's reluctance to divest itself of colonial ties. According to Rosemary J. Coombe (1998), "law develops…as constitutive of civilisation and thus of Culture as the preserve of European nation-states" (p. 23). This notion of development has been retained by Singapore, where the governance is based on the Westminster Model and the legal framework derived from the English system (Ministry of Law, n.d.). However, given Singapore's early attempts to break away from colonial rule after World War II and the government's progressive and prescient move to ensure equality amongst all religious and racial groups post-Independence, the reluctance to abolish or even extensively question a Western colonial relic leaves Singapore in a nebulous relationship with

its historical legacy instead of having it lead the charge in defining a new Asian, post-colonial modernity.

It is also worth noting that despite anxieties about the West and its apparent influence on conservative "Asian values" in Singapore, the ideal of the nuclear family is a colonial concept, a site that preserves and institutionalises Western patriarchal notions of gender and kinship relations while signifying modernity, civilisation and progress within Eurocentric knowledge construction (Blaut, 1993). Indeed, with the rise of various family compositions that include single-person, childless, single-parent, matrilineal and blended households (Lee, 2018), it is time to reconsider the relevance of the nuclear family.

Furthermore, adopting decolonisation as a progressive step in Singapore is underscored by Coombe's argument that the law is the "ideal site and resource for counterhegemonic struggles just as it is fundamental to the hegemonic process" (1998, p. 35). Indeed, by seriously questioning the validity of inherited colonial statutes and structures while also taking into consideration the current social climate and evolving cultural values, Coombe argues that "law provides means and forums both for legitimating and contesting dominant meanings and the social hierarchies they support" (1998, p. 35). Most importantly, it allows for a more inclusive legal system that ensures fairness and dignity for all.

Conclusion: Towards a More Humanistic Approach

The tension over Section 377A continues today, and debate over its repeal was re-ignited by India's decriminalisation of homosexuality, reflecting a move towards liberalisation and decolonisation. In September 2018, a five-judge bench decriminalised homosexuality, ruling that the 160-year-old law banning sex "against the order of nature" under Section 377 (Safi, 2018) in the Indian penal code amounted to discrimination on the basis of sexual orientation and was unconstitutional. In words that closely resembled the defense mounted by Barker and Ravi, Indian Chief Justice Dipak Misra declared the statute to be "irrational, indefensible and manifestly arbitrary" (Safi, 2018), and defense attorney Anand Grover added that "the future is for everybody to be included, to realise their fundamental rights of equality, privacy, dignity et cetera" (Safi, 2018).

This watershed development was all the more remarkable given that India's bid to legalise homosexuality was arduous. Cases filed in 1994 and 2001 to legalise homosexuality in India bounced back and forth for years between courts reluctant to rule on the issue before homosexuality was finally decriminalised. That a society and fellow ex-colony that was so rigidly opposed to homosexuality was able to arrive at this point led to rival online petitions being set up in Singapore to lobby for the retention or repealing of the statute, and familiar arguments pitting personal freedom against heteronormative family and religious values re-surfaced. While the more liberal "Ready4Repeal" camp urged for tolerance towards the LGBT community by highlighting that it is time for a more "inclusive Singapore" (Ready4Repeal, 2018) on their Facebook page, a petition posted on Change.org called "Please Keep Penal Code 377A in Singapore" reiterated that Singapore is "a conservative society with traditional family values" (P., 2018). Catholic Archbishop William Goh also weighed in, stating that he was in favour of decriminalising homosexuality only if no further demands are made "to legalise same-sex unions, same-sex adoption of babies, surrogacy, or to criminalise those who do not support the homosexual lifestyle" (Tan, 2018), which nonetheless implies that homosexuality is shameful and subordinate. While proponents of repeal were hopeful that India's similar

trajectory to Singapore would provide momentum for the repeal, the discussions have since died down, reflecting that the prospect of repealing Section 377A remains slim.

Since protracted debates in the public sphere and legal appeals have gone nowhere and the judiciary remains unwilling to question the legislature, perhaps the solution lies in presenting the decriminalising of homosexuality as a pragmatic option for the country's continued development. According to Erni (2009), the fact that neo-liberalism tends to supersede the impulse towards humanitarian endeavours across the world calls for the re-imagination of international politics via the application of market rationality to humanitarian politics and social action. By using human rights as a tool to measure political legitimacy, states focus on accruing human rights capital, or "rights assets" (p. 425) as a way to maintain international standing, equal friendly relations among states as well as to advance national security, political interests and sovereign power. Erni argues that in a decentred world where absolute sovereignty has increasingly given way to networked sovereignty, "the operational logic of the new sovereignty is derived from 'the active role of the [new sovereignty] regime in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime'" (p. 422). Therefore, by presenting their human rights concerns as if they were properties that can be traded among partners in the network, Erni asserts that "a new human rights imaginary whereby economic capital and 'rights capital' forms a trade nexus forms, and that what mediates this trading are various practices of collective learning, technical knowledge transfer and rule-making" (p. 426). In other words, the decision to comply with human rights regulations, how much effort goes into the compliance, and what level of human rights "output" to produce are forms of state behaviour that have bearing on their relative sovereign power. It is hoped that "even though human rights abuses cannot be totally eliminated, through inter-state negotiations they will someday be reduced to what might be deemed a 'morally efficient' level" (p. 427).

This could be a compelling proposition for Singapore, where the perpetual navigation of global transformations to stay relevant and survive is a perennial preoccupation. Thus far, Singapore is integrated into this system of networked sovereignty by maintaining geopolitical and economic alliances with various countries such as the United States, China, Japan, India and Australia via key partnerships to advance common interests and mutual benefits in its foreign policy strategies. Currently, Singapore has 22 Free Trade Agreements that have been implemented with 33 trading partners, and it signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership with 10 other countries in 2018 (Siau, 2018). It also shares its developmental and technical expertise with other countries in return for political and economic clout on the international stage. One prominent example is the exporting of Singapore's urban planning strategy to cities such as Kigali and Tianjin in a combination of public sector diplomacy with private sector consultancy, a catalytic process of state capitalism that does not only create economic space for Singapore's public agencies but also brings a host of benefits such as special investment conditions, political endorsements from local governments and a host of operational benefits while also benefitting foreign firms (Chye, 2018).

However, with the paradigmatic shift towards an economic re-articulation of human rights globally, the need to secure Singapore's competitive edge in the international arena could pave the way to a more humanistic approach in law and governance at the same time. Indeed, while Singapore has not budged from its position on Section 377A and issues relating to LGBT, it has been an active player in the international climate change negotiations. It ratified the United

Nations Framework Convention on Climate Change to address climate change alongside other governments in light of different national circumstances in 1997 and acceded to the Kyoto Protocol in 2006. Singapore further ratified the Doha Amendment to the Kyoto Protocol in 2014 and continues to work with other parties to advance the international climate change agenda (National Climate Change Secretariat, n.d.). Singapore has also signed onto three international conventions – the International Convention on Elimination of All Forms of Racial Discrimination, the United Nations Trafficking In Persons Protocol, and the Convention on the Rights of Persons with Disabilities – in recent years (Yong, 2015), indicating the country's desire to be in alignment with global values and of "brokering" an improved international standing through various human rights and humanitarian projects. Of course, these protocols relate to issues with relatively low stakes locally, while Singapore's heavy restrictions on freedom of expression and use of capital punishment persist. For instance, the prosecution of civil rights activist Jolovan Wham, who organised an event that featured speakers such as Hong Kong pro-democracy activist Joshua Wong in 2017 without a permit, amounted to a breach under the Public Order Act. The treatment of Wham attracted the attention of local as well as regional and international groups, including European Union parliamentarians, Malaysian civil society organisations, Human Rights Watch and Amnesty International, who deemed Wham's charges "disproportionate and unjust" (Wong, 2019). Nevertheless, the Singapore government was uncompromising in its position to strongly enforce what it viewed as a threat to public order and harmony. Moreover, it has also consistently maintained that stability, security and social harmony are key prerequisites for economic growth, which enables it to care for and protect Singaporeans (Yong, 2015). However, with greater international pressure to take action on pressing global issues like climate change as well as a more progressive populace vocal about change, there is a growing possibility that Singapore will eventually adopt a more humanistic approach in law and governance as it is politically logical and expedient.

