A SUPREME SLEIGHT OF HAND - THE EVOLUTION OF THE INDIAN JUDICIARY AND THE THEORIES OF LAW IT FOLLOWS

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ABSTRACT

The Judiciary plays the role of a fall-back for the common man when they face disagreement with their elected government's decisions. Historically and jurisprudentially however, the judiciary has often been a tool to enforce the sovereign's will through the black letter of the Law. Post-colonial India saw this Austin's command-based interpretation of the Law in its nascent stages. However, there was an apparent shift in the Judiciary's approach, with a more nuanced and objective outlook of individual rights and morality.

This discernible shift, although, was not a gradual and seamless one. It required great judicial activism to firstly, take up the Dworkian method of forgetting precedents to cull out a different interpretation of the Law and moreover, interpret the muddled decision of the constitutional bench in *Keshavananda Bharati* to as Naturalist. This Paper attempts to delineate and show that this shift was a momentary period of activism by the Courts and not a linear transformation of the understanding of the Law in India. While in principle and on the prima facie language of the Courts, it appears that we have shifted to a rather naturalist and moralist understanding of the Law, the way judgments have factually and practically played out to those aggrieved reflects a tension and hesitation on the part of the Judiciary to in fact substantially enforce the naturalist rule of law.

It is thus argued and demonstrated that Hart's inclusive positivism provides a more comprehensive and compelling framework to contextualise judicial decisions in India by viewing morality and legality as accommodating with one another rather than being exclusive vacuums.

Introduction

What is or what it ought to be? The black letter or underlying morals? The social and political being of "Sovereign" has been historically conceptualised under the hood of these questions of 'law'. The Natural Law philosophy was one based out of morality rather than on practicality through the early sixteenth and seventeenth centuries.[1] Come the fall in theology and the rise of the industrial revolution, this discourse set off on a new tangent to rediscover the idea of State within the power system, enabling Austin's positivist idea of an 'absolute political sovereign'[2] and subordinating individuals to the State.[3] Contrastingly though, the writings of Locke, Montesquieu and Rousseau developed the view of a welfare state with people at the helm of political power. This gave a dichotomy to the chicken-egg problem – was it the sovereign from the people or the people from the sovereign? It is in the backdrop of this dichotomy that the evaluation of the Modern State with a 'written constitution' comes under the lens. Unlike the United Kingdom, where on paper all reference is made to the Crown (creature of the Parliament)[4], thereby substantiating Austin's idea of a "determinate human superior"[5], the Positivist theory becomes harder to harmonize in a situation of democracy where the people themselves, through a constitution confer the constituent power onto a *representative institution*. Bentham and Austin would weaken the Naturalist nature of a written constitution on grounds that the Parliament's constituent power is to be read under the wording of such constitution and not the intention of its drafters, thereby any limitation not explicitly mentioned would be deemed to be surrendered, including the power to make amends. The Naturalist theory would rather operate on the spirit to uphold the sovereign of the people.

The Indian Constitution was drafted in the backdrop of the colonial regime's withdrawal and sought to involve issues so addressed in Constitutions abroad to ensure that the ghosts of the past – the unbridled power of the sovereign, do not come back to haunt the nation.

On face value, it is apparent through the principles of the Constitution, that the Constituent Assembly sought to defeat the positivist idea. The ideas of federalism, separation

[1] V. R. Jayadevan, *Interpretation of the Amending Clause: The Brawl between the Spirit of Natural Law and the Ghost of Analytical Positivism - A Comparative Overview of the American and Indian Experiences*, 33 HAMLINE L. REV. 243 (2010).
[2] John Austin, *The Province of Jurisprudence Determined* (Wilfred E. Rumble ed., Cambridge University Press 2009).
[3] Jayadevan, supra note 1, at 244.
[4] Salman Khurshid, *In Search Of Rights Jurisprudence*, 62 Source: Journal of the Indian Law Institute 371 (2020).
[5] Austin, supra note 2.

of powers between the executive and the judiciary, and by judicial review hit Austin's idea of an 'indivisible' political sovereign at its very heart. However, there comes the supposed saving clause – Article 368[6] of the Indian Constitution that allows the Parliament to amend the Constitution. This paper essentially sets out to delineate the application of this constituent power and seeks to argue that at the inception, the Parliament employed the provision to reinstate its curtailed sovereignty and abridge fundamental rights as provided under Part III of the Constitution, starting with the Right to Land (a fundamental right then) extending upto the Right of Free Speech and Expression and it was in fact the apex court that aided such interpretation through a pragmatic approach. This metaphorically instated Austin's Command Theory in the way the Indian constitution was interpreted – thereby instating the State as the political sovereign.

