ARTICLE

INCORPORATING INDIRECT DISCRIMINATION: EVALUATING SECTION 9 OF THE HINDU MARRIAGE ACT, 1955

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ABSTRACT

Laws against discrimination should shield not only from acts of direct discrimination but also from acts that perpetuate indirect discrimination. A facially neutral provision can be extremely disadvantageous to vulnerable segments of society that have already been facing acute subordination. In order to grant constitutional protection from indirect discrimination, it becomes imperative to identify the constitutional provision that acts as a safeguard to it. This establishes the need to resolve the dilemma of Article 14 vis-à-vis Article 15(1) of the Constitution of . Additionally, Section 9 of the Hindu Marriage Act, 1955 is a classic example of a provision that underscores indirect discrimination by placing women in a worse situation than their male counterparts. In this article, the author establishes the origin and foundations of indirect discrimination and lays down the mental element that can be attributed to it. Further, the author aims to trace judgments that delve into the question of indirect discrimination and incorporate it within the Indian Constitution. Following which, the author evaluates Section 9 of the Hindu Marriage Act based on such an incorporation. The position of Section 9 and the impact of its unconstitutionality has been examined and a common ground that can resolve the subsequent paradoxes has been proposed.

Keywords: indirect discrimination, facially neutral, Indian constitution, restitution of conjugal rights, constitutionality.

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I. INTRODUCTION

Formally equal rules can, in reality, bear a consequence of the denial of opportunities. The Aesop's fable of '*the fox and the stork'* reflects that though principally giving each animal an equal opportunity to enjoy the dinner, in practice, the vessels for the serving of the soup inevitably excluded the guest on account of their particular characteristics.[1] Thereby, when the emphasis shifts to the effects of some impugned action, the concept of indirect discrimination (**'ID'**) comes into play.

In this article, the author identifies what ID implies and where it finds recognition within the Indian Constitution (**'IC'**). To that extent, the author has critically engaged with Section 9 of the Hindu Marriage Act (**'HMA'**), 1955 that deals with restitution of conjugal rights. While conservative jurisprudence is evidence for how Section 9 is an indispensable provision for the maintenance of marriage as a precursor to the creation of family- the most basic social institution, the stakeholders of the feminist movement condemn the above stated provision on grounds of ID.

Section II lays down the theoretical foundations of ID. It stresses upon the concept's origin and explores whether it is derivative of direct discrimination or is an independent concept in itself. It attributes negligence as the mental element in ID and analyses why it may require a lesser amount of moral condemnation. Further, it presents two objections that might be raised to this attribution of mental element and seeks to counter them. Section III contests the recognition of ID in the IC and specifies the article where the concept finds its legal recognition. It studies cases in Indian jurisprudence where ID has been located differently. Further, it also lays down the need to identify this location aptly because it bears different implications in each of the Articles, namely Article 14 and Article 15(1) of the IC. It ends with identifying one structural flaw to the recognition and a suggestion to resolve it. Section IV evaluates Section 9 of the HMA on the touchstone of Article 14 of the IC and the criterion of ID. It delves into the cases that determined its constitutionality and laid down the essential nature of privacy. It also examines the impact of unconstitutionality on various policy questions that may arise forthwith and how resultantly it can prove to be counterproductive. Subsequently, it proposes a solution that might help neutralize the effect.

[1] HUGH COLLINS AND TARUNABH KHAITAN, FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 1 (Hart Publishing 2018) (hereinafter "COLLINS").

Section V offers some concluding thoughts on incorporating ID in the IC and the validity of Section 9 of the HMA in light of the same.

II. THEORETICAL FOUNDATIONS OF INDIRECT DISCRIMINATION

ID is linked to the substantive conception of equality that disclaims the uncritical adoption of laws and practices that appear neutral but might help to validate and perpetuate an unjust *status quo.*[2] The origin of this concept can be traced to a decision of the United States Supreme Court in *Griggs v. Duke Power.*[3] The case dealt with the application process for a job where the applicants had to pass a written test that was open to everyone. However, in practice, black applicants performed worse than white applicants on the test, a disparity that almost certainly reflected their different educational opportunities within a segregated school system.[4] Black workers were disqualified in substantially larger proportions than their white counterparts on account of their inferior education, when this requirement of a test, set as a pre-condition, was never proven to be necessary for the jobs in question. Justice Burger declared, "*if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employers lack of discriminatory intent."*[5]

Can it be argued that the law imbibed with ID attempts to achieve social inclusion by guaranteeing that disadvantaged groups do not face obstacles in being integrated through participation in social life? Answering this question in the affirmative, some may very well claim that ID does not deserve the same amount of moral condemnation as is given to direct discrimination and hence, is an independent concept in itself. This independency arises from three bases of differentiation: causation, mode of proof and moral wrongfulness.

