LEGAL IMAGINATION AND SOCIAL REFORM: NAVTEJ JOHAR REVISITED

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A central concept in the Navtej Singh Johar judgement of the Supreme Court is that of 'constitutional morality'. Through its framing of 'constitutional morality' juxtaposed with and pitted against 'societal morality', the judgement sought to bring about a transformation within the realm of 'the social'. While the term and content of 'constitutional morality' have been the subject of intense legal discourse, emanating from Navtej Johar and in jurisprudence thereafter, the ramifications of the term 'social morality' and its relationship with the law have been inadequately addressed in public discourse. It, therefore, becomes important to examine what the courts imagine when they talk of 'the social' to fully understand the extent to which they can bring about such transformations. In this article, we examine if the separation between constitutional morality and societal morality, as advocated in Navtej Johar, is philosophically and practically tenable and desirable. To do this, the article engages with the assumptions made by the courts in their framing of 'constitutional morality' and examines the validity of these assumptions.

The questions raised and addressed in this article include the following - is societal morality qualitatively different and distinct from constitutional morality? If constitutional morality comprises of those principles of justice that the society envisions, are the two intrinsically not linked to each other, and feed into and reinforce each other? Consequently, is there a false dichotomy created between constitutional and social / societal morality? Additionally, is it desirable for and realistic to envision law – in its formulation, implementation and interpretation – to be devoid of societal morality? Navtej Johar presents constitutional morality to be progressive, liberating, counter-majoritarian and transformative and views societal morality to be majoritarian, restrictive, status-quoist and repressive. The article analyses this conception through not only a legal but also a social science perspective.

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I. INTRODUCTION

In recent times, the 2018 Supreme Court judgement in *Navtej Singh Johar* v. *Union of India* ('Navtej Johar'),[1] has been the subject matter of innumerable deliberations, debates, and discourse. These analyses range from examinations of legal ramifications[2] to sociological evaluations.[3] Of these, a major criticism of the judgement has been that the Supreme Court failed to recognise the extent of diversity of queer identities and experiences, thereby reducing the judgement to little more than a symbolic victory within the law.[4] A related criticism is that, in the absence of this diversity, the judgement addresses the concerns of only a small section of the queer community.[5]

However, the Court's inability to recognise the diversity of queer identities, experiences, lived realities and concerns is symptomatic of a larger issue of the law's restricted (and often myopic) imagination of society. Thus, in order to fully understand why the judgement falls short in the way that it does, it becomes essential to examine the framework of imagination of society within which the Court operates. This entails an understanding of 'society' as well as a construction of law's relationship to the social. This imagination is seen through the Court's juxtaposition of 'constitutional morality' with 'social morality'. The concept of 'constitutional morality' not only lies at the centre of the Supreme Court's reasoning in Navtej Johar but also forms the basis of the Court's attempts to bring about social transformation. This article examines 'constitutional morality' as an anthropological symbol and uses this lens to critically examine the framework of imagination of society that the Court operates in, both in Navtej Johar and in other instances where the court discusses the concept of 'constitutional morality'.

The article is divided into three parts. The first offers a close reading of the judgement and its framing of 'constitutional morality' and 'social morality'. This explores the language the court uses to talk of these terms and the assumptions that this language carries within it. The second part analyses the legal discourse on morality, encompassing the history and evolution of the term 'constitutional morality', use of morality in statutory provisions, and a discussion on social morality in contemporary judgements. The third part dismantles the law-society divide and foregrounds the complex notion of 'social morality' while analysing the assumptions present in the judgement. The article concludes that the framing of social morality and constitutional morality as seen in the judgement is based on an imagination of society that is removed from ground reality. Through the lens of symbolic anthropology, the article reconceptualises the law as being a part of the social. The article then goes on to re-frame the

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[1] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

2 *See* Dominic McGoldrick, *Challenging the Constitutionality of Restrictions on Same-Sex Sexual Relations: Lessons from India*, Vol. 19(1), HUMAN RIGHTS LAW REVIEW, 173 (February, 2019); *See also* Kakoti Borah, *Engaging with the Law: Decriminalisation of Homosexuality and the Johar Judgement*, Vol. 6(3), SPACE AND CULTURE, INDIA, 5 (2018); *See also* Siddharth Narrain, *From Naz to Navtej: Constitutionalism and the Decriminalization of Homosexuality in India*, OPINIO JURIS, November 6, 2018, available at http://opiniojuris.org/2018/11/06/from-naz-to-navtej-constitutionalism-and-the-decriminalization-of-homosexuality-in-india/ (Last visited on October 30, 2020); Adil Saifudheen & Pranav Tanwar, *Social Dimensions Of Judicial Decisions: The Navtej Johar Template*, LAW AND OTHER THINGS, October 19, 2018, available at https://lawandotherthings.com/2018/10/social-dimensions-of-judicial-decisions-the-navtej-johar-template/ (October 23, 2020).

[3] Kalpana Kannabiran, *What Use Is Poetry: Excavating Tongues of Justice around Navtej Singh Johar v. Union of India*, Vol. 31, NAT'L L. SCH. INDIA REV., 1 (2019).

[4] Saptarshi Mandal, *Section 377: "Whose Concerns Does the Judgment Address?*", Vol. 53(37), ECONOMIC & POLITICAL WEEKLY (September 15, 2018); *See also* Radhika Radhakrishnan, *How does the Centre appear from the Margins? Queer Politics after Section 377*, Vol. 12, NUJS L. Rev., 3 (2019).

[5] *Id*.

social as being a fragmented, multi-faceted space rather than being a singular entity to challenge the assumptions presented in the judgement.