Furthermore, there is a need to take an active approach towards decolonisation by vigorously questioning and re-examining the institutions that have been inherited from the West, which include the government, law and family. However, even as these decolonial strategies are enacted, care needs to be taken in the approach to human rights lest one falls back on old models of Western universalism again. Here, the argument that Boaventura de Sousa Santos (2007) makes for establishing ur-rights is helpful in considering the way forward to a more progressive politics of human rights, where a post-imperial re-construction of human rights centred on undoing the massive effects of constitutive suppression supports the emancipatory potential of human rights politics in the double context of competing globalisations as well as cultural fragmentation and identity politics. Defined by de Sousa Santos as rights that were suppressed by the Western colonialist and capitalist modernity "in order to build, upon their ruins, the monumental cathedral of fundamental human rights" (p. 29), they are rights that exist only in the process of being negated and as negations," (p. 29). He argues that "to vindicate them is to open the time-space for a post-colonial and post-imperial conception of human rights" (p. 29). In this case, disentangling oneself from a deeply-entrenched colonial legacy and mindset allows for the examination of notions of family beyond imposed stereotypes and for an understanding of what it means to truly exhibit tolerance, inclusivity, and common decency to those who share a common space despite having vastly different worldviews and values.

Ultimately, a legitimate state takes measures to protect its citizens' human rights, and this starts with re-configuring the law. This entails an accurate and unambivalent recognition of LGBT individuals' inherent humanity and their legal status in society, and only with this fundamental

understanding in place will Singapore be on the road to becoming a modern State that honours all.

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What Constitutes a "Due" Burden on Women's Access to Abortion: A Cultural Discourse Analysis of *Whole Woman's Health v. Hellerstedt*

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Abstract

We can find numerous international treaties and legal documents that support women's choice for safe and legal abortion. However, there are constant different, incompatible and even opposing discourses around abortion globally. This paper examines a 2016 legal case *(Whole Women's Health v. Hellerstedt)* to explore how anti-abortion discourse in the U.S. has found its way into the legal text. I begin by addressing women's right to abortion as a human rights issue and then I investigate how U.S. abortion law entangles with social and cultural reality in the country; I then offer a close reading of the Supreme Court's judgement and discuss the implications of such a legal text. Public opinions on reproductive rights in the U.S. are closely related to the dynamics between religious culture and feminist activism, and political manipulation leads to divided opinions over the issue. A close reading of the case shows that the court's constant emphasis on "right to privacy" sets the stage for the current fragility of the reproductive rights in the U.S. cultural and political context. First, it opens a gate for anti-abortion groups to burden women with moral responsibility; second, under TRAP laws it becomes difficult for the abortion providers to justify their stand. I further argue that the undue burden test, which was central to winning this case, is not a strong test for future lawsuits over abortion rights.

Keywords: abortion law, human right, law and culture, reproductive right, undue burden

Introduction

According to the Center for Reproductive Rights (2011), "International legal support for a woman's right to safe abortion are found in numerous international treaties and other instruments" (p.1). However, there are constant different, incompatible, and even opposing discourses around abortion globally (Pierson & Bloomer 2017; Stettner, Ackerman, Burnett, & Hay, 2017; Macleod, Sigcau, & Luwaca, 2011; Stephens, Jordens, Kerridge, & Ankeny, 2010). Anti-abortion discourse in the United States has found its way into the legal text (Ferree et al., 2002). Since abortion became legalized in 1973 in the U.S., over a thousand state abortion restrictions have been enacted, with more than one third enacted since 2010 (Guttmacher, 2018). Many of those restrictions are "TRAP" (Targeted Regulations of Abortion Provisions) laws targeted at the abortion providers by imposing on them burdensome and unnecessary requirements, in order to block women from having access to abortion (Center for Reproductive Rights, 2015). While upholding women's right to choose, the U.S. legal system, with its particular approach toward abortion, has invited more and more restrictions on abortion providers in the last few decades, resulting in substantial obstacles for women seeking abortion services. Such an unfavorable legal environment for abortion embodies the deep cultural divide and reflects political manipulation of the issue.

In 2013, the Texas legislator enacted House Bill 2 (H.B.2), a bill containing several unfavorable requirements for the abortion clinics in the state: (1) "the admitting-privileges requirement", requiring a doctor who performs abortion surgeries to "have admitting-privileges at a hospital that is located no more than 30 miles from the location at which the abortion is performed or induced" (H.B.2, 2013, p. 2); and (2) "the surgical-center requirement", which requires that "the minimum standards for an abortion facility must be equivalent to the minimum standards for ambulatory surgical centers" (p. 12). Such provisions significantly affect women's access to abortion within Texas. Endeavors to prevent the provisions from taking effect failed at the state level. After the admitting privileges requirement took effect in November 2013, the number of abortion clinics in the state dropped from 42 to 19. After that, a group of abortion providers (*Whole Women's Health etc.*) sued the Texas state in an attempt to shut down the provisions, and finally this case made it to the U.S. Supreme Court. In 2016, the Supreme Court held 5 to 3 in *Whole Woman's Health v. Hellerstedt* (2016) that the above-mentioned provisions of H.B.2 were unconstitutional since they burdened women's access to abortions.

Whole Women's Health v. Hellerstedt (*Hellerstedt*) is allegedly the most important U.S. Supreme Court decision on abortion since *Planned Parenthood of Pennsylvania v. Casey* (1992) – the 1992 landmark abortion case that crafted the "undue burden" standard (Robinson, 2016). *Hellerstedt* reasserts women's right to abortion but at the same time reflects the hostile social and political environment that women are facing in accessing safe abortions. I want to use this case to examine how the legal efforts against abortion in the public sphere are mixed with discourses that intrude upon women's autonomous private choices, and the implications behind such reality. In the first section, I begin by addressing the human rights at stake here, and offer a common ground for the discussion on this case; subsequently, I try to contextualize this case in the socio-political environment in the U.S. throughout recent history to better understand how abortion discourse is formed in U.S. legal texts; next, I turn to the social and cultural perception of abortion in the U.S., and the socio-cultural reality faced by women seeking abortion there; in the last section, I offer a close reading of the Supreme Court's judgments and the abortion discourse created by similar legal texts. Overall, I want to offer a reading of *Hellerstedt* as a "victorious" case that yet exposes the disputes and uncertainty of American women's right to abortion in the current social and political context.

Abortion as Human Right

The case here appears to be about the economic rights of some medical clinics, since the immediate consequence is the closure of the abortion clinics. However, in reality, what lies behind it is women's right to abortion in general. By forcing abortion facilities to close down, H.B.2 significantly blocks women's access to safe and legal abortion. Various reasons push a woman to seek abortion: financial or social hardship, pregnancy that arises from rape or incest, malformation or disease condition of the fetus, her own unhealthy mental state, or risk of maternity death, along with many other personal reasons. When affordable abortion is legally unavailable and requisite services are not provided, women may resort to unsafe abortions to terminate unwanted pregnancy in illegal clinics or through self-inducing abortions. Such procedures can lead to life-threatening complications and cause serious social issues. The right to abortion is closely related to many fundamental human rights of women, such as right to life, right to health, right to gender equality and non-discrimination. Legal restrictions on women's abortion right or reproductive right leave other rights at risk, too. Therefore, it is necessary and legitimate for national institutions to protect a woman's right to safe and legal abortion.

Overall, women's right to safe and legal abortion is becoming recognized as a fundamental human right in different parts of the world, mostly for health concerns. Human rights treaties constantly emphasize the link between maternal death and unsafe abortions (CESCR, 2012; CEDAW, 2014). Article 14(2)(c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) prompts State Parties to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." The Protocol explicitly states women's right to abortion.

However, women's right to abortion is not just a health issue; it also relates to women's right to gender equality and non-discrimination. The Human Rights Committee (2000) further linked women's reproductive rights to equality of rights between men and women. CEDAW (2014) also emphasizes that "it is discriminatory for a State Party to refuse to provide legally for the performance of certain reproductive health services for women". HRC's decision in K.L. v. Peru (2003) is a formal application of human rights treaties to a woman's reproductive right. The Committee finds that in "compelling a minor, who was pregnant with an anencephalic fetus to carry the pregnancy to term", Peru had violated her rights under "Article 2 (right to an effective remedy), 7 (right to be free from cruel, inhuman, or degrading treatment), 17 (right to privacy) and 24 (right to special protection as a minor) of ICCPR".