ID can occur out of implicit biases or an inability to recognize how existing structures/institutions have the consequence of freezing an unjust *status quo.*[6] Thereby, the causation of ID is heavily contested as it is often argued that the disadvantage caused is the result of choice made by the claimant that makes it impossible to comply with the rule or practice.[7] Direct discrimination, on the other hand, is caused by conduct that is strictly prohibited *per se.* John Gardner has understood

[2] Lt. Col. Nitisha and Others v. UOI, (2021) SCC OnLine SC 261 (hereinafter "Lt. Col. Nitisha").
[3] Griggs v. Duke Power Co, (1971) 401 U.S. 424 (hereinafter "Griggs").
[4] COLLINS, *supra* note 1.
[5] Griggs, *supra* note 3.
[6] Lt. Col. Nitisha, *supra* note 2.
[7] COLLINS, *supra* note 1, at 15.

it to mean that direct discrimination is primary because a prohibited marker is an operative premise based on which a discriminator acts and ID is secondary, because it is constituted by the side-effects of an operational decision[8]. Secondly, ID does not require proof of intention or any malign discriminatory purpose to establish a claim. Also, the absence of proof of such an intention is not a valid defence for any conduct that results into ID so much so that, in some places, it becomes difficult to legislate upon it because it seems to be based on social welfare policies. On the other hand, cases of direct discrimination have intention, desirability, and consciousness of the result as modes of proof to attribute culpability. Thirdly, there is a different category of moral wrongfulness that can be ascribed to ID, and a policy decision resulting into ID is often justified as necessary in the pursuit of a legitimate aim[9]. The moral foundations of ID get weaker than those of direct discrimination since it occurs in pursuit of one of the goals concerning social welfare. According to Sandra Fredman, an equality law has a four-pronged objective — *first*, to redress past disadvantage, *second*, to address stigma, stereotypes, and prejudice, *third*, to accommodate difference and *fourth*, to transform societal structures of hierarchies and subordination; direct and ID fulfil different ends of this framework[10]. While law on direct discrimination addresses stigma and stereotyping, law on ID attacks domains that disadvantage vulnerable groups and transforms the apparently neutral provisions into evils by accommodating the difference it inherently propagates.

The independent existence of the concept of ID stems from how ID can be seen as a form of negligence[11], whereas direct discrimination might occur when the agent's conduct knowledgably leads to discriminatory actions. There is a certain omission and unreasonability in giving other people's interests the same kind of moral significance that should have been attributed to, from the agent. It is significant for us to view ID from the lens of negligence. This is not because this idea specifies the discriminator's obligations but because it helps us avoid ascribing any *mala fide* intention to the discriminator. At the same time, this approach gathers our attention to what the discriminator failed to notice and act upon. It gives us a victim-centric approach while scrutinizing the discriminator's diligence. However, two objections[12] might follow from ascribing negligence as the element of moral wrongfulness in ID. *Firstly*, actions taken upon a policy leading to ID

[8] Dhruva Gandhi, *Locating Indirect Discrimination In India: A Case For Rigorous Review Under Article 14*, 4(13) NUJS L. REV. 17, 1-26 (2020), http://nujslawreview.org/wp-content/uploads/2020/12/13.4-Gandhi.pdf (hereinafter "Gandhi").
[9] COLLINS, *supra* note 1, at 271.
[10] Gandhi, *supra* note 8, at 19.
[11] COLLINS, *supra* note 1, at 143.
[12] *Id.* at 145.