II. SOCIAL MORALITY VS. CONSTITUTIONAL MORALITY: THE NAVTEJ JOHAR APPROACH

In Navtej Johar, the Supreme Court does not spell out what exactly it means when referring to 'social morality'. However, the judgement positions social morality against constitutional morality, and states that the latter would supersede the former.[6] Hence, it is through an examination of the court's conception of constitutional morality that one has to infer its understanding of social morality, since it has been constructed as a diametrically opposite concept.

In the judgement, the court observes that constitutional morality was "not a natural forte" and was an "alien notion" at the time of the Constituent Assembly. Hence, it is a duty of all organs of the State, including the judiciary, to strengthen the concept in contemporary India.[7] The court emphasises that the ideals of justice, liberty, equality and fraternity enshrined in the Preamble to the Constitution of India can only be achieved "through the commitment and loyalty of the organs of the State to the principle of constitutional morality".[8] The Supreme Court also elaborates that the concept is not limited to the "mere observance of the core principles of constitutionalism" and that "it is not confined to the provisions and literal text which a Constitution contains", but has a wide magnitude such as "ushering a pluralistic and inclusive society".[9] According to the Supreme Court, while it is possible for 'social morality" to be discriminatory and non-inclusive, 'constitutional morality' is free from such prejudices and must therefore be upheld.[10] Thus, it becomes clear that from the Court's point of view, constitutional morality is explicitly separate from the forces of 'social morality' since it is rooted in Constitutional values and not in the changing perspectives of 'society'.

As a logical corollary, the judgement reiterated that the Court has to be guided by the conception of constitutional morality and ensure that it prevails over social morality, in a context where there is a violation of fundamental rights for however small a section of the society.[11] The court further opines that social morality usually has majoritarian facets, which the Constitution of India tried to rectify.

That constitutional morality is essentially counter-majoritarian in nature was further elaborated in the judgement in the following words of Justice Rohinton Nariman:

> "…The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities… These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism

[6] *Id*., ¶123.
[7] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶114 (per Dipak Misra, C.J., and A.M. Khanwilkar, J.).
[8] *Id*., ¶115.
[9] *Id*., ¶111.
[10] *Id*., ¶¶12, 120, 253(v).
[11] *Id*., ¶121.

> in India. Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes."[12]

Consequently, the court concludes that regardless of what 'social morality' indicates, constitutional morality would be vehemently opposed to outlawing or discriminating against members of the Queer community. Thus, by testing the validity of §377 of the Indian Penal Code, 1860 against the normative standard of constitutional morality, the five judge Bench in the Navtej Singh Johar judgement came to reaffirm and uphold the fundamental rights of members of the Queer community. These include the right to life with dignity, liberty, equality and non-discrimination on the basis of gender identity, sexual autonomy, privacy, health and freedom of expression.[13]

In fact, the judgement sees constitutional morality as the life force of a living dynamic constitution, as it aids in the "dynamic, vibrant and pragmatic interpretation" of the Constitution. The court is of the view that constitutional morality is what fuels judicial creativity in order to safeguard the fundamental rights bestowed by the Constitution.[14] In doing so, the Court is emphatic that when 'constitutional morality' finds itself in opposition to 'social morality' the former must prevail:

> "The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality".[15]

Through this interpretative exercise, the court's ultimate goal is to transform society and move it in a more 'progressive' direction based on the values of 'constitutional morality'[16] through the principle of transformative constitutionalism. In the judgement, the court not only uses constitutional morality to interpret the law, but also uses it as an opportunity to lead society away down a more 'progressive' path.[17]

A close reading of the judgement, therefore, shows that the following assumptions appear to be behind the use of the term 'constitutional morality". The first is that, 'constitutional

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[12] *Id*., ¶81.

[13] The court observed as follows: *We hold and declare that in penalising sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law. Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture.* (emphasis added); *Id*., ¶¶147-148.

[14] *Id*., ¶ 97.

[15] *Id*., ¶119.

[16] The court observed as follows: *A hundred and fifty-eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty-eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution; Id*., ¶154.

[17] *Id*., ¶96.

morality', is fundamentally separate and distinct from the 'social morality.' The second assumption is that there exists a hierarchy between constitutional morality and social morality, with the former prevailing over the latter. The third assumption made by the court is that constitutional morality is necessarily counter-majoritarian, and by that logic, social morality is always majoritarian. Perhaps, the larger assumption is that 'the social' or 'society' is predominantly a singular, homogenous entity that speaks, thinks and acts in a unified manner. We can infer this from: a) the language of the court when talking about social morality. The courts seem to always refer to social morality as though it were a uniform set of ideas that the court could engage with; and b) though the framing of this entity in opposition to this other entity called 'constitutional morality'. In other words, none of the above-mentioned assumption on social morality would be possible if the court did not imagine 'social morality' to be a singular and bounded entity. Thus, while the courts recognise that pluralities of identities exist within 'society', they do not fully realise the extent to which this impacts their reach. These assumptions together constitute the framework of imagination within which the court constructs 'the social' and its relationship to it.

III. LAW AND ITS DISCOURSE ON MORALITY

In this part, the article examines Law's discourse on morality. Part A explores the historical origins of the term 'constitutional morality', Part B looks at the envisioning of morality in constitutional and statutory provisions, and Part C looks at how the court has dealt with constitutional morality by exploring selected judgements.