However, following from *Golaknath*, the Court broke loose from such timidness and read Natural Law into the constituent power of the Parliament, thereby making headway into conferring and expanding the scope of Fundamental Rights as not a gift of the State but rather an idea pre-existing the representative institution. It is further averred that Dworkin's virtue of 'equal concern and respect'[7] has underscored such decisions of the Court in the past few decades. However, these developments have their share of challenges. A close perusal of the Supreme Court's decisions lately reflects that while in principle it attempts to uphold the Natural Rule of Law in its interpretation of Part III, in effect the Parliament has been in a position to take actions without the real threat of retribution, thereby disabling the sense of deterrence that the constitutional principles are expected to have. Such a divulgence calls to rethink the discourse of the basic structure doctrine through the lens of Hart's idea of *inclusive positivism*, that allows for a minimal inclusion of morality while overarchingly following the black letter of the law and sovereign control of the State.

Early Years and Command Theory

The early years of the judiciary saw an intense reliance placed on the legislative and executive. This reflected an Austinian view of the law that was not the initially intended effect. Beginning from 1947, when India became a newly independent nation, till the end of the era of national emergency imposed in 1976, the legal system gradually became increasingly tilted

[6] INDIA Const. art. 368.
[7] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

to favour the union government. This caused a concentration of power in the hands of an already strong centre that ultimately try to dismantle a core tenet of Indian Constitutionalism and identity, that is, federalism by curbing various fundamental rights leading up to and during the national emergency. This seen together with John Austin's *Command Theory of Law*[8] that assumes the following: A sovereign exists, and the command of this sovereign imposes a duty that is compulsory on the subject. This command is backed by a threat of a sanction that is faced by the subject if the task is not performed. Hence, this forces the subject to perform the command. Austin's theory suggests that a political sovereign is a superior being that is legally unlimited and indivisible. The majority population "habitually obey" the sovereign and this is the basis for the Command Theory of Law.[9] The timeline of the legislature inching towards becoming an all powering 'sovereign' is inherently problematic because it went against the very spirit that the country is built on. However, it is important to analyse this trend to understand the true nature of the basic structure doctrine of the Indian Constitution as it has been construed through the years and at present as well as the way rights are guaranteed and presented to the public. It is also important to keep an open mind as the judiciary might not be as welcoming as they now seem, with hints of their past creeping in through a new crack in this pillar of democracy.

It is easier to understand the obscure and parallel path of the judiciary interpretation of rights and the legislative's understanding of the interpretation and their actions, through a string of cases. The descent towards the judiciary seemingly forfeiting the greatest weapon of judicial review for no reason except the ghost of a 'sovereign' spirited legislative shrouding them, begins with *Shankari Prasad v. Union of India*[10]. This case was regarding the right to equality under Article 14 as claimed by the zamindars during the period of land reforms for redistribution where the union was taking over land in the interim. At this juncture, the legislative deemed it fit to pass the First Amendment to the Indian constitution in the form of Articles 31 A and 31 B, the latter which barred the courts from reviewing any matter violating the rights contained in Part III of the Constitution with respect to items in the then added Ninth Schedule. The petitioners in this case argued on several grounds of various constitutional provisional violation especially the absence of judicial review that is blatantly against Articles

[8] Bix, Brian, "John Austin", *The Stanford Encyclopedia of Philosophy* (Winter 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), forthcoming URL = https://plato.stanford.edu/archives/win2024/entries/austin-john/.
[9] Ibid.
[10] Shankari Prasad v. Union of India, AIR 1951 SC 458 (India).

132, 136 and 226. However, the only real clarification the Supreme Court made in this case was that the constitutional procedure under Article 368 to amend the constitution was the same as any other 'legislative procedure'. However, they established a difference between constituent power and legislative power by stating that fundamental rights can be abridged by constituent power but not by legislative power. This interpretation gave unlimited power to the legislature in amending the Constitution as they pleased, thus creating an entity close to what Austin imagined as a 'judge who legislates'. The whole idea that the Ninth Schedule existed with certain subjects given immunity from judicial review and the fact that the vast powers of the Constituent Assembly were equated to that of the legislative implies a judgement built on the core principles of Command theory with a departure from natural law.[11]