seems more like strict liability[13] than negligence. This is because ID often comes with no defences such as that the discriminator took all the precautions to avoid the disproportionate harm to a particular group or that the agent did best to look for viable alternate policies. Here, it can be said that the discriminators, although not negligent in their actions, should bear the costs of eliminating the resultant harm from their policies. More often than not, the duty to not discriminate falls not upon private citizens but upon public entities that are in charge of resources and opportunities. It is exactly here that a reasonable expectation arises that these entities should be conversant of the possible effects of their policy decisions by virtue of their position of being a part of a grand social network invested in social welfare. Therefore, any act of ID by these very entities can be ascribed the moral element of negligence since these entities deviated from their usual standard of legal duty to be familiar with the impact their policies would have on the wider network of society. *Secondly*, are these entities actually obliged to consider the other group's interests while formulating policies?[14] If not, then the element of negligence fails to hold any relevance in the moral element of ID. There are certain protected groups that have been vulnerable to social changes from time immemorial, for example, women, racial minorities, LGBTQ+ community and religious groups that have faced persecution. The previous instances of social subordination attributed to these groups give rise to a plausible expectation with respect to a *general duty* on stakeholders to give weight to their interests in any policy consideration. The fact that these protected groups have already faced disadvantages places a legal and moral obligation upon the rest of the members of the society to prevent any perpetuation of this sort. Hence, entities are obliged to consider the interests of all protected groups and any action in contravention of this can lead to negligence in accentuating ID in society.

The concept of ID has started gaining prominence in the Indian jurisprudence as evidenced by *Navtej Singh Johar v. Union of India*[15] and by *Naz Foundation v. Government of NCT of Delhi*[16], in which ID has been defined as occurring "*when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary*.[17]" The Supreme Court in *Ravinder Kumar Dhariwal and*

[13] *Id.*
[14] COLLINS, *supra* note 1, at 146.
[15] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (hereinafter "Navtej").
[16] Naz Foundation v. Government of NCT of Delhi, (2009) SCC OnLine Del 1762 (hereinafter "Naz Foundation").
[17] *Id.* at 93.

Ors. v. The Union of India,[18] held that mental disability of a person impairs the ability of person to adhere to workplace standards in comparison to their able-bodied counterparts and when such people have been provided protection from disciplinary proceedings, the initiation of such disciplinary proceedings against people with mental disabilities was a facet of indirect discrimination.[19]

III. RECOGNITION OF INDIRECT DISCRIMINATION IN THE INDIAN CONSTITUTION

Following the recognition of ID in Indian jurisprudence through the Supreme Court of India and the High Courts[20], it is essential to demarcate the constitutional provisions that come into effect with it. Anti-discrimination provisions are embodied in Article 14 and Article 15(1) of the IC. While Article 15(1) is of the nature of absolute prohibition, Article 14 does not prohibit reasonable classification founded on intelligible differentia that has a rational relation to the objective of the provision in question.[21] Accordingly, there is a tangible difference in the implications of locating discrimination under Article 14 or Article 15(1).[22] In this section, I argue that cases of ID should be recognized under Article 14 because Article 15(1) only covers cases of direct discrimination.

In the decision of *Navtej Singh Johar v. UOI*[23], ID was enveloped within Article 15(1) when Justice Chandrachud opined, "*if any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.*"[24] On the other hand, in the opinion of former Chief Justice Dipak Misra in the same case, Section 377 of the Indian Penal Code, 1860 had to go through the litmus test for survival on the bedrock of Articles 14, 19 and 21 of the IC. He located ID in Article 14 when he opined, "*A perusal of Section 377 of Indian Penal Code reveals that it classifies and penalises persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the IC.*"[25] In yet another case, while arguing in

[18] Ravinder Kumar Dhariwal and Ors. v. The Union of India,(2023) 2 SCC 209 (hereinafter "Dhariwal").
[19] Dhariwal, *supra* note 18, at 106.
[20] Madhu & Anr. v. Northern Railway & Ors., (2018) SCC OnLine Del 6660; T. Sareetha v. T. Venakata Subbaiah, (1983) SCC Online AP 90; Girish Uskaikar v. Chief Secretary, (2001) SCC OnLine Bom 41; Smt. Harvinder Kaur v. Harmander Singh Chaudhary, AIR (1984) Delhi 66.
[21] R. K. Dalmia v. SR Tendolkar, (1959) SCR 279 [11].
[22] Gandhi, *supra* note 8, at 2.
[23] Navtej, *supra* note 15
[24] *Id.* At 438.
[25] *Id,* at 252.