A. THE HISTORICAL ORIGINS

A significant aspect of Dr B.R. Ambedkar's work is his advancement of the notion of constitutional morality. Dr. Ambedkar famously invoked the phrase in his speech 'The Draft Constitution', delivered on 4 November 1948, in the context of defending the decision to include the structure of the administration in the Constitution.[18] He argued that constitutional morality was "not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."[19]

After drawing upon the notion of constitutional morality as expounded by George Grote, a Greek historian, Dr Ambedkar observed as follows:

> "While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other, that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution."[20]

Pratap Bhanu Mehta, in his elaboration of the concept, concludes that the Constitution "was made possible by a constitutional morality that was liberal at its core. Not liberal in the

[18] CONSTITUENT ASSEMBLY DEBATES, November 4, 1948, 38, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/%C2%AD1948-11-04 (Last visited on September 28, 2020).
[19] *Id*.
[20] *Id*.

eviscerated ideological sense, but in the deeper virtues from which it sprang."[21] From the references to and elaboration of the concept made by Dr Ambedkar, one may conclude that constitutional morality demands a commitment to the norms of the Constitution, and to refrain from arbitrary actions that would undermine rule of law. It also focuses on the substantive content of the Constitution as opposed to mere form, and predominant importance to the spirit of the law as opposed to letter of the law. Further, it rejects a transactional approach to the Constitution, emphasising instead on the eventual outcomes reached.

B. MORALITY IN CONSTITUTIONAL AND STATUTORY PROVISIONS

Despite the references to Constitutional morality during the Constituent Assembly debates, the Indian Constitution has no reference to the term or any standard of Constitutional morality. Neither is any reference to constitutional morality made in statutory law, though the phrase 'morality' is juxtaposed with public policy in some contexts.[22] The importance of morality in law has been endorsed by jurists such as Justice Krishna Iyer, who observed that we cannot regain our past glory unless we realise the importance of morality in our present legal system.[23]

The Indian Constitution refers to 'public order, decency and morality' as a reasonable restriction to the fundamental right to freedom of speech and expression, guaranteed in Article 19(1)(a).[24] The term 'public order or morality' is also used in Article 19(4) as a reasonable restriction to the fundamental freedom to form associations or unions, guaranteed in Article 19(1)(c). In the *Udeshi* judgement, the Supreme Court was called upon to determine if the obscenity law was consistent with freedom of speech and expression, guaranteed by Article 19(1)(a) of the Indian Constitution.[25] In this judgement, the book of fiction 'Lady Chatterley's Lover' by D.H. Lawrence was held to be obscene and the Court upheld the constitutional validity of the obscenity law. The court observed that the book "treated sex in a manner offensive to public decency and morality judged of by our national standards and considered likely to pander to lascivious prurient or sexually precocious minds".[26] In 2004, the Chennai police banned the play 'Vagina Monologues' from being performed in the city, by calling parts of the script objectionable, and it was only ten years later that the play was allowed to be performed in the city.[27] In 2009, the government prohibited the popular animated pornographic series called 'Savita Bhabhi' because it concerned a married Indian woman's sexual adventures. It drew strength from the Information Technology Act, 2000 for its act of moral policing and blocking pornographic

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[21] Pratap Bhanu Mehta, *What is Constitutional Morality?*, SEMINAR, 2010, available at http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (Last visited on September 28, 2020).

[22] For example, §23 of the Indian Contract Act, 1872 states as follows: *The consideration or object of an agreement is lawful, unless— —The consideration or object of an agreement is lawful, unless—" it is forbidden by law;* [1] *or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.* (emphasis added).

[23] N.V. PARANJAPE, STUDIES IN JURISPRUDENCE & LEGAL THEORY 360-361 (1997) *cited in* A. Raghunadha Reddy, *Role of Morality in Law Making: A Critical Study*, Vol. 49(2), JOURNAL OF THE INDIAN LAW INSTITUTE, 194-211, 206 (April-June, 2007).

[24] Article 19(2) reads as follows: *Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.*(emphasis added).

[25] The Indian Penal Code, 1860, §292.

[26] Ranjit D Udeshi v. State of Maharashtra, AIR 1965 SC 881.

[27] Vaishna Roy, *Saying the V Word Aloud*, THE HINDU, April 25, 2014.

websites – a move that was stiffly resisted by many.[28] In these instances, we can see that the courts and law enforcement officials apply a yardstick of morality to prohibit books, films, plays and other materials, using the ruse of obscenity, or objectionable immoral content. It is unclear if such a yardstick comprises of constitutional morality.

As another example, while the Indian Constitution, in Article 23, prohibits human trafficking as a right against the State and non-state actors, the premier legislation which gave teeth to this right is titled The Immoral Traffic (Prevention) Act, 1956. It has morality written large in the title of the legislation itself and aims at regulating commercial sexual exploitation. The legislation conflates sex work and trafficking and restricts its purview only to trafficking for sex work, when, in fact, thousands of persons are trafficked routinely for marriage, domestic labour and bonded labour.[29] Sex workers are routinely harassed by the police using this legislation.[30] The underlying reason is an imposition of sexual morality by the law enforcers.[31] In *State of Uttar Pradesh* v. *Kaushaliya*, the police sought to restrict the movement of sex workers and the removal of sex workers from a public place in Kanpur, under §20 of the 1956 Act. This was challenged as violative of fundamental rights guaranteed in the Indian Constitution. The Supreme Court judgement, while upholding a law as constitutional, took the crutch of social morality, and said "prevailing social values as also social needs which are intended to be satisfied".[32] In 2018, when the government sought to amend the 1956 legislation, United Nations agencies called upon India to bring the anti-trafficking legislation in conformity with human rights standards.[33] Experts have argued that in its haste to rescue sex workers (under the ruse of morality), the Act has made them more vulnerable due to widespread human rights abuses that the police subject them to during 'raid', 'rescue' and 'rehabilitation'.[34] The law mandates rescuing and rehabilitating adult sex workers without any regard to whether or not such women stay in sex work out of their own volition. This can be attributed to an over-zealousness in purging society of sex workers who are perceived to lead immoral lives.

Another legislation that can be examined in this light is The Indecent Representation of Women (Prohibition) Act, 1986 which was enacted in response to the women's movements' demand to address the derogatory depiction of women in mainstream media in India.