Socio-legal Context of the Case

Internationally, current laws pertaining to abortion are very diverse due to various religious, moral, and cultural factors. With the help of human rights advocacy, in recent history we have seen progress in the enforcement of abortion right. According to the Center for Reproductive Rights (2019), by 2019, abortion is permitted in at least some cases across 133 countries. Among them, 59 permit abortion to protect women's life and health; 13 permit abortion for socio-economic reasons; and 61 (primarily located in the Global North with the U.S. included) have the most liberal abortion laws. In Chile, where abortion used to be criminalized without exception, legislation permitting abortion under limited circumstances was approved in 2017 in respect to the human rights prodding of the United Nations (UN), CESCR, CEDAW and United Nations Human Rights Council (UNHRC). However, despite the global trend of

liberalizing abortion laws, the world still constantly witnesses a receding trend as well. Europe, which used to have the most liberal abortion laws, is now seeing a countermovement (Zampas & Gher, 2008).

In the United States, the current status of women's abortion right is shaped by two historical conjunctures. The first one is the U.S. Supreme Court's decision on *Roe v. Wade* in 1973, which affirmed the constitutionality of abortions conducted within the first two trimesters of pregnancy based on women's right to privacy. Before *Roe*, abortion was mostly banned across the states, keeping it an unspeakable discourse between doctors and countless women who would not talk about it in public (Hendel 2012). The illegal status of abortion jeopardized women's life and put them in endless despair. *Roe's* "triumph" of abortion right happened largely because of a series of abortion reform movements from 1960s to 1970s. The newly emerging feminist grassroots groups of the time, as well as the early Democratic involvement in the abortion rights movement (Hendel, 2012) constitute the context for legalization of abortion in the U.S. However, since that court decision was made, abortion has become more and more politicized in the United States, leading to a clamor for a reversing of the case.

The second historical conjuncture is in the 1990s, when the U.S. abortion law started to target abortion providers with the help of the undue burden test brought in by two Supreme Court cases: *Webster v. Reproductive Health Services* (1989) and *Casey* (1992). *Webster* first introduced the undue burden test into the legal discourse saying that restrictions on abortion should not create "an undue burden" on a pregnant woman. *Casey* further confirmed this test by weighing on whether the state interest is creating an undue burden on women's right to abortion.

The test brought an ambiguous standard into the abortion discourse, implying that there are some restrictions "due" to be placed on women if the state has a larger interest to pursue. Hence, since these two cases, state legislators in the U.S. are constantly challenging the boundary of an "undue burden", adopting more and more restrictive abortion laws targeted at women's abortion access. This reflects the hostile environment for abortion in the present-day U.S.

In the following, *Hellerstedt* is discussed in the above context. It has been referred to as the most significant case on abortion rights before the Supreme Court since *Casey*. Like the former cases, the court reemphasized women's right to abortion based on the "right to privacy". Once again, the Court adopted the "undue burden test", and reinterpreted it as a benefits-burden balancing test – asking whether the burdens created for women can be justified by the benefits the law confers. Some believe that *Hellerstedt* brings doctrinal clarity to the undue burden analysis (e.g. Robinson, 2016). By drawing abundant evidence from social scientific research, the court ruled that state benefits through such restrictions cannot be balanced with the burden placed on women; therefore, it nullified the state law. It seems that at this point, women's right to abortion is fully recognized in the U.S. legal system. However, the playing field has also shifted to the accessibility and availability of abortion care.

Cultural Disputes over Life and Choice

Because the idea of abortion touches a fundamental cultural issue concerning the starting point of human life (whether it begins at conception, birth, or at some point in between), it has been highly contentious in the United States both culturally and politically. *Roe* ruled that abortion during the third trimester of pregnancy is illegal unless the woman's health is at risk, due to "the state's interest in protecting potential life". By calling the late-term fetus "potential life",

the Court is conveying a positive attitude toward seeing the fetus as a human person. This reveals the core cultural dispute on abortion right: whether to consider the unborn fetus a human being or not? Calling the unborn fetus "potential life" implies that women who go through abortion and the abortion practitioners who help them are "taking away" potential life. In the U.S., anti-abortion groups usually see themselves as "pro-life", arguing that a human fetus is a human person with a right to live. In the meantime, abortion rights groups describe themselves as "pro-choice", supporting women's right to choose whether or not to have a baby. While upholding women's right to abortion in general, the terminology that *Casey* adopted shows the changing position of the Court regarding abortion.

The other terms the Court has been using include "viable fetus", and "partial-birth abortion". While the former is a relatively neutral medical term, the latter is an intentionally chosen word to stress that the abortion procedure is almost like "giving birth". "Partial-birth abortion" refers to intact dilation and extraction; it is a term coined by pro-life advocates (Hoffer & Hull, 2001). The surgery is outlawed in most cases in the U.S. by the Partial-Birth Abortion Ban Act (2007). Pro-choice activists argue that the term is consciously chosen by the pro-life lawmakers while it is not even an accepted medical term.

Undoubtedly, religious traditions are one of the most important cultural factors that affects people's attitude toward abortion globally. Therefore, it is not surprising to find that many of the religions in the United States are unfavorably inclined toward abortion rights. Generally, the more fundamentalist and evangelical religious traditions are usually highly opposed to abortions, and increasingly inclined to call on the state to enforce their moral code of seeing the fetus as a human life (Ferree, Gamson, Gerhards, & Rucht, 2002). Scholars find that the Roman Catholic and conservative Protestant churches have significant influence on state abortion statutes and public opinion toward abortion (O'Connor & Berkman, 1995). In Texas where H.B.2 was enacted, 77% of the population are Christians and only 4% of the population have non-Christian faiths (Pew Research Center, 2019). The conservative religious groups constantly compete with pro-choice citizen groups to influence abortion policies. Recent research has shown that these conservative religious traditions are not only opposed to elective abortions, but even more opposed to traumatic abortions (Hoffmann & Johnson, 2005). Under the pressure of current human rights discourse on women, the pro-life religious speakers are now mainly articulating their voices through organizations like the National Right to Life committees and other grassroots anti-abortion groups that are not affiliated to any religious groups. They have also learned to circle around the discourse by relating abortion to women's conscience, and by arousing shame and guilt among those who went through abortion surgeries.

However, religious groups do not share a consensus on seeing a fetus as a person (Ferree et al., 2002). Even within one religious tradition, people's opinions over abortion are diverse. Pro-choice individuals may emphasize certain aspects of their religion that advocate tolerance of different faith, and equality of men and women (2002).

At the time when *Roe* was ruled, abortion was more of a medical and a social problem. But in the last few decades, the abortion issue is being highly politicized in the United States because of its strong affiliation with religious beliefs makes it easy to be utilized by politicians to win public support. The Republican and Democratic Parties now hold polarizing positions on the abortion issue. Generally, pro-life religious groups have become more attached to the Republican Party (Wilcox, 1995), while the Democratic Party has endorsed legal abortions and women's right to choose (Goggin, 1993; Stimson, 2004).

Such polarized positions toward abortion have at times turned from public cultural debates to extreme violence. According to the National Abortion Federation (2017), there were 8812 incidents of violence against abortion providers from 1977 to 2017. The attacks include arson and bomb attacks of abortion clinics, and even the murder of abortion providers. Research has shown that "traditional fundamentalist religious culture is associated with such high rates of crimes" (Freilich & Pridemore, 2007, p.326). The protesters gather regularly outside abortion clinics abusing doctors and calling them "baby killers" and "murderers". Those politically-motivated crimes cloud abortion providers and women seeking abortion across the nation. In Jason Reitman's *Juno* (2007), one of the most famous American films on abortion, Juno's final decision to keep the baby is indeed influenced by the protests of an anti-abortion activist outside the abortion clinic.

Abortions are often underrepresented or misrepresented in American films and television. The portrayals of the women's final choice on abortion, abortion-related complications, and the mortality rate in films are much more frequent than in reality (Conti & Cahill, 2017). Besides, the media is concentrating on pre-Roe plotlines rather than post-Roe plotlines, as if the issue of abortion were just a problem of the past (Sisson & Kimport, 2014). Such exaggerated patterns of outcome and portrayals may lead to further social myths around abortions. In the films, the characters who obtained abortions are often white, young, and rich, while in reality, Latinas are roughly 2.5 times as likely and black women are more than 3 times as likely as white women to have an abortion (National Abortion Federation, 2003). Unlike in real-life, where reasons for abortion are usually financial hardship or other difficulties, the media portrayals centered more on the immaturity of the heroine and future opportunities that the abortion could provide.

A Shifted Playing Field: Case Analysis

In the documentary film *Reversing Roe* (Stern & Sundberg, 2018), the major argument that feminists and pro-choicers are repeatedly making is still: "abortion is a woman's free choice to make." But a close reading of the legal text reveals how risky it is to defend women's right to abortion solely by emphasizing women's free choice. The truth is, pro-life lawmakers are no longer confronting this fundamental human right in legal language, but secretly moving away to a new playing field.