S.K. Nausad Rahaman and Ors. v. Union of India,[26] that challenged the orders of the Central Administrative Tribunal on the issue of the withdrawal of Inter-Commissionerate Transfers, the submissions made before the Supreme Court were centred around the impugned circular being indirectly discriminatory and thus denying the equality of opportunity to women guaranteed under Articles 15(1) and 16(1) of the Constitution.[27]

The Delhi High Court, in *Madhu v. Northern Railway*[28], located ID in Article 15(1) when it said, "*The reason that the drafters of the Constitution included Article 15 and 16 was because women (inter alia) have been subjected to historic discrimination that makes a classification which disproportionately affects them as a class constitutionally untenable. The Northern Railways' decision to not grant the Appellants medical cards clearly has such a disproportionate effect.*"[29] Distinguishably so, the Andhra Pradesh High Court, in the case of *T Sareetha*[30], found Section 9 of the HMA to be indirectly discriminatory and struck it down on the foundation of Article 14 of the IC. The court declared, "*By treating the wife and the husband who are inherently unequal as equals, Section 9 of the Act offends the rule of equal protection of laws. Section 9 of the Act should therefore be struck down as violative of Article 14 of the Constitution.*"[31] The written submissions made in the Hijab case of 2022, in *Aishat Shifa v. State of Karnataka*[32]*,* mention that the impugned circular only impacts Muslim girls wanting to wear the headscarf, which while being facially neutral is indirectly discriminatory and thus violates Article 14 of the IC. The accommodation sought is contrary to the provisions of Article 14 because the net result would not be something other than different treatment of students in secular schools who may be following varied religious beliefs. According to the policy of the hijab ban, if a student feels that she cannot compromise with the custom of wearing a hijab which is an outwardly religious symbol, the school would be justified in not allowing that student in the larger interest of Article 14 of the IC that mandates treating all students alike. Here, the provision impacts one group worse than the others and hence, becomes a classic case of ID under Article 14 of the IC.

The moot point that emerges from such analysis is that there are different implications of locating ID in these two articles because there lies no scope for justification in Article 15(1), whereas under

[26] S.K. Nausad Rahaman and Ors. v. Union of India, 2022 SCC OnLine SC 297.
[27] *Id.* At 15.
[28] Madhu v. Northern Railway, (2018) SCC OnLine Del 6660.
[29] *Id.* At 29.
[30] T. Sareetha v. T. Venakata Subbaiah, (1983) SCC Online AP 90 (hereinafter "T. Sareetha").
[31] *Id.*
[32] Aishat Shifa v. State of *Karnataka*, (2023) 2 SCC 1.

Article 14, any rule can be saved from unconstitutionality on the bedrock of reasonable classification. The Bombay High Court in *Girish Uskaikar v. Chief Secretary*[33] was called to determine whether the exception to wearing helmets applicable over Sikh people wearing turbans was constitutional. In order to prove it to be *intra vires*, the court analysed it based on Article 14 and said that the rule did not violate the guarantee of equal protection before law given by Article 14 of the Constitution.[34] Therefore, ID cannot align with Article 15(1) that provides no scope for justifiability. The moral wrong tracked by ID has a close nexus with the element of unjustifiability, and thus, Article 15(1) and ID are mutually incongruous[35].

Locating ID under Article 14 might carry a structural flaw[36] as it might cover instances even on grounds of immutable characteristics that one has little choice over and thus, deserve protection. In this manner, Article 14 may offer protection from ID on several grounds. Article 15(1) however, is a closed list that offers protection from direct discrimination only on five grounds. One way to address this issue is to say that the grounds of direct discrimination in Article 15(1) are not exhaustive by way of judicial review. This has already been done to a large extent in the *Naz Foundation*[37] case by ruling that the heightened protection of strict scrutiny, which is a stricter standard than just reasonableness, will be the standard of review under Article 15 and it will require the State to prove that the impugned policy pursues national interest and has minimal interference with the rights of individual alongside being proportionate to the cause. This standard of scrutiny under Article 15 will also be available to those grounds that are not specified in Article 15 of the IC but are analogous to those specified therein, those which have the potential to impair the personal autonomy of an individual.[38]

IV. EVALUATING SECTION 9 OF THE HINDU MARRIAGE ACT, 1955

Section 9 of the HMA deals with restitution of conjugal rights and can be checked on the tenets of ID and Article 14 because the provision facilitates the male spouse to settle a score over female

[33] Girish Uskaikar v. Chief Secretary, (2001) SCC OnLine Bom 41.
[34] *Id.* At 11.
[35] Gandhi, *supra* note 8, at 21.
[36] *Id.*
[37] Naz Foundation, *supra* note 16, at 2.
[38] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities,* 2 NUJS L. REV. 419, 419-432 (2009).

counterpart, something otherwise impossible to settle in his favour[39]. The fault lies not in the provision but in the practice.