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[28] *See* Manoj Mitta, *Govt Can't Ban Porn Websites for Obscenity*, THE TIMES OF INDIA, February 11, 2010; DNA, *What has Savita Bhabhi Done to Deserve This?*, DAILY NEWS AND ANALYSIS, June 30, 2009, available at https://www.dnaindia.com/speak-up/report-what-has-savita-bhabhi-done-to-deserve-this-1269904 (Last visited on October 23, 2020).

[29] This can be deduced from the fact that almost every section refers to aspects of prostitution, while the title of the law mentions 'immoral traffic'. For example, § 3 provides punishment for keeping a brothel; §4 provides punishment for living on the earnings of a prostitute; §5 speaks of procuring, including or taking person for the sake of prostitution. S. 6 refers to the act of detaining a person in premises where prostitution is carried on. There is no definition of trafficking that is given in the legislation.

[30] For details of harassment, *see* UPR, *Violations faced by Sex Workers in India: Joint Stakeholders Submission*, September 20, 2016, available at https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/js9_upr27_ind_e_main.pdf (Last visited on October 23, 2020); *See also* National Commission for Women, *Research Study of Human Right Violations of Victims of Trafficking, conducted by Social Action Forum for Maanavadhikar*, available at http://ncwapps.nic.in/pdfReports/Human_Right_Violation_of_Victims_of_Trafficking.pdf (Last visited on October 23, 2020).

[31] *Id*.

[32] State of UP v. Kaushaliya, AIR 1964 SC 416.

[33] OHCHR, *India must bring its new anti-trafficking Bill in line with human rights law, urge UN experts*, July 23, 2018, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23392&LangID=E. (Last visited on October 23, 2020).

[34] Aarthi Pai, Meena Saraswathi Seshu & Laxmi Murthy, *In Its Haste to Rescue Sex Workers, 'Anti-Trafficking' Is Increasing Their Vulnerability*, Vol. 53(28), ECONOMIC AND POLITICAL WEEKLY, (July 14, 2018).

The Act defines indecent representation as the "*depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals."*[35] Interestingly, the revised definition in a proposed amendment to this legislation in 2012 retained the phrase *"which is likely to deprave, corrupt or injure the public morality or morals"*.[36] The definition confuses indecency with morality as the definition defines *'indecent representation of women'* by means of acts that injure public morality. Authors Madhu Kishwar and Ruth Vanita have opined that the Bill also conflated the expression of female sexuality as obscenity and effectively causes repression in the name of public morality.[37] If, as Navtej Johar states, constitutional morality is to triumph over social morality, this Act would probably need to be struck down as unconstitutional since it is prioritises the morals as held by the public at large over women's freedom to express their sexuality.

Yet another law where morality intertwines with law is the Indian Contract Act, 1872. §23 of the Act states the circumstances under which a consideration or object of an agreement may be unlawful, and therefore void. It states as follows:

> "the consideration or object of an agreement is lawful, unless— it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or *the Court regards it as immoral, or opposed to public policy* (emphasis added)".

In the illustrations given below the section to explain its import, Illustration (k) states as follows:

> "A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral…".

In explaining the term 'immoral' under the section, the Supreme Court clarified in *Gherulal Parakh* v. *Mahadeodas Maiya* as follows:

> "The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. *Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down* and any law based on such fluid concept defeats its own purpose. The provisions of §23 of the Indian Contract Act

[35] The Indecent Representation of Women (Prohibition) Act, 1986, §2(c).

[36] "indecent representation of women" means— (i) publication or distribution in any manner, of any material depicting women as a sexual object or which is lascivious or appeals to the prurient interests; or (ii) depiction, publication or distribution in any manner, of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent or derogatory to or denigrating women or which is likely to deprave, corrupt or injure the public morality or morals;" (emphasis added), DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Rajya Sabha, *Report on the Indecent Representation of Women (Prohibition) Amendment Bill, 2012*, Two-Hundred-Fifty-Eighth Report, ¶ 3.13, September 2013, available at https://www.prsindia.org/uploads/media/Indecent%20Representation%20of%20Women/SCRIndecent%20Representation%20of%20Women.pdf (Last visited on October 23, 2020).

[37] For more details, *see* Madhu Kishwar & Ruth Vanita, *Using Women as a Pretext for Repression: Indecent Representation of Women (Prohibition) Bill*, available at http://www.cscsarchive.org/dataarchive/otherfiles/UGDCM2-128/file (Last visited on October 23, 2020).

> indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality (emphasis added)".[38]

It further opined that the scope of morality can be extended depending upon time and age.[39] In a 2014 judgement – *Associate Builders* v. *Delhi Development Authority*, the Supreme Court adopted a narrow interpretation of 'morality' under §23, confining it to 'sexual morality' and further observed that if the agreement were to extend beyond sexual morality, it would "have to be against prevailing mores of the day".[40] It added that "interference on this ground would also be only if something shocks the court's conscience".[41] The above quotes from judgements indicate the manner in which an interpretation of the term 'immoral' potentially provides an entry for sexual conduct that might deviate from the standard norms of life held by the public at large.

From §23 of the Indian Contract Act and judicial interpretations of the same, it is obvious that sexual morality – a subset of social morality - has not only been woven into the law but also applied by the Supreme Court in determining the legality of an agreement. This is a dangerous proposition for all persons who lead sexual lives and assert their right to sexuality and sexual expressions, which contradict social norms and standards of acceptability and morality. It bears an adverse impact for those who choose not to indulge in procreative, heterosexual sexual intercourse within the framework of a marriage (which is the socially acceptable norm). There are potential repercussions of such a proposition for women (and men) engaged in sex work out of their own volition, as well as for the transgender community as well as the queer community at large. This contradicts with the court's imagined conception of the boundaries of social morality in Navtej Johar.