Is "Right to Privacy" Enough?

In *Hellerstedt*, Justice Thomas expressed his dissenting opinion: "The court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortion" (Whole Woman's Health v. Hellerstedt, 2016, p. 2320). He argues that "the plaintiffs cannot file suits to vindicate the constitutional rights of others" (p. 2321). His dissenting opinion reveals the awkward jurisprudential status of this case and of the U.S. abortion law, that while the rights at stake are women's rights, the direct impact is on the abortion providers.

How did the abortion provider become plaintiffs representing women? This can be explained from two perspectives. On the one hand, the accessibility of abortion providers is essential to women's access toward safe abortion, women's health, and their rights to health and health care. According to the World Health Organization (2019), it is estimated that more than 70,000 women globally die of unsafe abortions every year, and 5.3 million women suffer temporary or permanent disability due to unsafe abortion. Women's right to abortion means little if they

cannot access safe abortion health care. On the other hand, this is the result of active pro-choice movements. Because individual women and small abortion clinics can hardly make their voices heard, feminist and human rights organizations are trying to use legal tools to protect women's right to safe and accessible abortions. Global legal advocacy organizations, like the Center for Reproductive Rights, are trying to provide legal support for women's abortion rights through abortion providers.

Despite the clear reasoning of why abortion providers are now representing women's right, it is hardly justifiable in the legal language. While abortion providers are forced to represent women to file lawsuits against the state legislators, the playing field of abortion law in the U.S. is also silently shifting from the rights to privacy to the field of public health. But ironically, in the legal system, the abortion providers have to defend their economic rights and women's right to abortion access in the private sphere – centering on an individual's right to choose. In some sense, not only the abortion providers, but all pro-choice activists are pushed into the private sphere to guard women's right to abortion – which is never just an issue of a single woman's self-determination. A woman's right to a safe abortion can only be realized where there are affordable and accessible abortion providers, as well as a friendly social environment free from constant violence and intimidation.

In *Hellerstedt,* the court upheld the *Roe* decision in defending women's right to abortion through the constitutional right to privacy. The court summarized this in its headnote in the following way: "Constitutional Law > Substantive Due Process > Privacy > Personal Decisions Healthcare Law > Treatment > End-of-Life Decisions > Abortion > Right to Privacy [HN1] There exists an undue burden on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the purpose or effect of the provision is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (Whole Woman's Health v. Hellerstedt, 2016, p. 2292).

According to this headnote, the right to privacy is mainly interpreted in this case as a woman's right to decide to have an abortion. Nonetheless, this right is not clearly articulated nor discussed in the text. The legal text implies that the abortion right is inherent in the U.S. legal system, and it is a prerequisite for the court's elaborate discussion of "undue burden". Therefore, the court naturally shifted the playing field to the public sphere, to compare the provisions' state interest with their burden on women's rights. By doing so, the court has neglected the risk of defending a women's right solely in the private sphere. Like the situation in this case, in the U.S. legal system, women's abortion rights are mainly situated in the rights of individual privacy and women's self-determination (Ferree et al., 2002). However, Justice Thomas' dissent indicates that simply upholding women's right to abortion is not enough to protect this right. To force abortion providers to file lawsuits on behalf of women is an indirect and weak approach to defend women's right to safe and legal abortion.

According to Qureshi (2012), there exists a fictional public/private divide in the human rights discourse in the domestic domain. Since in most societies, the public sphere is mainly occupied by men, and women are considered to belong to the domestic sphere of home and family where the state regulations can hardly reach, the position of women is rather vulnerable within the domestic sphere (Binion, 1995). But as women also rely on different forms of assistance in the public sphere, it seems impossible to think only within a framework of private choice here (Stettner et al. 2017). Based on this feminist critique of the public/private bifurcation, the following section will examine the U.S. abortion right law embodied in this case, and how this situation came into being.

The Court's constant emphasis on "right to privacy" actually sets a stage for the current fragility of the abortion discourse in the U.S. cultural and political context. First of all, it opens the door for anti-abortion groups to burden women with moral values. To cite Qureshi, "the private sphere is largely regulated by indigenous customs and cultural norms in pluralistic legal systems" (2012, p.44). As discussed above, the religious environment in the United States constitutes very unfavorable cultural norms for women seeking abortions. While the legal discourse endows women with the right to decide, this right is often interfered with by different cultural values. Certain religious worldviews may urge women to make a moral, ethical and religiously responsible decision regarding abortion. Under such circumstances, when the right to abortion is regulated solely by the constitutional "right to privacy", a woman's decision is turned into a moral responsibility. Those who choose to have an abortion may have to suffer from social pressure, and worst of all, feel guilty about "killing a potential life".

Secondly, a woman's autonomy in decision-making can easily be undermined by factors in the public sphere. Legal restrictions severely block women's access to safe abortion. In many cases, the abortion right is acknowledged by the government, but abortion services are not guaranteed. For example, in Nepal abortion became legal in September 2002, and the court claims that "the right to abortion is fundamental to women's equality, dignity, and self-determination" (Lakshmi Dhikta & Others v. Government of Nepal, 2009, p. 6). However, the abortion service only became available in March 2004, when a government clinic was finally opened. But according to later petitioners, its services were still unaffordable for many.

In *Hellerstedt* (2016), the restrictions are placed on medical facilities and personnel. The Court evaluated the two requirements of H.B.2, and further analyzed how these restrictions are standing in the way of women seeking abortion. The Court first evaluated the admitting privileges requirement through abundant scientific evidence. The requirement asks that a "physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." (H. B. 2, 2013, p. 2). It is asserted that this requirement stems from the state's interest in protecting women in cases of complications from abortion. The Court cited evidence to prove that "there were low rates of abortion complications and that those complications rarely required hospital admissions and those that did happened days after the abortion and women would go to the nearest hospital" (Whole Woman's Health v. Hellerstedt, 2016, p.2302). A persuasive fact was that Texas admitted that there was no evidence that this requirement would guarantee better treatment. The Court cited the factual findings of the District Court that "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20", and "eight abortion clinics closed in the months leading up to the requirement's effective date. Eleven more closed on the day the admitting-privileges requirement took effect" (p. 2337).

Next, the Court turned to evaluate the surgical-center requirement. H.B.2 gives "detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements" (Whole Woman's Health, 2016, p. 2313). Based on the evidence, the majority holds that the new requirements are unnecessary as they do not benefit the patient at all. The Court contended that the current facilities are safe. And many surgical-center requirements do not apply to abortion procedures. For example, the Court mentioned that "the surgical center requirement contends that regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin" (p.2315). But in fact, "abortions typically involve either the administration of medicines or procedures

performed through the natural opening of the birth canal, which is itself not sterile" (p. 2315). The Court also agreed with the District Court's finding that the costs for upgrading existing abortion facilities to meet the surgical-center requirement is quite considerable. Therefore, the high cost may force more facilities to close. Thus, the quality of the abortion services may be reduced due to lack of available facilities.

Defending abortion right solely through the "right to privacy" conveys the idea that abortion rights are only a matter of personal decision. Therefore, the anti-abortion discourse found its way into the public sphere via abortion facilities. With the guide of maximizing the patient's safety as a state interest (despite the fact that it is a very safe procedure), the pro-life lawmakers target at the abortion providers. The two provisions discussed in this case are typical TRAP laws. The subtext of these laws is that pro-life advocates, unable to overturn a legal framework they find morally abhorrent, instead attempt to lessen the number of abortions by making them more difficult to secure. These restrictions greatly endanger women's rights to health and health care.

A "Due" Burden?

Hellerstedt is allegedly the most important Supreme Court decision on abortion since *Casey*. The Court reframed the notable undue burden test in *Casey* into a benefit-burden balancing analysis. It seems that this makes it easier for the abortion practitioners and women who seek abortion care to challenge the state statutes.

However, I find this "undue burden test" linguistically problematic. To begin with, the prefix of the word "undue" implies that there exists a "due" burden. And the benefit-burden balancing test introduced in the case also indicates that there is a "benefit" to balance with the "burden", leading up to the questions: "Is there a burden that is due to be placed on women seeking abortions? If so, where is the balancing point between "due" burden and "undue" burden?