In a similar case challenging the constitutional validity of the Seventeenth Amendment, *Sajjan Singh v. State of Rajasthan*[12] , the court upheld *Shankari Prasad* and went so far as to acknowledging the "specific, unqualified and unambiguous power to amend the Constitution" that is given to the Legislative that includes fundamental rights. In this regard, the court prefers the sovereign (legislative) over the subjects (the people) even if the Constitution itself (the overarching rule of law) originated from the subjects. It goes a step further and allows the legislative to take away the rights that are supposedly inherent, from those who proclaimed them.[13] However, a positive takeaway (ironically which is not positivist in nature) is the *obiter dicta* of Justice Hidayatullah, who through caution to the wind and urged to amend to the Constitution to prevent the abuse pelted on the fundamental rights and Justice Mudholkar, who is the pioneer for the shift in Indian jurisprudence with regards to the power of the legislative, sidestepping the previous ruling to state that there is a distinction between constituent power and legislative power and the need for judicial review in the latter. He also argued for a different interpretation of Article 368, to include the need for a two thirds majority amongst all states to pass any constitutional amendments.

Justice Mudholkar's vision to instate the fundamental rights to the actual untouchable glory envisioned by the makers of the Constitution had to take a backseat, as the single largest decision that most resembled Austinian and Benthamian theories was delivered in 1976, during

[11] V.R. Jayadevan, Interpretation of the Amending Clause: The Brawl Between the Spirit of Natural Law and the Ghost of Analytical Positivism- A Comparative Overview of the American and Indian Experiences, 33 HAMLINE L. REV. 243 (2010). Pg. 262.
[12] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845, 846 (India).
[13] Supra Note 3 Pg. 264.

the emergency in the form of *Additional District Magistrate, Jabalpur v. S. S. Shukla*[14] (hereinafter *ADM Jabalpur v. Shivkant Shukla*). The infamous five judge bench deliberated on the validity of writ petitions against the imposition of Article 359 that suspended *habeas corpus* rights. This meant prevention of the enforcement of fundamental rights under Articles 14, 19, 21 and 22 during the state of national emergency called for under Article 352. In an overwhelming majority, the court unfortunately ruled in favour of the Centre and dismissed the *habeas corpus* petition. The court reasoned this decree by stating something of jurisprudential weight. They first established that emergencies are called for in extraordinary circumstances, and in such a situation where the security of the nation is of paramount importance, whatever action the government takes should not be questioned, even if they may seem arbitrary or illegal. The judgement further says the following through Chief Justice A.N. Ray's opinion: *"Liberty is confined and controlled by law, whether common law or statute. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved." "Liberty is itself the gift of the law and may by the law forfeited or abridged."*[15] This judgement is in alignment with Bentham's idea that rights do not pre-exist the government or the sovereign.

In *ADM Jabalpur*, the court assumes that rights and laws stem from the entity in charge. Flowing from this is a reflection of Command theory[16] in a strict form as the sovereign has total control over subjects and commands are to be followed. In the state of emergency, the threat of sanction manifests in the form of preventative detention. Sovereign power that cannot be legally limited is seen in the form of the suspension of fundamental rights and the denial of the *habeas corpus* petitions. The dissenting opinion of Justice Khanna beams like a ray of hope for critiques of positive law, for the judge introduces the legal fiction of 'rule of law' as opposed to 'rule of men' principle that positivists and pragmatists rely on. He uses this to state that personal liberty and freedoms should never be curtailed, and it was in the minds of the makers of the constitution to prioritize this fundamental right over the security of the nation.

The three cases above highlight the strictly positivist outlook of the judiciary in India till the emergency. However, some slivers of morality influencing opinions, like in the cases of Justices Hidayatullah and Mudholkar in *Sajjan Singh* and Justice Khanna in *ADM Jabalpur,*

[14] Additional District Magistrate, Jabalpur v. S. S. Shukla, 1976 AIR 1207 (India).
[15] Ibid.
[16] Supra note 1.

are a premonition for the wave of change that surfaced throughout the next era of the Supreme Court in Indian jurisprudence.

Basic Structure and Natural Law

The dissenting opinions in *Sajjan Singh* formed the basis for the digression from Analytical Positivism to what appeared to be the principles of Natural Law. *I.C Golaknath v State of Punjab*[17] became the essential predecessor to Kesavananda Bharati wherein despite upholding the constitutionality of the *Security of Land Tenures Act* and the *Land Reforms Act*, the Court through J. Hidayatullah drew a distinction between a 'Constituent Body' and a 'Constituted Body'. He limited the Parliament to the latter and held, was subject to the Indian Constitution and hence, could not alter the Constitution to confer on itself the powers to do something it could not do directly.[18] Furthermore, the Bench construed the amending procedure and power of the Parliament as congruent with that of law making and read in implied limitations into its constituted power as well as falling under the scope of judicial review.