Social morality also plays a vital role in determining a legally valid custom. Article 13(3) of the Indian Constitution defines 'law' and includes 'custom having the force of law' as a component of law. Custom is a source of law, but all customs do not acquire legal recognition. British law, which influenced Indian law, lays down that one of the essential criteria for a custom to be considered legally valid is that it should not be immoral. In *Madhura Naikin* v. *Esu Naikin*, the Bombay High Court refused to recognise the custom of adopting girls for immoral purpose.[42] In *Balusami* v. *Balakrishna*, the court held a custom permitting a man to marry his daughter's daughter as immoral.[43]

The constitutional and statutory provisions discussed above illustrate the intrinsic linkages between law and morality – including public morality and sexual morality as subsets of social morality. These defy a convenient and neat separation and operation of social morality from constitutional morality as circumscribed in Navtej Johar. They also indicate that the Legislature did not eliminate social morality and its variants from statutory law and have even incorporated the same into specific legislations and legislative provisions. Legislating or law-making itself

[38] Gherulal Parakh v. Mahadeodas Maiya, 1959 Supp (2) SCR 406.
[39] *Id*.
[40] Associate Builders v. Delhi Development, 2015 3 SCC 49.
[41] *Id*.
[42] Hira Naikin v. Radha Naikin, (1880) ILR 4 Bom 545.
[43] Balusami v. Balakrishna, AIR 1957 Mad 97.

involves a moral choice to prioritise certain values that are or ought to be prevalent in society. For example, social legislations such as The Dowry Prohibition Act, 1961, The Protection of Women from Domestic Violence Act, 2005, The Protection of Children from Sexual Offences Act, 2012, and the Juvenile Justice (Care and Protection of Children) Act, 2015 are the culmination of a legislative need to mould the Indian society in a particular manner. Such legislations either crystallise certain moral standards in law or attempt to alter prevailing social practices through law, much the same way as the transformative constitutionalism that Navtej Johar refers to. Social morality plays a pivotal role in such processes. The demarcation of constitutional morality and social morality on article, as done in Navtej Johar, does not reflect the reality of overlaps, links, and the blurred line of distinction between the two.

It therefore appears that Navtej Johar ascribes to Dworkin's philosophy that law necessarily involves a moral judgement, albeit constitutional morality and not social morality.[44] Immanuel Kant's observation that the law deals with external conduct, while morality deals with the internal conduct of a person, and the two are distinct and separate, have been disproved by Indian constitutional and legislative provisions. This is demonstrated above in this part of the article where constitutional and statutory provisions have, indeed, incorporated standards of morality, which are then subject to interpretations by the judiciary.[45] As the next section demonstrates, social morality also plays a pivotal role in interpretation of law by the courts.

C. DISCOURSE ON SOCIAL MORALITY IN CONTEMPORARY JUDGEMENTS

On a cursory assessment, the phrase had been used in less than ten reported cases by the Supreme Court till 2010 from the time the Constitution was adopted.[46] However, in the past few years, a spate of judgements of the Supreme Court refer to and discuss the same. For example, in the Supreme Court judgement related to restrictions being placed on dance bars and bar dancers in Maharashtra, the court observed that standards of morality in society change with time, and struck down varied provisions of the state legislation - Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (working therein) Act, 2016 - as unconstitutional.[47] Interestingly, the Supreme Court wondered as to the extent to which a state government could impose its own notion of morality on the citizens. It observed as follows:

> "It needs to be borne in mind that there may be certain activities which the society perceives as immoral per se. It may include gambling (though that is also becoming a debatable issue now), prostitution etc. It is also to be noted that standards of morality in a society change with the passage of time. A particular activity, which was treated as immoral few decades ago may not be so now. Societal norms keep changing. Social change is of two types: continuous or evolutionary and discontinuous or revolutionary. The most common form of change is continuous. This day-to-day incremental change is a subtle, but dynamic, factor in social analysis. It cannot be denied that dance performances, in dignified forms, are socially acceptable and nobody takes exceptions to the same. On the other hand, obscenity is treated as immoral. Therefore, obscene dance performance may not be acceptable, and the State can pass a law prohibiting obscene dances. However,

[44] *See* RONALD DWORKIN, LAW'S EMPIRE (Harvard University Press, 1986).
[45] *See* IMMANUEL KANT, THE MORAL LAW: KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS (Hutchinson's University Library, 1953).
[46] Balakrishnan K, 'Constitutional Morality in India – The New Kid on the Block', https://www.barandbench.com/columns/constitutional-morality-india-new-kid-block, Feb 5, 2019
[47] Indian Hotel and Restaurant Association (AHAR) v. State of Maharashtra, (2019) 3 SCC 429.

> a practice which may not be immoral by societal standards cannot be thrusted upon the society as immoral by the State with its own notion of morality and thereby exercise 'social control' (emphasis added)".[48]

The quote reproduced above indicates that the Supreme Court permits the enactment of laws premised on what is deemed to be obscene through the lens of social morality. What it does not permit is an imposition of moral standards by the state, and a substitution of its own moral standards for that of society, in order to exercise social control. However, 'a practice which may not be immoral by societal standards' implies using the yardstick of majoritarian values and standards of morality, which are anathema to constitutional morality, as explained in Navtej Johar. What is also ironic is that while the Supreme Court, in this case, prevented the State (executive) from thrusting its own notion of morality upon the society, the Court licenses itself with an attempt to distinguish its own social morality from that of the executive's and the society's.