First, let's trace the historical context and original meaning of "undue burden" in the legal text on abortion. The Court cites mainly *Casey's* definition of "undue burden". In *Casey*, it says: "To protect the central right recognized by *Roe* while at the same time accommodating the state's profound interest in potential life…the undue burden standard should be employed" (Planned Parenthood v. Casey, 1992, p. 837). And it further explains: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." In *Casey,* "undue burden" is mainly used together with two different noun phrases: "an undue burden on a woman's abortion right" and "an undue burden on a woman's choice". Second, it is necessary to look into the current case's usage of "undue burden" to see if its meaning has shifted across time and space. In *Hellerstedt*, the term "undue burden" is used in the following ways: "undue burden on a woman's right (to decide…)" and "undue burden to abortion access".

From the above expressions we can see that, in *Casey*, the phrase "undue burden" was used consistently, since the meaning of "abortion right", or "a woman's right to decide whether or not to have abortion" is equivalent with "a woman's choice (to have abortion or not)". Both noun phrases refer to a woman's right to choose. However, in *Hellerstedt*, the meaning of undue burden becomes ambiguous. Sometimes, it corresponds with *Casey*; and sometimes, it refers to a woman's physical accessibility to abortion services rather than her subjective intention.

Then the question of whether there exists a due burden should be discussed based on the two different usages of the term: 1) undue burden on a woman's right to choose, and 2) undue burden on a woman's access to abortion services. For the former usage – undue burden on a woman's right to choose, as discussed in the beginning, a woman's right to abortion should be considered as an inseparable part of her basic human rights. It represents her right to freedom, her right to live with dignity and her right to personal liberty. Therefore, I contend that any burden placed on this right would be problematic. The articulation of "undue" falsely implies that there are burdens that are "due" to be enacted on women's right to choose, as long as the burden placed on women seeking abortion are not creating "substantial" obstacles. *Casey*'s usage of the term "undue burden" allowed challengers and states to deliberately play with words to justify the "state's interest in abortion health care". As a result, the employment of the "undue burden" standard actually has invited and is still inviting more restrictions on the abortion providers in the legal system. For the latter usage – undue burden on a woman's access to abortion services – , according to the Court, it seems that burden on a woman's access to abortion services is measurable based on certain criteria like the distribution of facilities throughout the state, and the clinics' capacity. When addressing the issue of potential obstacles to abortion access, Justice Alito wrote: "Based on the Court's holding in Planned Parenthood of Southeastern Pa v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, it appears that the need to travel up to 150 miles is not an undue burden" (p. 2348). It seems a burden that is "not an undue burden" should be seen as a "due" burden. Therefore, for instance, "150 miles" may be considered as a balancing point to decide whether the distribution of facilities in the State is causing an undue burden to a woman's abortion access.

Although the Court employed both expressions discussed above (undue burden on a woman's right; undue burden on abortion access), its undue burden test was actually focused on the second one. In *Hellerstedt,* the Court advocated a benefit-burden analysis: to analyze the "benefit" a law confers, and the "burden" it places on a woman's access to abortion. The Court evaluated the benefit of admitting privilege requirement and the surgical center requirement, together with the burden these requirements have placed on women. Based on abundant factual findings, the Court decided that there is literally no benefit, but a lot of burden put on women seeking abortion. By weighing the benefits and burdens emplaced by the law, the Court has introduced an examination of the legislative purpose into the legal system. This reinterpretation brings more clarity to the undue burden test when compared to the wording in the *Casey* ruling. The significance and limitations of this test can then be examined below:

Hellerstedt has turned the undue burden test into a benefit-burden test. It enables the Court to balance the benefit of a state law with the burden that this law places on women. However, the Court may have ignored the fact that the test was workable in *Hellerstedt* mainly because the "benefit" and "burden" in this case is extremely unbalanced. H.B.2 was particularly poorly suited to go through a benefits-burden test. The Court found that these provisions offered no benefit to women's health, but placed tremendous burden on their abortion access by severely reducing the number of abortion facilities. That is why they can easily draw a conclusion based on the benefit-burden analysis.

On the one hand, the balancing test thus resolves a problem inherent in the undue burden test. It helps to examine the intent behind a state's restrictions. If such a law creates even modest burdens, but has no corresponding benefits, then it can be struck down. This test frees courts from engaging in laborious and difficult assessment of legislative intent. On the other hand, the balancing point is still very difficult to define. If a situation is more complex than H.B.2, its application will depend more upon the personal beliefs of judges and Justices. Moreover,

this balancing test is heavily dependent on factual findings. It is easy to predict that in the future, if a petitioner wanted to challenge an abortion law based on this test, he/she will have to do laborious work to collect necessary evidence. Another limitation of the test is that it only examines the burden on "abortion access" – which may lead to women's rights to abortion related health care. Apparently, it will not apply to potential future lawsuits concerning other abortion related rights, such as the right to dignity, or the right to personal liberty.

Conclusion

The cultural and political struggle between the pro-life and the pro-choice groups in the U.S. is fully displayed in the nation's legal text. The Supreme Court discarded the trimester framework of *Roe* and employed the term "viability" instead of "potential life", and it seems that the Court is making gradual efforts to prioritize women's rights. However, a later adoption of the term "partial-birth abortion" (which is not a medical term) has strong implications for viewing late-term abortions as "killing a potential life". The ruling of *Hellerstedt* reveals that, at a time when women's fundamental rights to choose are widely accepted in society, the anti-abortion discourse has shifted from the private sphere to public health care. A discourse analysis of the legal text indicates that the Court's undue burden test would only apply to abortion access. Many other human rights related to abortion cannot be defended by this test. This false benefit-burden balancing test is burying the pro-choice activists with laborious works of peripheral evidence-gathering to justify their stance.

It is time for the pro-choice and feminist organizations to build on their triumph in advocating women's right to choose and move on to guarding women's access to safe and legal abortion in every aspect in the public sphere. For a start, instead of passively defending their ground in the private sphere, they should work on a more extensive protection of women's right to abortion access in health care laws. By doing so, those endless state restrictions on abortion providers can be eradicated. Moreover, the subject of abortion is still misrepresented in mainstream films and on television. They can collaborate with film makers and producers to promote more objective and in-depth media depiction of abortion, to reveal the stories of unprivileged women seeking abortions and the difficult choices that they are facing in reality. More realistic depictions of abortions can expand public understanding and acceptance of the difficult choices with which women are faced. Lastly, as extreme pro-life activists are imposing their worldview and pushing their violent rhetoric in cyberspace; to counter their presence, the abortion advocates should also expand their own influence in cyberspace.

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A Quest for "Justice" in Capital Punishment: A Socio-Legal Study of the Nirbhaya Gangrape Case

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Abstract

The December 16, 2012 gang rape case in India's capital ignited fierce discussion on women's rights, safety measures as well as the punishment for the rapists. A major question stemming from this case and elaborated in this paper is: is capital punishment for a rapist an effective measure, as a form of "justice" for the victim? The paper concludes that capital punishment should be abolished even for gruesome crimes like rape and it further raises the question whether capital punishment can serve as a reform tool for the existing and oftentimes dysfunctional criminal system in India. Through a thorough analysis of Mukesh & Another Vs State of NCT of Delhi and others (known as the Nirbhaya gang rape case), the paper explores capital punishment for the rapist from a socio-legal and cultural perspective. The case particularly becomes important as, along with other issues, it is concerned with the question of rights of the victim *vis-à-vis* the rights of the offender. In other words, the paper delves deeper into the conflict between the victims' interests and the right of the offender in the justice system by examining who is responsible for what and to what extent. Taking a human rights approach, the paper examines the human rights jurisprudence in India as well as in international laws. Further, it maps the social and historical perspective revolving around rape victimhood and gender along with arguments that have been predominant for and against capital punishment, particularly for rapists in an Indian context.

Keywords: capital punishment, culture, gang rape, gender, India, law, justice, *Nirbahaya*

Introduction

The case under consideration in the following pages is about a rape victim, the pseudonym used for her is *Nirbhaya* ("The fearless one" in Hindi) as the rape laws in India do not allow to use a victim's actual name. She was a 23-year-old female student who was brutally assaulted and gang raped by six men, among whom was a juvenile who was a few months away from his 18th birthday. The incident took place on a 2012 December evening in a moving bus in New Delhi, India, in the presence of her male friend, who when trying to intervene, was beaten up and insulted. They both were then thrown out and an attempt was made to run them over with the bus. The woman struggled for her life for over a fortnight but ultimately died due to multiple organ failure. This 2012 December incident received widespread media coverage in India as well as internationally.