The Court in *Kesavananda Bharati v State of Kerala*[19], took off from where Golaknath left to draw in apparent principles of Natural Law and construed the Preamble to reflect the authority of the people as the sovereign. Resultantly, the power to alter the constitution was held to be a subset of the power to make it. The implication of this observation was that certain aspects and features of the Constitution were held to be unamendable, owing to the idea that they resonated the primary principles of the drafters of the Constitution that essentially spoke to the identity of the Constitution. These principles were thus accorded to be the 'basic structure' of the Constitution. Resultantly thus, the Bench observed that the action of amending, abrogating or repealing the Constitution was *ultra vires* of the constituted power. This decision divulged from prior jurisprudence in two ways – *firstly*, it sought to introduce a Natural Law approach of upholding the people as the paramount holders of political sovereignty and *secondly*, it did so by straying away from history and precedents and the 'core', as Dworkin would put it[20] and instead, gave the constitution a textual interpretation that they believed gave effect to the intention of the original framers. Such a normative reading of the Constitution and the intended purpose reflects the textual fidelity that Dworkin endorsed as required to decide

[17] I.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643 (India).
[18] *Id.* at 1696.
[19] Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461 (India.)
[20] *Id.* at 1664.

the 'penumbra' or disputed cases rather than asking the question of "how would the original drafters have interpreted the clauses?". In his own words,

> *"Some parts of any constitutional theory must be independent of the theory designates as framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular."*[21]

Therefore, the Court drew upon Dworkin's dissent against pragmatism and took up *judicial activism* to negate a strict positivist approach and rendered the State to be a drawn on Welfare rather than power and arbitrariness. This put certain principles in the Constitution on the pedestal of "higher order principles"[22], outside the amending reach of the Parliament. This Natural Law interpretation has been affirmed in principle by CJI D.Y Chandrachud in *Puttaswamy*[23] while talking about Art. 21:

> *"These rights are, as recognised in Kesavananda Bharati, primordial rights. They constitute rights under Natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilised State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right."*[24]

The admission of certain rights as pre-constitutional affects the root of Bentham's theory that rights are correlated with duties and are present as a command of the Sovereign.[25] CJI Chandrachud in fact categorically went ahead and turned down the starking positivist take in *ADM Jabalpur* in the above judgment:

> *"nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty*

[21] S.R. Bommai v Union of India, (1994) 3 SCC 1, 185 (India).
[22] Jayadevan, supra note 1, at 247.
[23] Justice K. S. Puttaswamy v. Union of India (2017) 10 SCC 1 (India).
[24] *Id at 418.*
[25] Jeremy Bentham, *An Introduction to the Principles of Morals* and Legislation (J.H. Burns & H.L.A. Hart eds., Oxford University Press 1996).

and freedom to the State on whose mercy these rights would depend"[26]

In principle hence, the Apex Court has moved on from interpreting a rather naturalist constitution through analytical positivism in *Shankari Prasad* and *Sajjan Singh* to establish the people as the political sovereign rather than their representatives in accordance with Natural Law Theory.

Rethinking The Influences Of The Indian Legal System And The Scope of Inclusionary Positivism

This approach of Natural Law Theory found consonance in and was furthermore expanded in subsequent cases. One such instance was that of *Maneka Gandhi v UOI*[27] wherein the State was directed to employ 'due process of law' while inhibiting one's fundamental rights under Article 21 by substantially meeting the Reasonability tests of Arts. 14 and 19 as a matter of prudence. The direction to read them in conjunction to one another rather than as watertight aspects increased the threshold for the State to inhibit one's fundamental rights, thereby limiting its powers at taking unreasoned and arbitrary actions.

Another instance is that of *Lt. Col. Nitisha & Ors. v UOI*[28] wherein the Court while probing into the government's 'general instructions' on the screening of Women SSC officers for grant of permanent commission, sought to distinguish the idea of formal and substantive equality, as rooted in Dworkin's idea of 'right to equal concern and respect', i.e. the essential right to treatment as an equal and not just to be treated with right of equal distribution. The decision in this case was not one that involved an explicit question of affirmative action but was read into by the Court to demarcate the underlying indirect discrimination by the State. An expansion hence was made from the letter of the law under Arts.15[29] and 16[30] to read it into the constitutional principles of equality, thereby adding a test to be fulfilled by the State in its actions.