In *Shayara Bano and Others* v. *Union of India and Others* ('Shayara Bano'), the issue for determination by the Supreme Court was the constitutional validity of the prevalent practice of instantaneous, unilateral, oral divorce by the Muslim husband ('*talaq-e-biddat*').[49] The petitioners vehemently argued that the practice was not only violative of the fundamental right to equality[50] and non-discrimination,[51] enshrined in the Indian Constitution, but also contravened the principle of constitutional morality. However, the Court was not persuaded by this argument, on the ground that freedom of religion was protected by Article 25 and that laws related to marriage and divorce were matters of faith and belief. The court held that *talaq-e-biddat*, as a constituent of Muslim family law, had a status equal to other fundamental rights and could not be set aside as violative of constitutional morality.[52] Article 25 of the Indian Constitution enshrines the fundamental right to freedom of religion, subject to "public order, morality, health and other provisions contained in Part III of the Constitution." Curiously, the term 'social morality', as a value contrary to constitutional morality, does not feature in this judgement as it did in Navtej Johar, and instead the court frequently refers to 'public order, morality and health' and to 'constitutional morality'. Perhaps this is due to the fact that the subject matter of the case was religion – a social institution. The court concluded that the practice of *talaq-e-biddat* had no nexus with morality, and that it could not be struck down as unconstitutional.[53] It also reasoned that since the practice was an aspect of personal law, which "has a stature equal to other fundamental rights", and hence, it cannot be said to be violative of constitutional morality.[54] Further, in contrast to Navtej Johar which envisaged judicial application of constitutional morality as a way of infusing social transformation, in Shayara Bano, Justices Khehar and Nazeer opined as follows:

> "Reforms to personal law in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention... The said procedure alone needs to be followed with reference to the practice of talaq-e-biddat, if the same is to be set aside".[55]

So, in the opinion of the two judges (who formed a minority opinion) social transformation ought to be brought about, not through judicial interpretations using the tool of constitutional morality, but by legislative interventions. This observation needs to be understood in

[48] *Id*., ¶77.
[49] Shayara Bano v. Union of India, (2017) 9 SCC 1 ('Shayara Bano').
[50] The Constitution of India, 1950, Art.14.
[51] The Constitution of India, 1950, Art.15.
[52] Shayara Bano, *supra* note 41, at ¶¶174, ¶190(6) (per J.S. Khehar, C.J.).
[53] *Id*., ¶¶180, ¶190 (per J.S. Khehar, C.J., and Abdul Nazeer, J.).
[54] *Id*., ¶190(7).
[55] *Id*., ¶190(8).

the context of the highly contentious issue of reform in family laws, rather than a generic application to all issues.

In *Joseph Shine* v. *Union of India* ('Joseph Shine'), which struck down the provision of adultery from the Indian Penal Code ('IPC') as unconstitutional, the Court observed that the criminal law on adultery was premised on 'Victorian morality' with patriarchal underpinnings, and hence violative of constitutional morality.[56] In Joseph Shine, the construction of a wife's body as the property of her husband, 'trespassed upon' by the adulterer, constituted the core of the offence of adultery. The criminal remedy was only available for an aggrieved husband, and not for an aggrieved wife if her husband indulged in an adulterous relationship. The offence also viewed the wife as a helpless victim and not an active agent of the adulterous act, and hence, only the male adulterer could be prosecuted. The Supreme Court declared the provision to be unconstitutional. Thus the Victorian morality and its construction of women, especially wives, was triumphed over by an application of constitutional standard of rights to life, equality and non-discrimination. The judgement referred to and relied upon the discourse on constitutional morality in Navtej Johar. In Joseph Shine, Justice R.F. Nariman, in his concurring judgement, extended this elaboration of constitutional morality to the adultery provision, and observed as follows:

> "What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational".[57]

This was further reiterated in Justice D.Y. Chandrachud's concurring judgement, where he observed as follows:

> "A woman's 'purity' and a man's marital 'entitlement' to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but they cannot be recognised as being so today. It is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of §497 of the IPC".[58]

IV. DISMANTLING THE LAW AND 'SOCIETY' DIVIDE

Part I of this article introduced the topic at hand. Part II examined the construction of constitutional morality and social morality in Navtej Johar and the primary assumptions made therein. Part III examined a historical evolution of the concept of constitutional morality, and examined constitutional provisions, statutory provisions and judicial interpretations to test if there is a clear separation of law and social morality as envisaged in Navtej Johar. In this part, the article seeks to dismantle and collapse the divide between law and society, with morality as a derivative of society.

[56] Joseph Shine v. Union of India, (2019) 3 SCC 39, ¶64('Joseph Shine').
[57] *Id*., ¶23(per R.F. Nariman, J.).
[58] *Id*., ¶25(per D.Y.Chandrachud, J.).

The legal evolution of constitutional morality shows us that the imagination laid out in Part I of the article, while not limited to Navtej Johar, is one that is not consistent throughout the court's dealings with 'the social morality'. However, the position adopted in Navtej Johar is one that is premised on an understanding of 'culture' or 'society' that is by no means a novel one within the legal imagination. This brings us to the first two assumptions of the court as noted in Part II: a) that, 'constitutional morality', is fundamentally separate and distinct from the 'social morality.' and b) that there exists a hierarchy between constitutional morality and social morality, with the former prevailing over the latter.

This tendency to pit legal or constitutional interpretation of morality over 'cultural or social morality' is far from being restricted to just the Indian legal framework. In fact, the law, in its broadest sense, has often constructed this binary and positioned itself as the force that guides society forward. In observing this tendency, Sally Merry observes that the law often assumes the role of being the sole enforcer of Modernity. This reinforces the idea that it is culture or society that oppresses people and it is modernity (through law) that frees them. That modernity is also a cultural system seems lost in this formulation. "Culture is relegated to the domain of the past, to religious extremism, and to irrational 'taboos.' Its opposite is modernity and the norms of human rights".[59] Simply put, this framework ignores that fact that ideas of modernity are born from the culture of modernity. Thus, any person attempting to interpret an action, must still rely on a cultural system. In other words, 'culture' cannot be set as an opposition to a set of ideas, since all ideas are a product of some cultural system. Instead, it is more accurate to recognise that multiple systems of culture exist within one society and the Courts simply implement the values of one of these systems (modernity).