One of the accused, Ram Singh, allegedly committed suicide while in custody early on after the incident. The juvenile accused was sent to a correctional home for three years and the remaining four were sentenced to death by the trial court in 2013, a verdict confirmed in 2014 by the High Court of Delhi. The accused then appealed to the Supreme Court of India to reduced their punishment to life imprisonment; however, its judgement, delivered in May 2017, four years later, upheld the High Court's verdict and confirmed the death penalty. Three of the four accused had then filed a review petition in the Supreme Court of India which was also rejected, in a judgement that came about a year after, in July 2018. In early 2020, the four convicts of the Nirbhaya case were hanged in Delhi's Tihar Jail.

Mukesh and Another Vs. the State of NCT of Delhi and others 2017, known as the *Nirbhaya* Gang Rape Case in the public consciousness, changed the course of penal laws in India. The incident led to a huge public outcry across the country, with stricter laws demanded, a speedy judicial trial, "justice" for the victims of horrific gang rapes, more vigilant police forces as well as structural changes aiming at ending violence against women and a gender equal society. The protest marches spread beyond the geographical boundaries of Delhi, covering different localities across the nation as the incident was not an isolated one. "Justice" was equated with stricter laws and harsher punishments including death penalty and chemical castration for the rapist.

The Government of India responded to the protestors immediately by setting up a committee under the leadership of Justice J.S. Verma, former Chief Justice of India, to suggest recommendations pertaining to laws concerning violence against women. Following the Committee's recommendation, the laws were amended in 2013, and expanded the definition of "rape" to include acts in addition to vaginal penetration and, for the first time in the Indian penal system, punishments were introduced and enhanced for crimes such as sexual harassment, voyeurism, and acid attacks. In its report (the Report hereafter), the Verma Committee had not suggested capital punishment for the rapist, though it had recommended enhanced punishment for the same. However, contrary to the Verma Committee's recommendations, the 2013 law included a provision for increased sentences for rape convicts including a life term and the death sentence, in case the victim dies or is left in "persistent vegetative state". This inclusion of the death sentence in the law re-ignited the old debate concerning the rights of the victims *vis-à-vis* the perpetrator, especially in light of the death sentence.

As the majority of countries in the world are moving towards banning the death penalty, the argument pertaining to the rights of perpetrators and that of the victims here investigates the

issue by directing the attention on the right to life and how it is understood in the Indian context. It further raises the question whether the legal system should be left to its own devices while dealing with this question. Capital punishment for rapists is questioned from a socio-legal and cultural perspective and the text discusses the Delhi gang rape case elaborately as it brought to the fore questions related to the rights of victims and perpetrators.

Socio-Legal Background

In the following, the socio-legal background of India will be discussed, in the context of which the case needs to be situated and understood. Although the Constitution of India provides for equal opportunity and status between men and women, however, in customary practice there remains a large gap. India is no exception to the gender inequality that persists in societies around the world, but the high degree of disparity remains worrisome. The various legislative provisions including five-year plans and ratifying various international conventions and human rights instruments like the Convention to Eliminate Discrimination Against Women (CEDAW 1979), were steps to provide for the safeguarding women and their rights. In spite of these conscious efforts taken by both governmental and non-governmental actors, women in India continue to be the subject of systematic discrimination, violence and oppression. From a very young age, women are raised to believe that they are responsible for their "behaviour" and body, especially in public spaces, which is often understood as the way they dress and the way they communicate or interact in their everyday life with men in particular and society at large. Women's bodies are the prime site for contestation and closely associated with the "honour" of the family and even the community. In other words, the cultural codes governing Indian society are centred upon women, and control over women's sexuality becomes an important factor for the maintenance of patriarchal power and hierarchy (see Chowdhry, 1997).

It is in this light that we need to understand rape in India. It is one of the fastest growing crimes in India. The National Crimes Records Bureau in India reports an increase of 88% in rape crimes in India from 2007 to 2016 (see Mallapur, 2017). The arrival of a neo-liberal globalised economy, as presumed, has posed a challenge to the traditional position and roles performed by women as it fractured the existing cultural codes. Rape can be seen as a tool to "fix" the broken cultural system and to re-emphasize dominant male power. From a feminist perspective, it can be understood as an expression of power where sexuality is used to maintain dominance and control, thus becoming as much a product of society as an individual's sexual lust. It violates not only a woman's right to her body but also her fundamental rights guaranteed by the Constitution of India under Article 21, that is, the right to life and personal liberty. Section 375 and 376 (a to d) of the Indian Penal Code (IPC), 1860, outlines the definition of rape and further lays down the punishment to be imposed. Other Sections including Section 228A protects the identity of the victim.[1] Further, the Code of Criminal Procedure (CrCP) of 1973 provides for the investigation procedures and how statements are to be recorded. These procedures are put in place to preserve the dignity of women.

The nature of the crime is so violent that regardless of the laws and legal statutes to provide protection or compensation to female victims of rape, it is believed that the social and psychological destruction it causes to women is irreparable. This is so because beyond the physical attack, rape is also seen as a moral injury to women by society. Women thus are subjected to shame, humiliation and, as a consequence, live in a constant state of fear. Further,

[1] See Chapter XVI "Of Offences Affecting the Human Body" and Chapter XI "Of False Evidence and Offences Against Public Justice" of Indian Penal Code (IPC).

the dishonour takes the form of victim blaming, social rejection, forced marriage to the rapist and even honour killing which adds to the anxiety, depression and difficulty for the raped women and their family. The pain, mental and physical, along with the societal stigma that the rape survivor undergoes, makes it an extremely complex crime *vis-à-vis* the punishment it demands. The momentum gathered around the demand for capital punishment for rapists after the Delhi gang rape case thus seems to be just. "The criminal "deserves" nothing less than death" became the loudest among the cries as the rape survivor is seen to be devoid of the dignity and has dishonoured the family/community. The woman thus bears a double burden, one imposed by the violent crime and another from the family/community that stigmatises her. and makes it a taboo for her.

However, a thorough analysis demonstrates the problems associated with the above view. Demand for capital punishment for the rapist lures one to fall into the same trap which presumes the women to maintain the family "honour" by protecting one's body by way of maintaining "sexual purity." It latently also points towards the stigma and social taboo that is attached to the raped women and victimises her even more. The idea that pushes for the death sentence for the rapist rests on the patriarchal belief system that positions death over having to live as a raped survivor, who is subjected to shame, blame and robbed of her dignity. Moreover, the real issue pertaining to the attitudes and structural bias against women remains un-addressed. It is argued that, to end violence against women, the certainty of punishment is much more important than the severity of it. The lack of implementation of laws and attitudes towards women as secondary citizens adds much to the problem. Hence, the following section discusses the complexity of the death penalty in light of right to life.

In Search of the Right to Life in Death Penalty

It is essential to understand the death penalty as a violation of a fundamental right, the right to life, that is enshrined in human rights law, as it not only denies a person life, but along with it all other rights which the person is entitled to. Moreover, the procedure leading to the death penalty results in torture which strips an individual of his/her dignity and any possible, but typical delay in execution adds to the mental trauma of the individual. Further, the inconsistent manner of application of the death penalty to some individuals and not to others violates the principle of non-discrimination.

The right to life is intrinsic in both the international and Indian human rights statutes. Article 3 of the Universal Declaration of Human Rights, 1948 (UDHR) states that "everyone has the right to life, liberty and security of person" (UDHR, 1948). With the imposition of capital punishment, the State has the power to deny access to all other rights that the Declaration pledges as the right to life is at the centre of and a foundation upon which all other rights are based. Further, Article 6 of the International Covenant on Civil and Political Rights,1976 (ICCPR) states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" (ICCPR, 1976). A further explanation from the General Comment No. 36 on Article 6 of the ICCPR elaborates that this article cannot be understood in a narrow sense. It states that this right is guaranteed to all the individuals including those who are convicted for most serious offence (UNHRC General Comment No. 36, 2018, p. 1). It further puts the onus on the State to ensure, protect, and respect the right to life of individuals through legislative and other measures. Capital punishment, when read in light of Article 6 of ICCPR is in direct violation of this, as it is in fact state-supported murder of an individual. The sub-clause of Article 6 further regulates the imposition of the death penalty by the States. It declares that "the term 'the most serious crimes' are to be read

in restricted sense" (p. 13) and "crimes not resulting directly or intentionally in death, …, although serious in nature, can never justify, within the framework of Article 6, the imposition of the death penalty" (p. 13).