However the above cases pertain to the rather rosier side of the Supreme Court's jurisprudence. In the case of *Lt. Col. Nitisha* itself, the order was a result of the Court's decision

[26] Puttaswamy, supra note 15.
[27] Maneka Gandhi v UOI (1978) 1 SCC 248 (India).
[28] Lt. Col. Nitisha & Ors. v. Union of India & Ors. 2021 SCC Online SC 261 (India.)
[29] INDIA Const. art. 15.
[30] INDIA Const. art. 16.

in *Babita Puniya*[31] that directed the Court to act on its order ten years back to set up a system allowing women for gaining permanent commission.

The recent judgments given by different levels of the judiciary are confusing to say the least. The inconsonance between the reasoning and the end result of these judgments leads us back to our primary question of "what is and what ought to be?" and our attempt to uncover the true influence of the Indian state. For this purpose, two cases shall be examined. The first is *Anuradha Bhasin v. Union of India*[32] in which the bench decided on the issue of the blocking of the internet for three months in Jammu and Kashmir during the abrogation of Article 370[33] due to which a violation of Article 19[34], Freedom of Speech and Expression, was alleged. The court decided that right to access the internet was not a fundamental right, however expressing oneself through the same was. They further said that a reasonable restriction is allowed but a blanket ban would lead to a violation of the fundamental right under Article 19. However, before they pronounced orders, some access to the internet had been restored. This shows a clear hesitance on the part of the Court to declare the order against the state. Declaring a fundamental right violation against the state has various repercussions for the government to bear. The fact that the Supreme Court's trial and restoration of access to internet coincided perfectly in this case is to be seen with a tone of suspicion and the delay in the trial could also add to the same. Even if the court ruled on a naturalist perspective of law, the end effect still caused no negative consequences for the government.

The second case to be examined is the same-sex marriage case[35] in which the five-judge bench delivered an unpopular opinion with two justices dissenting. This was a clear cut positivist judgement, as the judges have taken into account only the black letter of the law and refused to engage in judicial activism to broaden the scope of the *Special Marriage Act*[36] even if one can consider their rationale for right to marriage not being a fundamental right to be valid. Justice Bhat delivered a judgement that sits within the confines of the present law, devoid of morality for the affirming justices. Chief Justice Chandrachud delivered a creative solution in the form of a civil union but it alas remains in his *obiter dicta.* It was especially disappointing to see a court that usually stretches beyond imagination to include several rights under the

[31] The Secretary, Ministry of Defence v, Babita Puniya & Ors. (2020) 7 SCC 469 (India.)
[32] Anuradha Bhasin v. Union of India AIR 2020 SC 1308.
[33] INDIA CONST. art. 370.
[34] INDIA CONST. art. 19.
[35] Supriyo@ Supriya Chakraborty & Anr v. Union of India 2023 SCC OnLine SC 1348.
[36] Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

Right to Life but could not include the definition of a queer couple to marry each other and a trans couple to adopt. The bench leaves it to the legislative, to make specific amendments or legislations for the LGBTQIA+ community.

These cases show that while *in principle* Natural Law theory seems to be in operation, *in effect*, the State in no practical sense has been inhibited in going ahead with its actions owing to a lack in deterrence given the adjournment of trials and decisions post the effectuate of such legislative decisions . This phenomenon calls into question the reality of and in fact makes way for theorizing the discourse on the basic structure doctrine within Hart's idea of inclusive positivism.

Such a discourse may be argued on two grounds, firstly, Hart's *rule based system*[37] and secondly, his *minimum content theory*[38]. Hart's idea of the rule of recognition essentially requires the practice of judges and officials to be in consonance with such rules. Given that the Supreme Court has gone ahead and recognized and in fact expanded the scope of the basic structure doctrine, it has been internalised by the judiciary. Moreover, the same has also been accepted as the rule of public standard by officials, given that post the 42nd Amendment and the *Indira Gandhi case*[39], there has been no real challenge to the features of the basic structure in challenges to the parliamentary legislations on part of the State. This is thus reflective of the acceptance of the basic structure as a *Rule of Recognition*, so conferred and protected by the judiciary and State officials.