In a Public Interest Litigation by students of Gujrat National Law University, Gandhinagar, the constitutional validity of Section 9 of the HMA was challenged and was laid down that courts in India have understood 'conjugal rights' to have two key ingredients – cohabitation and sexual intercourse and the spouse is entitled to coercive measures in the form of attachment of property in case the spouse wilfully disobeys the decree of restitution. In the case of *T Sareetha v. T Venkata Subbaiah*[40], it was held that Section 9 of the HMA violates Article 14 because the requirements of equal protection of laws contained in Article 14 of the Constitution are not met. The provision of restitution of conjugal rights is gender-neutral and has been used by the women[41] to seek restitution of conjugal rights when their husbands have deserted them or refused to cohabit, casing them not only financial distress but also stigmatisation from society. For example, in the case of *Smt. Sushila Bai v. Prem Narayan Rai,*[42] the decree of restitution of conjugal rights under Section 9 of HMA was passed in favour of the wife. Nonetheless, realistically, this remedy is availed of exclusively by the husband[43] and is rarely resorted to by the wife. It was held that by enforcing a decree for restitution of conjugal rights, the life pattern of the wife is likely to be altered irretrievably, whereas the husband's can remain almost as it was, before because it is the wife who has to beget and bear a child[44]. Under the guise of restitution, women get subordinated to misogynist politics and sexual slavery in the form of marital rape. In Hindu society, this remedy becomes inherently incapable of adhering to equal protection of laws. The formal equality achieved by Section 9 of HMA does not stand the test of times, and only leads to ID. In contradiction to this, in the case of *Harvender Kaur v. Harminder Singh*[45], it was held that Section 9 of HMA provides the remedy of restitution of conjugal rights, in cases where one spouse has withdrawn from cohabitation. The Court cannot

[39] Debasis Poddar, *Restitution of Conjugal Rights: A Quest for Jurisprudence behind the law,* 4(1) JOURNAL OF NLUD, 93-114 (2018), https://doi.org/10.1177/2277401720160105.
[40] T. Sareetha, *supra* note 30.
[41] Mahendra Nath Yadav v. Sheela Devi, (2010) 9 SCC 484; Kollam Chandra Sekhar v. Kollam Padma Latha, (2014) 1 SCC 225; Suneetha v. Bheemraya, (2013) 10 SCC 714; Manisha Suhas v. Suhas Kisan, (2021) SCC OnLine Bom 5770; Suman Singh v. Sanjay Singh, (2017) 4 SCC 85.
[42] Smt. Sushila Bai v. Prem Narayan Rai, AIR 1986 MP 225.
[43] Shakun Srivastava v. Prem Prakash Srivastava, (2021) 14 SCC 175; Chetan Dass v. Kamla Devi, (2001) 4 SCC 250; Uma Prakash v. Ajeet Pareek, (2005) 9 SCC 600; Vishal Ugale v. Nivrutti Ugale, (2021) SCC OnLine Bom 13792; Sarika Badal Shinde v. Badal Vijay Shinde, (2020) SCC OnLine Bom 1754; Ravi Kumar v. Julmidevi, (2010) 4 SCC 476.
[44] T. Sareetha, *supra* note 30.
[45] Harvender Kaur v. Harminder Singh, AIR (1984) Delhi 66 (hereinafter "Smt. Harvinder Kaur").