Therefore, in constructing constitutional morality as separate and distinct from social morality, the Courts fail to recognise that their interpretations of constitutional morality are a product of their cultural or social understanding of what is moral. Therefore, in interpreting the contents and components of constitutional morality, the courts are influenced by their own sense of social values, stemming from social morality. We see signs of this in the previous section of the article, where courts make use of phrases like 'shocks the conscience of the court'. This 'conscience' is nothing other that the values of the judges that are, in turn, a product of their social contexts. We see this again in the cases where courts restricted expressions of female sexuality as it violated an idea of morality that they felt needed to be adhered to. In contrast, in other cases, where the matter seemed to be in opposition to some perception of social morality but aligned with the judges' sense of morality, constitutional morality was evoked to 'check' and circumscribe the limits and reach of social morality.

To better understand how and why this happens, it is helpful to consider the position held within symbolic anthropology. In the 1950s, Clifford Geertz introduced the idea of restructuring our understanding of 'culture' around the idea of 'meaning'. He says, "man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning".[60] More specifically, he defines culture as being a "historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge *about* and attitudes *towards* life".[61] He does not, however, formally offer a definition for 'meaning' and uses the word in a wide variety of contexts, something both his

[59]Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, Vol. 26(1), POLAR: POLITICAL AND LEGAL ANTHROPOLOGY REVIEW, 55-76 (2003).
[60]CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES, 5 (Basic Books, 1973).
[61] *Id*., 89.

critics and students have pointed out.[62] Regardless of this absence, 'meaning' can be carved out as being a sense of reality. As Sherry Ortner frames it: "meanings [are] a set of culturally constructed and historically specific guides, frames, or models of and for human feeling, intention, and action. Meaning is what both defines life and gives it its purpose".[63]

This tradition of symbolic anthropology and 'meaning' driven concept of culture has proceeded to greatly influence and shape the ways in which legal anthropologists frame the interactions between 'law' and 'society.' Speaking of this relationship, legal anthropologists like Cochrane have stated that 'law', to begin with, is a term that is used to describe a varied and complex system of principles, norms, ideas, practices, etc. This "complex 'law,' is abstracted from the social context in which it exists and is spoken of as if it were an entity capable of controlling that context. But the contrary can also be persuasively argued that it is society that controls law and not the reverse…".[64] To illustrate this, all one needs to do is look at any act of interpretation on part of the judges. Here one finds that the judges often have to necessarily rely on their 'subjective' understandings which is simply another way of referring to their cultural or social conditioning. Thus, any interpretive act by definition is an act rooted in what Geertz calls culture and what our Courts refer to as 'society'. Therefore, the assumption made in Navtej Johar and other judgments, that the 'law' and 'constitutional morality' are somehow separate from 'the social' and 'social morality', is not entirely an accurate one since the process of legal interpretation is fundamentally a product of the social.

The question that then comes up is that if constitutional morality is in fact a form of social morality, then why are the two sometimes found to be at odds with each other? This brings us to the overarching assumption seen in the judgement: that social morality is a uniform singular entity. In order to better study law as an extension of society, Sally Moore draws from the tradition of symbolic anthropology, and suggests looking at the site of study as a "semi-autonomous social field".[65] Each field is semi-autonomous in that "it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded".[66] The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. Under this framework, each site of study, in this case 'law' and 'society' is a separate 'culture' that interacts with and influences the other.

Thus, while constitutional morality and opposing views on morality all still constitute to exist within the folds of 'the social' at large, they can be seen as being smaller sub-sects of culture or society. Thus, 'the social' or 'culture' is better imagined as being a fragmented, multiple space rather than as a homogenous entity.

Partha Chatterjee uses this idea of multiples 'cultures' in relation to Benedict Anderson's conception of nationalism.[67] Partha Chatterjee recasts the idea of an imagined

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[62] Sherry B. Ortner, *Thick Resistance: Death and the Cultural Construction of Agency in Himalayan Mountaineering*, Special Issue No. 59, REPRESENTATIONS, 135-162 (1997).
[63] *Id*.
[64] GLYNN COCHRANE, DEVELOPMENT ANTHROPOLOGY, 93-94 (Oxford University Press, 1971).
[65] Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, Vol. 7(4), LAW & SOCIETY REVIEW, 719-746 (1973).
[66] *Id*., 721.
[67] Anderson states that a nation is an 'imagined community' since "the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." Thus, the sense of 'oneness' that members of a nation feel is a product of their imagined shared identities, *see* BENEDICT ANDERSON, IMAGINED COMMUNITIES (Verso, 1983).

political community by modifying it to account for a situation in which different groups of the 'nation' have different ways of perceiving and interacting with the images put forth by the 'nation'. He does this by applying Foucault's idea of heterotopia,[68] to the imagined space of the 'nation'.

Heterotropia is a concept Foucault conceptualises in relation to spaces in their most abstract sense. He says that "we live inside a set of relations that delineates sites which are irreducible to one another and absolutely not superimposable on one another".[69] He goes on to elaborate that "for each heterotopia has a precise and determined function within a society and the same heterotopia can, according to the synchrony of the culture in which it occurs, have one function or another".[70] In other words, when imagining a collective idea like morality or nationalism, individuals believe that their views are those that are shared by the entire community. However, since we are dealing with individual imagination, we are invariable left with multiple conceptions of morality or nationalism across a society which each one believing that the rest holds views similar to their own.