The Constitution of India 1949 through Article 21 guarantees the right to life and personal liberty. The right to life and personal liberty form the bedrock for all the other rights that the individual enjoys as all the other rights add quality to the "life" in question and depend on the pre-existence of life itself for their operation. This right is to be enjoyed by both the citizens as well as the non-citizens of India since the Article uses "person" instead of "citizen". According to the straightforward understanding of Article 21 of the Constitution, by establishing a procedure in accordance with the law, the State could infringe on an individual's right to life. However, the scope of Article 21 of the Constitution was expanded after the ruling of the Supreme Court of India in *Maneka Gandhi vs. Union of India,* 1978 (as cited in Kumar, 2017). It stated that "the procedure established by the law for depriving a person of life must be right, just, fair and reasonable" (p. 99). With a wider interpretation, the right to life included the right to live with human dignity, the right to livelihood, the right to health, the right to privacy and also the right to speedy trial and freedom from police atrocities. The delay in execution of capital punishment too would be a violation of Article 21 of the Constitution as an extended delay before the sentence is unfair and the uncertainty of life results in a severe traumatic condition for an individual. Article 21 of the Constitution, thus, is the only article that has received the widest possible interpretation because the right to life is fundamental to our very existence and includes all aspects of life which makes life meaningful and complete.

Here, it is important to understand why, or rather how, the punishment of death and the procedure leading up to it are violent. Capital punishment is an exceptional form of punishment as it is an expression of absolute repudiation of what constitutes humanity. It denies an individual the possibility of rehabilitation and reform. Further, the irrevocable nature of the punishment posits a challenge to erroneous human nature. Moreover, it takes place away from the public's view and therefore only an abstract imagination of the execution is present in our mind which distances us from the actuality of it. The constant uncertainty with which death row prisoners live is also a violation of their right to life. The rampant use of torture at every stage and the inhuman treatment strips the perpetrators of his/her dignity as they are subjected to immense humiliation. Article 21 of the Indian Constitution along with other rights are violated in practice though they exist in principle.

All kinds of punishments are based on the proposition that they discourage and create fear in others from committing the same crime and also that they are fair as a penalty. However, the death penalty is the worst of punitive reactions to a crime as it does not cure, deter or impede a crime. There has been much discussion concerning the legitimacy and legality of death penalty in India and, as we shall see, it often goes beyond the cultural, social, historical and political arenas. The following section will partially address this discussion as the Mukesh and others vs. the NCT of Delhi and another 2012 case brought to light the debate surrounding the legality of capital punishment in India.

Constitutionality of the Death Penalty in India

The first landmark judgement in this regard is *Jagmohan Singh vs State of UP* (1973) where the constitutionality of capital punishment was challenged before the Apex Court. The amendment of the Code of Criminal Procedure in 1973 (referred to as CrPC hereafter) made capital punishment a subject of discretion of the Court by removing the compulsory sentence

for murder. It was argued that since there were no standard guidelines available, the discretion was too wide which in turn violated Article 14 (Right to Equality), Article 19 (Freedom of speech and expression) and Article 21 (Right to life and personal liberty) of the Constitution of India. The Supreme Court of India rejected this contention and held that the death penalty does not violate any Article, including Article 21. The Supreme Court was of the opinion that following the procedures laid down in the CrPC and the requisites of trial, the death penalty cannot be seen as unconstitutional. Further, it mentioned that the right to life was not part of Article 19 and that death as punishment was not arbitrary. With regard to the matter of discretion of the court, it stated that this discretion would depend on the circumstances and evidences of each case. A balance had to be reached between aggravating and mitigating factors and thus it cannot be called unreasonable. It is significant to mention here that Justice Krishnaiyer in *Rajendra Prasad vs State of UP* (1979) had noted that the death penalty was precisely a violation of all the articles mentioned above except if the murder was intentional and horrific and there were no mitigating factors, making the case extraordinary, and the death penalty could then be imposed as a measure of social defence.

The question was again considered in *Bachhan Singh vs. State of Punjab* (1980), where a majority of 4 to 1 in the five-judge bench affirmed the decision in Jagmohan with few changes. Writ petitions were filed in the Supreme Court to challenge the constitutional validity of the death penalty as an alternative punishment for murder. The major change from Jagmohan was that through *Maneka Gandhi vs Union of India* (1978), the interpretation of Article 19 and 21 were expanded. However, since the right to life is not part of Article 19 and the death penalty indirectly affects the freedoms mentioned under the Article 19, it cannot be called unconstitutional. In 1979 India had also become a signatory to the International Covenant on Civil and Political Rights (ICCPR), however, this did not have any impact on the constitutionality of the death penalty as the ICCPR (1976) did not outlaw it. Further clarifying Jagmohan, the Court held that CrPC made it necessary to consider the circumstances of both the crime and the criminal, thereby making life imprisonment a rule and death penalty an exception. For the first time, the court enunciated that the death penalty would be awarded only in the "*rarest of the rare cases*." The Supreme Court further explained the phrase "*rarest of the rare case*" in *Machhi Singh vs. State of Punjab* (1983). The Apex Court further laid down guidelines to determine the *rarest of the rare cases* and the factors to be considered. Agarwal (2008) states the following as the five factors involved in this decision making process: "the manner of commission of murder, motive, anti-social or socially abhorrent nature of the crime, magnitude of the crime, personality of the victim of murder" (pp.281). However, the intention of *Bachhan Singh vs. State of Punjab* (1980) was much wider with an aim to provide for a landscape within which the Indian legal system to work. It cautioned the judges not to be "bloodthirsty" (para 207) and emphasised that the death penalty to be exercised only when the state proves that there exists no possibility for rehabilitation or reform. The inconsistent application of the "*rarest of the rare*", solely depending on the discretion of the judges, makes it a questionable, if not broken system. From time to time, the constitutional validity of the death penalty has been challenged, invoking Article 21 of the Constitution and also highlighting the fact that the death penalty does not serve any purpose of deterrence and seems to be in vain. The death penalty continued to be regarded as constitutional and much used in India, making the crime and not the criminal as axis for judgement, as ruled in *Rajvi Amar Singh vs State of Rajasthan,* (1955). In the post-Bachhan Singh era, amongst judicial confusion, the Supreme Court has been following the principles laid down in the Bachhan Singh case, as can be seen with *Mukesh and others vs the NCT of Delhi and another case.*

The *Nirbhaya* Gang Rape Case: Beyond the Legal Lens

After providing the larger framework above, I now shift the focus to the Nirbhaya gang rape case in order to point out the imbalance in the judgement. As S. Muralidhar (1998) noted, the case of Macchi Singh required the "court to draw up a balance sheet of the aggravating and mitigating circumstances and opt for maximum penalty only if, even after giving maximum weightage to the mitigating circumstances, there is no alternative but to impose death sentence" (p. 147). However, upon carefully analysing the gang rape case of *Nirbhaya* on 16 December 2012, it is revealed that both the trial court and the high court had failed to hear out the accused as per the requirement under Section 235 (2) of CrPC and mitigating factors were not considered before reaching the conclusion of awarding the death penalty. Thus, the Supreme Court, became accountable for considering both of these factors and to strike a balance between the two.

Accordingly, the report submitted by the appellants highlighted the social strata to which the accused belong, aged parents and other dependent family members who were completely devastated and, as a result, had contracted serious medical conditions like depression (a family member of one of the accused had committed suicide upon hearing about the death verdict), the behaviour of the accused while in custody and the possibility of their reform. The report, as depicted in the court judgement, also laid stress on the young age of the accused and their possible rehabilitation. Another strong contention made by the appellants was that the incident that had taken place was not pre-meditated and the accused did not have any previous criminal convictions. Reading the case from the perspective that is sketched by these mitigating factors projected the accused as young men, who, under the influence of alcohol and due to their harsh background of extreme poverty, felt temporarily empowered through their crime. While claiming to draw a balance between the aggravating and mitigating factors, the Supreme Court had failed to consider the background and the possibility of reform, instead, the attention was more on the *nature* of the crime. It can be speculated that the possible reason for hist could be that the Supreme Court had not been successfully presented with the full picture of the perpetrators due to reasons such as the lack of time, effort or will of the lawyer and keeping in mind that all perpetrators came from economically weaker sections of society. Other possible reasons could have been the discretion of the judges based on their own socio-economic status or the variable decisions in previous verdicts. The Courts in India adopt a victim-centric approach, as Justice R. Banumati (*Mukesh v State for NCT of Delhi,* 2017) asserted in her judgement, the reason being high obligation of the court towards society. As this incident "shocked the collective conscience" (para 144) of society, the punishment thus needed to be in accordance with it and "should act as a soothing balm" (para 137). The young age as well as the level of involvement of each of the accused persons individually were overlooked due to the brutality of the crime and public sentiments. Quoting the High Court judges, Rajgopal Saikumar (2016) emphasised that the "collective consciousness" adds up "as an aggravating factor in the balance sheet" (p. 89). In the three-bench judgement on the *Nirbhaya* case, Justice R. Banumati (supra*,* 2017) stated "the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim's family, are to be weighed against the mitigating circumstances" (para 138).