force sexual intercourse between estranged spouses, but it can direct them to cohabit together.[46] It was recognized that marriage is not a casual commerce between people and the provision of restitution mentioned in the Act is an attempt to save a marriage and preserve marital relations, because it aims at restoring cohabitation and consortium.[47] Section 9 of the HMA was held to be constitutional and the wife was ordered to resume cohabitation with the husband because she failed to prove the husband's misconduct. The case that analysed these conflicting views and set a precedent was *Saroj Rani v. Sudarshan Kumar*[48]. The Supreme Court considered the constitutionality of Section 9 of the HMA *vis-à-vis* the right to privacy. In the course of determining this question, the Court analysed T. Sareetha's case[49] that had considered courts' interference in mandating compulsory cohabitation a gross violation of personal choice and autonomy, and observed that a decree for restitution of conjugal rights denied the woman sexual autonomy and the free choice of procreation, thereby denying the right to privacy over her most intimate decisions.[50].Simultaneously, the court also analysed the judgment of the Delhi High Court in Harvinder Kaur's[51] case which held that Section 9 of the HMA did not violate Articles 21 or 14 of the IC, on the basis that the purpose of restitution of conjugal rights was to restore matrimonial harmony and not to enforce sexual cohabitation, and that the latter was not the only element of conjugal rights under Section 9 of the HMA[52]. After granting due consideration to both views, the Supreme Court held that Section 9 of the HMA did not violate Article 21 of the IC. It studied the technical definition of conjugal: "*of or pertaining to marriage or to husband and wife in their relations to each other*" and thus sided with Harvinder Kaur[53] in observing that matrimonial consortium did not necessitate sexual cohabitation[54]. Although the Court did not explicitly discuss the right to privacy, in overruling T. Sareetha[55], it suggested that enforcing Section 9 of the HMA did not constitute a breach of privacy. Further, it held that the social purpose of preserving the sanctity of marriage was enough to balance any possible constitutional assailment[56].

[46] *Id.*
[47] *Id.*
[48] Saroj Rani v. Sudarshan Kumar, (1984) 4 SCC 90 (hereinafter "Saroj Rani").
[49] T. Sareetha, *supra* note 30.
[50] Saroj Rani, *supra* note 48.
[51] Smt. Harvinder Kaur, *supra* note 45.
[52] Saroj Rani, *supra* note 48, at 49.
[53] Smt. Harvinder Kaur, *supra* note at 45.
[54] Saroj Rani, *supra* note 48, at 49.
[55] T. Sareetha, *supra* note 30.
[56] Saroj Rani, *supra* note 48, at 49.

The judicial jugglery leads to a paradox for the wife who either succumbs to the conditions of the husband, or loses the right of claiming maintenance amidst the multiplicity of judicial attempts to put them to reconciliation. In *Vandana Vithal Mandlik v. Vithal Namdeo Mandlik,*[57] the wife was badly illtreated and beat for not fulfilling monetary demands of her husbands and his relatives.[58] The husband denied to have matrimonial relations with the wife and restrained himself for providing any sort of maintenance.[59] Pressed by unfortunate circumstances, the only remedy available for her was to file for restitution of conjugal rights. However, the Family Court held that she was unable to prove that her husband, without any reasonable cause, withdrew from the society.[60] On appeal to the Bombay High Court, the matter was disposed of in favour of the wife which stated that if there are circumstances which show that the wife states the truth, then even without corroboration, her evidence shall be accepted.[61] This is a case in which just because of denial of maintenance and pressing financial needs, the wife was eventually coerced into cohabiting in an abusive household. The positive character of this remedy, thus, becomes equally negative as the other remedies lead to ID and violates the right to privacy recognized under Article 21 of the IC.

Justice D.Y. Chandrachud, in the case of *K.S. Puttaswamy v. Union of India*[62], elaborated on the essential nature of privacy.[63] He incorporated in it the reservation of private space for an individual and the ability of an individual to make choices that lies at the core of the human personality. "*The individual is autonomous in the domain of making decisions on matters intimate to human life and the integrity of the body and the sanctity of mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop.*"[64] It was held that "*family, marriage, procreation and sexual orientation are all integral to the dignity of the individual and the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.*"[65] The right to cohabit with the spouse or indulge in sexual intercourse arising out of matrimonial obligations should be considered as a matter that is intimate to an individual, and in order to protect the individual's bodily integrity and autonomy in decision making, the courts should not mandatorily order the

[57] Vandana Vithal Mandlik v. Vithal Namdeo Mandlik, (1989) SCC OnLine Bom 572.
[58] *Id.* at 2.
[59] *Id.* at 4.
[60] *Id.* at 6.
[61] *Id.* at 2.
[62] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[63] *Id.* at 168.
[64] *Id.*
[65] *Id.* at 169.