This difference comes about because what an individual imagines, is a product of their unique cultural positioning. Thus, the sub-sect of 'society' or 'culture' of the individual determines the nature of the community they imagine since this imagination necessarily involves the projection of the individual's 'patterns of meaning' onto all others in this imagined community.[71] Speaking of the Independence struggles, Chatterjee states, that while a great mass of individuals participated in 'major events' like those of Gandhi's marches, their experience of these events were dramatically different and coloured by their conception of reality.[72]

Morality, like nationalism, is an imagined shared belief within a system of meaning. Thus, 'constitutional morality' and 'social morality' are terms that bear different meanings depending on who is interpreting the terms and where (sphere of culture) the individual comes from. Thus, constitutional morality is not only a type of social morality, the contents of what it entails greatly depend on who the judges are and where these judges come from. Thus, in practice, constitutional morality and its interpretation are heavily dependent on Judges' subjective identities, rather than abstract legal concepts. This subjectivity is seen in Part III and the multiple ways in which courts have interpreted constitutional morality over the years.

Thus, to tie this back to the judgement, the belief that constitutional morality is superior to and separate from social morality is a product of the larger assumption that the 'social' is a singular entity. What we observe when adopting an anthropological lens, however, is that the 'social' is actually a fragmented space with multiple systems of belief existing within in. Ideas of modernity as believed to be espoused in the constitution simply constitute one such fragment of the 'social.' Thus, no interpretation of the law is separate of the social, and interpretations of the law vary based on what contexts the judges come from.

This brings us to the third assumption, as noted in Part II of the article, that constitutional morality is superior and more progressive than social morality. As seen in Part II, the Courts believe in this superiority since the constitutional morality is one rooted in constitutional values and the impartiality of the Constitution. However, voices from the ground surrounding the queer rights movement in India indicate otherwise. When talking of preparing for

[68] Michel Foucault & Jay Miskowiec, *Of Other Spaces*, Vol.16(1), DIACRITICS, 22–27(1986).
[69] *Id*., 23.
[70] *Id*.
[71] PARATHA CHATTERJEE, THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD, 3-13(Columbia University Press, 2004).
[72] *Id*., 14.

the Naz Foundation case, anthropologist Akshay Khanna, notes that when choosing between the term LGBT and the more inclusive Queer, there was the general consensus that the activists had to compromise on the forms of sexual freedoms they wished to represent so as to not be "too radical for the court".[73] Through this exercise, he notes, how this was a process of translating queer ideology into the limiting language of and imagination of the law. "Simply put, in order to enter the juridical register, one must take a form that is familiar to it, this being a "carefully crafted compromise". In order for an effective claim to be made in Court, one is constrained to offer the Court a problem framed in the idiom of the juridical register".[74] Accounts from the field, such as this, illustrate that the belief that constitutional morality is superior to social morality because it is rooted in Law is not always true. Often, ideas from the 'social' are required to be tempered down so as to fit within the framework of meaning which judges are comfortable with.

Further, law is a domain of endless narratives and counter-narratives, at least some of which is paradoxical. Nowhere is this more prominent than in the legislature's and judiciary's differing approach to law and social morality. On one hand, the Supreme Court undermines the value of social morality and calls it majoritarian and regressive, worthy of being defeated by judicial interpretation of constitutional goals and visions, irrespective of how coloured such interpretations may be by the judges' own social contexts; on the other hand, the legislature, through a large gamut of statutory provisions, inter-weaves social morality with the law, and makes it a pivotal point for activating legal processes. The obscenity laws, laws related to human trafficking and 'indecent representation' of women, and the legal requirement for a valid custom and a valid contract are some such examples. The moral content of these laws often lends themselves to an exercise of a wide discretionary power by the law enforcement agencies, particularly in the context of female sexuality. Additionally, social legislations are premised upon a moral choice of legislators to transform society through an establishment of normative standards of behaviour. Against this backdrop, presenting social morality and constitutional morality as Navtej Johar does: as distinct and separate entities, where one is superior to the other, is nothing more than a legal fallacy.

V. CONCLUSION

This exercise in dissecting the judgement's imagination of the social goes far beyond just being an intriguing thought exercise. Geertz's definition of culture, along with its criticisms, allow one to peel back the curtain of the law and see the social factors that are at play when constitutional morality is evoked. This, in turn, allows one to engage with why certain freedoms or ideas are interpreted as being within the realm of constitutional morality while others are not.

As Sherry Ortner clarifies, Geertz's definition of culture allows one to view power and political systems as being not merely systems of control but also systems of meaning.[75] What this means is that power is not just reinforced through the acts of control, but also through exclusive access to sets of cultural meanings that groups with power have. While this may not always be a problem, this framework of analysis does illustrate how the 'legal' imagination is predominantly the imagination of certain privileged groups of society. Since this legal imagination is then given a preferred status, it is worth exploring whose systems of meaning are being placed above other. For instance, in the context of India's judiciary, where a majority are men belonging to upper caste and upper-class communities, it is of value to critically explore what social factors

[73] Akshay Khanna, *Three Hundred and Seventy-Seven Ways of Being - Sexualness of the Citizen in India*, Vol. 26(1), JOURNAL OF HISTORICAL SOCIOLOGY, 120-142 (2013).
[74] *Id*., 133.
[75] Ortner, *supra* note 62, at 137.

(or meanings) influence their legal interpretations. As Akshay Khanna points out, in focusing on decriminalising same-sex intercourse through the right to privacy, the argument left out working-class queer folx who could not engage in private intercourse (from not having access to private space) and who were the primary targets of police harassment.[76] Thus, viewing constitutional morality as an anthropological symbol allows us to explore the various channels of power that are at play when it is being interpreted.

[76] Khanna, *supra* note 73, at 129.