The extreme public outrage conceived the act as "barbaric and diabolic" (para 356) and sent a "tsunami of shock" (para 356) over the country which led the Court to be swayed by the motion. But what marked this incident as a special or rather "a rarest of the rare case"? Multiple rape cases were brought to the court from all around the country, before and after this incident which were equivalent in brutality and violence. But not all had received the uniform public outrage

and hence not the same punishment. A deeper analysis of the case revealed that the case wasn't as exceptional as the verdict indicated. It is through a different representation, through the media discourse, that a larger-than-life image of *Nirbhaya,* was constructed; she became a symbol for the upper-caste, urban, middle-class Hindu woman with which many women of this standing sympathised (see Krupa, 2015). Location and identity of the rape victim, too, became crucial factors for affecting the public consciousness of the people from Delhi in particular as well as the country and world at large. As Krupa (2015) argued, the reason for such unified public outrage was that, "*Nirbhaya*" represented, "everywoman"; even before her identity was made public, all sorts of names were given to her, identifying her with the majority of women in India. Krupa (2015) further suggested that the "everywoman" is a "signifier of a particular class and social identity" (p. 469). The media representation, along with the political scenario, allowed for this resemblance to take hold and it became apparent that this case was not different from the incidents of rape of women belonging to lower castes, classes and minority religions that were less emphasised by the media.

Further, what added to the public outrage was the identity of the perpetrators, synchronising well with the uncertainties and insecurities of the urban middle class in general and urban woman in particular. As the media announced loud and clear, the accused persons were migrants, having come from rural-poor family conditions to make a living and find economic-opportunities in the capital, Delhi. They lived in informal settlements adjacent to the posh and authorised localities. The male, working class-migrant identity of the convicts resonated strongly with the urban middle-class fears of the "other". During the years before the 2012 gang rape incident, a narrative correlating a rise in crime with the coming of migrants to the metropolitan cities, especially Delhi, Mumbai and Bengaluru, had already been established. Migrants belonging to the villages of Uttar Pradesh and Bihar, the northern-plain belt of the sub-continent, were viewed with suspicion and were prejudiced against as those who engage in unacceptable activities and behaviours. All perpetrators exhibiting these criteria were immediately viewed as criminals, deserving the harshest punishment and robbed of their rights to dignity and equality. This became evident also in the case at hand when the accused were even denied the right to a fair trial and to be defended when they first appeared in the trial court. Throughout the case hearing, the accused were further considered as a "unit" of criminals and denied the right to be individually represented.

Though in principle, the cases of extreme culpability are recognised as the "rarest of rare" by the Court, based on the Court's verdicts in the past, it is however difficult to interpret what really constitutes "rarest of the rare". The decisions of the Courts without any fixed guidelines often depend upon the value systems and ideologies, which often also include the larger public sentiment and subjective notions of the judges, and the unpredictability of such special reasons which might violate the right to equality and also the right to life and personal liberty. Moreover, it adds to the probability of judicial error which is irrevocable, as has been proven in past cases and especially so in cases of capital punishment.

Another factor which became apparent through a thorough analysis of the case *Mukesh and others vs. NCT of Delhi and another* (2017) was that although measures were taken to protect the identity of the victim under Section 228 A of the Indian Penal Code, the identity of the perpetrators (except for the juvenile) including their name and faces were publicly circulated through different media to shame the culprits and indicate brutality and their devilish personality, before they could be tried before the court. Even during the trial, the Apex Court maintained to refer to the victim and informant (the victim's friend) as such, but the accused were referred to by their full name. The names of all six accused (except for the juvenile)

appeared repeatedly throughout the case which might have also added in constructing the public image much earlier and before the case had concluded. It is important to mention this as the politics surrounding the names goes much deeper, "placing" the individuals on a vertical ladder of the social hierarchy that governs Indian society. The law thus provides for the protection of the identity of the victim, but not that of the perpetrator, which risks the possibility of bias or prejudice.

The Court had also conveniently disregarded the fact that one of the accused in the case, while being in the custody of the police in the central jail, had allegedly committed suicide. The reason as reported by the media was a high degree of torture by the police and abuse by other prisoners. Despite the fact that India is signatory to the United Nation Convention Against Torture, 1984 (CAT), at times the police resort to torturous means to dehumanise the accused. Such deaths in police custody also suggests a much wider violation of the human rights of the perpetrators. These acts violate Article 21 of the Constitution of India in letter and spirit. The ambit of "divine retribution" and the presumption that a culprit of such a gruesome crime has no right to live and deserves nothing less than death pushed away the fact that he died in police custody. The nature and location of death becomes insignificant when seen only through a victim-centric approach to justice as the perpetrator ceases to exist as human.

Further, it is crucial to note that the judgement of the Apex Court came in 2017, four years after the High Court judgement. By then, the Juvenile had already completed his tenure in the correction home, having become skilled in cooking and tailoring and today is known to be working in the southern part of the country as per the information provided to media by a non-government organisation who helped to place him in his current job. The remaining four convicts, however, were only executed in 2020. The long delay in the execution of the verdict, as has been argued earlier, is a violation of Article 21 of the Constitution of India. Many have argued that a long delay in the execution of the death penalty is sufficient to demand life-imprisonment as its substitute, as to live with constant uncertainty and the persistent experience to live and die every day on the death row denies multiple rights of the perpetrator as an individual.[2] However, the Court in its judgement has discounted time already spent since the incident and confirmed the death penalty for the perpetrators yet again.

Conclusion

It becomes apparent from the previous sections that the judgement in the *Nirbhaya* gang rape case needs to be understood relating to and read with other socio-cultural attributes like public pressure, media intensity, political and cultural milieu as well as the victim-oriented jurisprudence in India, and not solely through a legal lens. It is indispensable to do so in order to provide a mechanism of checks and balances to the legal system, which tends to capitulate to its own ideological proclivities. The shifting positions of the judges themselves over a period of time, along with the social-political and cultural contexts, highlights this dilemma. Providing a dissenting judgement in *Bachhan Singh Vs. State of Punjab* (1980), Justice Bhagwati, stated that the death penalty is unconstitutional and violates Article 14, 19 and 21 of the Constitution of India. It is often acknowledged that the death penalty is the cruellest form of punishment and does not work towards advancement of any constitutional value and in fact is contrary to the most fundamental principle of human rights. It is murder legalised by the state in the name of justice, deterrence and even retribution. The supposedly unique deterrent that it claimed to be is clearly challenged by the statistics available from the crime records bureau.

[2] See judgement of T.V. Vatheeswaran v. State of Tamil Nadu,1983 AIR 361.

In the context of India, particularly with respect to this case, the proposition "death penalty for rapists" demands to move beyond the binary that surrounds the discussion of death penalty, that is, being for or against it. It is necessary to understand the death penalty by analysing it comprehensively through focusing on who receives it and why. The death penalty is often awarded to individuals who belong to the most vulnerable parts of society - migrants, *dalits*, lower caste-class, rural, illiterate men – minorities who are also often unable to hire a competent lawyer. Historically, in western capitalist society, capital punishment has been designed to punish racial minorities, especially people of colour.

The debate on the death penalty has failed to reach any conclusion and the same arguments in favour or against it are still making the rounds. Succumbing to public pressure, in the recent past the Indian Government has passed an Ordinance of death penalty for child rape.[3] Immediately after the *Nirbhaya* gang rape case, amendments were made in the Criminal Law which provided for the death sentence to rapists in case of the death of the victim or if the offender is a repeat offender. Deepak Kumar (2018) writes that, "there are now 59 sections across 18 central legislations in India that allow for the death penalty as punishment, of which 12 sections are under the Indian Penal Code, 1860" (Kumar, 2018). In the name of a victim-centric approach of the justice system, the rights of the perpetrators have been neglected. Not many voices have been raised in defence of the offenders as that might label one as a miscreant. It is, however, vital to mention that from a human rights perspective, the rights of perpetrators are as important as those of the victim. An intensified human rights discourse, thus, would provide fresh arguments for the abolishment of the death penalty in India.

[3] See Chapter II of The Criminal Law (Amendment) Act, 2018, no. 22 of 2018 dated 11 August 2018.

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