spouse to resume cohabitation on the passage of such a decree by virtue of Section 9 of the HMA. Similarly, in the case of *Navtej Singh Johar v. Union of India*[66], Justice Indu Malhotra encompasses decisional autonomy to cover intimate decisions and preserve the sanctity of the private sphere of an individual.[67] Justice Deepak Misra introduced the concept of transformative constitutionalism that essentially highlights the ability of the Constitution to adapt and transform with the changing needs of times.[68] In order to strengthen the values incorporated in the IC, the dire need in today's times involves ascertaining the ID that eventually flows from Section 9 of the HMA and recognizing how the court's interference in mandating compulsory cohabitation can lead to gross violation of constitutional liberties.

However, the questions on policy that the unconstitutionality of Section 9 might eventually lead to are more complicated than they seem on the surface.[69] *Firstly*, for women who have left their matrimonial homes to pursue a career and who do not want to get divorced, will this unconstitutionality bring benefits or adversities? *Secondly*, for women who have been deserted by their spouses and want a divorce to which the husband is averse, will this unconstitutionality be a boon or a bane? *Thirdly*, for women subjected to sexual oppression within their marriage, will unconstitutionality of Section 9 bring a ray of hope?

Elucidating on the first, Article 19(1)(g)[70] provides for the right to choose an occupation and pursue a lawful vocation. The interpretation of 'without reasonable cause' in Section 9 of the HMA will come into play here. What needs to be determined is whether living apart for pursuing a career can be considered a reasonable cause for the benefit of either of the spouses. In the case of *Kailash Vati v. Ayodhia Parkash*[71], the wife, who was a school teacher, changed her place of residence and the husband contended that he was eligible to provide her dignified comfort[72] and hence, the wife should return to her matrimonial home. Kailash Vati had spent the vacations at her matrimonial home and implicitly intended not to get divorced when she argued that she could not be denied the freedom of employment. The case was eventually decided in favour of the husband, and grounds of employment were not considered to be a reasonable excuse because "*in all civilised*

[66] Navtej, *supra* note 15
[67] *Id.* at 15.
[68] *Id.* at 169.
[69] Vimal Balasubrahmanyan, *Conjugal Rights vs Personal Liberty: Andhra Pradesh Judgement,* 18(29) EPW 1263, (1983), https://www.jstor.org/stable/4372307 (hereinafter "Vimal Balasubrahmanyan").
[70] INDIA CONST. art. 19, cl. (g).
[71] Kailash Vati v. Ayodhia Parkash, (1976) SCC OnLine P&H 208.
[72] *Id.*

societies, the husband has a quasi-proprietary right over his wife."[73] What becomes pertinent to notice here is that the wife is coerced to alter her life pattern. In contrast, it remains the same for the husband. Unless the ground of pursuing employment becomes a manifestly reasonable excuse as has been held in *Shanti Nigam v. Ramesh Chandra*[74] and *Swaraj Garg v. K.M. Garg*[75], constitutionality of Section 9 of the HMA will evidently violate 'equal protection of laws' guaranteed under Article 14[76]. If held unconstitutional, women who do not want the dissolution of marriage at the cost of pursuing an independent career will certainly be pestered by their husbands for divorce on grounds of desertion and mental cruelty, through a total departure from the normal standard of conjugal kindness that was incorporated in the case of *Samar Ghosh v. Jaya Ghosh*[77]. This will only accentuate the adverse impact that is currently in place.

Taking up the second question, it must be stated at the outset that the court that passes the restitution order has no power to enforce it, whatsoever. If the spouse who has deserted the other lives in such a *status quo* for one year after an order of restitution, it becomes a ground of divorce in itself and continuous desertion for two years is *ipso facto* a ground for divorce. However, here the problem arises when the option of divorce by mutual consent is ruled out, because the husband is the deserting spouse who is averse to divorce. Constitutionality of Section 9 of the HMA makes the legislative procedure of divorce be availed of a year earlier if cohabitation has not been restored after one year of the court's order. Unconstitutionality of Section 9 will only leave one remedy in the hands of the wife who has been deserted by her husband and want a divorce, which is to prove continuous desertion for two years in order to make a valid ground for divorce.