The concept of *minimum content* essentially allows a minimum influence of morality, thereby enabling legal systems *with* a moral criteria.[40] This essentially fits into the incorporation theory of Hart, bridged on two components – one of *necessity* and the other of *sufficiency*. The former provides that there may be a legal order wherein morality acts as a constraint on law whereas in the latter, the mere existence of/compliance with morality is enough to validate the law. This may be articulated in the words of *Jules Coleman*[41] that the

[37] Dr Sanjay S Jain, *Grounding the Basic Structure in Legal Theory*, (2023), https://www.nls.ac.in/wp-content/uploads/2023/05/MLJ-25-05-2023-13-24.pdf .
[38] Ibid.
[39] Abhishek Sudhir, *DISCOVERING DWORKIN IN THE SUPREME COURT OF INDIA - A COMPARATIVE EXCURSUS.*
[40] Kenneth Himma, *Inclusive Legal Positivism,* in Ed. Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro "The Oxford Handbook of Jurisprudence and Philosophy of Law" Oxford University Press 2004.
[41] Andrei Marmor, *Exclusive Legal Positivism*, in Ed. Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro "The Oxford Handbook of Jurisprudence and Philosophy of Law" Oxford University Press 2004.

"content of law can truthfully be redescribed as a moral directive or authorization."[42] Such a legal system with moral criteria (in this case the basic structure) must be evaluated against three steps – *adequacy* (why is it important?); *flexibility* (must fit differing scenarios); *salient feature* (must have some given essential features).[43]

A reading of the decision in *Nagraj & Ors. v UOI*[44] shows that the basic structure doctrine, as an instrument of recognition of the *constitutional values* is essentially a Rule of Recognition that provides "coherence to the Constitution"[45] (adequacy) and allows for its applicability and linking to other provisions of the Constitution as over-arching principles (flexibility).[46] Furthermore, the Court has been mindful in limiting the scope of the basic structure to mere constitutional maxims and has explicitly excluded principles evolved through judicial pronouncements – like *catch up rule* and *consequential seniority* as recognized in *Nagraj.*

In fact, the case of *Maneka Gandhi* may in fact be re-read as a mere recognition of the principles and standards of the Constitution, essentially inclusive positivism rather than a case of enforcement of the rule of natural law. Such an interpretation of the Rule of Recognition in fact allows for the inclusion of implied limitations into the Constitution to meet the minimum content theory. After *Navtej Singh Johar*[47] there has been considerable amount of hope from the Supreme Court and the rest of the judicial system to employ a more "constitutionally moral approach" that does strike a balance and finds itself at the heart of Hart's Minimum Content Theory[48] while drawing more morality and breathing a new life to the interpretations of the Constitution.

Conclusion

On 23rd September 2024, the Supreme Court held a hearing for a batch petition on criminalising marital rape. The position of law on the same has been precarious for years, with different high courts having different opinions on the same. It was reported[49] that the central government is

[42] Ibid.
[43] Jain, supra note 24.
[44] M. Nagraj and Others v. Union of India, 2006 (8) SCC 212 (India).
[45] Ibid.
[46] Jain, supra note 24.
[47] Navtej Singh Johar v. Union of India AIR 2018 SC 4321 (India).
[48] H.L.A. HART, CONCEPT OF LAW, 193.
[49] Utkarsh Anand, *"Excessively harsh": Centre defends marital rape exception in Supreme Court | Latest News India - Hindustan Times*, Hindustan Times (2024), https://www.hindustantimes.com/india-news/excessively-

against such a clarification and has made the plea to not criminalise marital rape as there are other recourses available and criminalising it would be invasive and destructive to the institution of marriage. As the hearing is ongoing, it is hoped that the court exercises some judicial activism and takes into account the moral aspects of the extremely precarious issue at hand. While the extremes of Command Theory have been exercised in the early years, and an active choice to move away from the same, recent trends seem to confuse the decision to be expected. There is a need for the resurgence of the *activist era* of the judiciary that sought to place the masses on the sovereign pedestal and ensure that the State does not manifest into the indivisible political sovereign that Austin had projected. Morality, as argued, whether through the Naturalist or Hart-ian Positivist outlook, hits at the very root of the constitutional principles of the nation and must be emphasized in the process of judicial decision making and the authority of the Parliament in making laws must be subjected and scrutinized under the same rigour of morality and proportionality that CJI Chandrachud iterated in the *Puttaswamy* case.

harsh-centre-defends-marital-rape-exception-in-supreme-court-101727960745867.html (last visited Jun 16, 2025).