Scrutinizing the third question, the constitutionality of Section 9 of the HMA has widespread implications. If cohabitation is resumed on the court's order, provided that the wife could not prove a reasonable excuse, the patriarchal structure of society broadens the scope of reading the rape law into the domain of marriage and can lead to an examination of the more complicated question involving marital rape.[78] It has also been held that resumption of cohabitation does not necessitate the inflow of sexual rights to either spouse without mutual consent. However, this safeguard does not come with any legal implications for the violation of the same in the course of

[73] *Id.* at 651.
[74] Shanti Nigam v. Ramesh Chandra, (1970) SCC OnLine All 139.
[75] Swaraj Garg v. K.M. Garg, (1978) SCC OnLine Del 41.
[76] INDIA CONST. art 14.
[77] Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.
[78] Vimal Balasubrahmanyan, *supra* note 69.

marriage because marital rape is still not legally criminalized. To trigger legislative proceedings under Section 9 of the HMA, it is a pre-requisite that the spouse must have withdrawn from society on an unreasonable ground. However, unconstitutionality of Section 9 of the HMA might eliminate the chance of the wife withdrawing from society at the first instance and then proving it to be a reasonable ground eventually in the legislative proceedings. Thereby, unconstitutionality might complicate the intricacies in the rape law even further and deprive women of an option, amongst others, to abandon the matrimonial home.

Section 9 of the HMA is coercive in a positivist reading, however, it does not make non-compliance of such a decree a legal offence. The mere scrapping of Section 9 might mean that one useful method of getting a divorce is no longer available.[79] To make it a step forward, this unconstitutionality will have to be accompanied by the introduction of irretrievable breakdown of marriage as a ground for divorce, as suggested in the 71st and the 217th Law Commission of India Reports. In the case of *Neveen Kohli v. Neelu Kohli*[80], it was asserted that irretrievable breakdown of marriage should be incorporated as a ground for divorce in the HMA and the pre-requisite legislative amendment to this respect should be considered at the earliest. There might be cases wherein no fault can be ascribed to either of the parties to marriage, but there might arise a situation in which the marriage cannot sustain. Even if one of the parties does not consent to the divorce and the court observes from the factual matrix that the marriage has broken down irretrievably, there should be a legislative provision to pass a decree of divorce after considering the stability of relationship. Under the fault grounds of divorce under HMA, the standard of proof usually weighs down on the petitioner and establishing preponderance of probabilities often is met with counter arguments and facts that oppose the same, thereby, compelling the parties to reconcile. In the case of *N.G. Dastane v. S. Dastane*[81], the petition was dismissed on grounds of condonation and the case was fought for more than ten years. It is evident that the ground for irretrievable breakdown of marriage should be included as an independent ground for divorce under HMA apart from letting the courts use jurisdiction conferred by Article 142 of the IC to administer the required justice.

[79] *Id.*
[80] Neveen Kohli v. Neelu Kohli, AIR (2006) SC 1675.
[81] N.G. Dastane v. S. Dastane, (1975) 2 SCC 326.

V. CONCLUSION

In this article, the author has attempted to establish that ID does not deserve the same amount of moral condemnation as given to direct discrimination and is an independent concept in itself. Causation of ID is mostly based on the inability to recognize the disadvantageous consequences of some policies, whereas direct discrimination is caused by undertaking a strictly prohibited conduct. Modes that can prove indirect discrimination are almost non-existent; however, culpability can often be attributed to cases of direct discrimination because these are easier to prove. Unlike that of direct discrimination, the moral foundations of ID stem from negligence and not knowledge. Locating ID under Article 14 is the right approach because, unlike Article 15(1), Article 14 leaves scope for justification of a rule to save it from unconstitutionality. The structural flaw that might flow out of locating ID under Article 14 can be resolved by saying that the grounds of direct discrimination in Article 15(1) are not exhaustive in nature by way of judicial review. Section 9 of the HMA eventually leads to ID against women and inherently violates the constitutional liberties due to its implications. However, for unconstitutionality to be a step forward, introduction of irretrievable breakdown of marriage as a ground for divorce, as suggested by the 71st and 217th Law Commission Reports, should be introduced under HMA to counter the adverse situations that might flow from unconstitutionality.