UNIVERSITA' DI TORINO (UNIVERSITY OF TURIN)

DEPARTMENT OF: LAW

PHD PROGRAMME IN: LAW AND INSTITUTION

CYCLE: 36

TITLE OF THESIS:

Scrapping the Lawjon Approach: The Freejon Alternative in Dworkin's Quest for the Practical Authority of Law

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ACADEMIC YEAR OF ENROLMENT: 2020 - 21

CODE OF SCIENTIFIC DISCIPLINE: IUS/20

Title Clarification

Freejon

Initially, we started with the term ‘Freeman’ by combining two English words, ‘Free’ and ‘man’. However, to ensure the gender neutrality of the term, we have decided to use the Bengali word ‘jon’ instead of the gender-biased word ‘man’. Therefore, the term is now ‘Freejon’. The Bengali word ‘jon’ represents man or woman in a gender-neutral sense.

Lawjon

Initially, we started with the term ‘Lawman’ by combining two English words, ‘Law’ and ‘man’. However, to ensure the gender neutrality of the term, we have decided to use the Bengali word ‘jon’ instead of the gender-biased word ‘man’. Therefore, the term is now ‘Lawjon’. The Bengali word ‘jon’ represents man or woman in a gender-neutral sense.

Abstract

The thesis brings the freejon approach to light, explains the dynamic features of it, and explores the prospects of freejon as an alternative approach to the burdensome and troublesome lawjon approach that has inevitably been followed by the legal arena. The central claim of the lawjon approach is that every aspect of human life, including Freedom, is subject to acceptance, permission, and recognition of the provisions of the law. The sadistic, and repressive approach holds that the law has its say in every single expression and action of human life. The thesis, rejecting this baseless, reactive, and heuristic approach, submits an alternative approach ie freejon approach by giving Freedom its due regard, accepting the absolute value of Freedom, and refuting all the misconceptions about Freedom. The freejon submits that the law does not get its authority from nature, divine authority, sovereign authority, or political authority. Instead, the general and shared commitment of the evaluative self is the source of law and its legality, and the absolute Freedom of humans is the precondition to ensure that the commitment is profound and compelling enough to maintain its general and shared nature. Thus, human Freedom is the precondition of law and not the opposite. Thus, the equation is very simple: Freedom exists, the law exists; Freedom does not exist, and the law does not exist. The dominant claim that people are free by virtue of law is not only illusory but also dangerous.

To demonstrate the prospects and comparative advantage of the approach, the thesis takes Dworkin's quest for the practical authority of law as a test case. The thesis shows how Dworkin's quest is misdirected by the lawjon approach, resulting in a wrong and deceptive conclusion: political morality as the practical authority of law. However, the thesis argues that the law has no essential connection with any morality other than the morality of the law itself. Freejon not only explains how his quest and its outcome have nothing to do with the sense of law but also reveals how the result is contradictory to his narrative and his own sense of law, of which he himself is unaware. Freejon demonstrates its mastery by redirecting and refining the focus of its journey, placing its narrative within the theoretical framework associated with the freejon approach. Thus, Dworkin is not only inoculated against and insulated from the drawbacks of the Lawjon approach, but his theory is also presented in the best possible light. Freejon demonstrates similar prospects in explaining, clarifying, and addressing numerous other questions and confusions that the legal arena has been grappling with for years.

Acknowledgement

Professor Patrick Nerhot, who has been my formal supervisor from the beginning of my doctoral journey until the last year, has been the guiding light throughout my doctoral journey. The path I have traversed during this journey has always been illuminated by his wisdom, prudence, and foresight. Whatever original and dynamic contribution the thesis might have made is a direct or consequential outcome of that light, whereas the mistakes or flaws, if there are any in the thesis, are due to my inability to choose and pursue the right path the light has shown me. Nerhot sets the standard that serves as the reliable and trustworthy basis for every single attempt I have made to explore and challenge the status quo of the traditional legal landscape. Therefore, I will remain ever grateful to professor Nerhot throughout my life.

I am immensely indebted to my two mentors Professor Maria Borrello and Professor Paolo Heritier. It is a great fortune for any doctoral student to have such a kind, sincere, and cooperative mentor as Borrello. She has been by my side with her expertise and valuable instructions that have guided me in resolving many issues concerning my writing tone and style, methods of reasoning, and selection of references, among others. She has consistently guided me in both personal and academic matters. While Nerhot has provided me with the courage to challenge and explore beyond existing standards, Borrello has cautioned me to be careful and considerate while undertaking such challenges. I will always remain grateful to Heritier for introducing me to the remarkable scholarship of continental Europe. He has kindly helped me see the law from a whole new perspective, and his practical tips on certain occasions have proven immensely beneficial to me.

Declaration and Citation Clarification

I do hereby certify that this thesis is entirely my own work and that any material written by others has been acknowledged in the text.

Additionally, I confirm that the thesis has not been previously submitted for a degree or any other academic purposes at the University of Turin or any other university or institution.

Other works have been duly cited in the thesis, following the OSCOLA (no ibid) citation style. The thesis generally employs the pinpoint citation style to give credit to the sources cited or used. However, in several instances, pinpointing was not feasible due to two main reasons:

1. Pinpointing was not possible because the sources of information did not appear in a specific location within the works, or the cited information was generally spread throughout the work.
2. Even when the cited information appeared in a specific section of the sourced work, it did not align with the overall message or theme of the sourced work.

Referencing software Zotero has been used to generate the citation and the list of references.

Statement about Language, Grammar, and Proof-reading

To ensure the accuracy of spelling, grammar, and language clarity, we have utilized various spelling and grammar checkers as well as AI tools.

In a few instances, we have relied on AI tools to validate and locate established and agreed-upon information, and the thesis explicitly acknowledges the use of AI in those cases.

However, in both cases, we have manually verified and evaluated each suggestion provided by the spelling and grammar checkers and AI tools before accepting and incorporating them into this thesis.

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Introduction

In the Anglo-American jurisdictions, very few jurists have been as influential as Ronald Dworkin; his theory, which covers a vast area of political-legal philosophy, has tried to introduce new perspectives and methodologies in legal reasoning.[1] His phenomenal scholarly works are aimed at casting a new light and removing the cloud of confusion created by natural law theory and legal positivism. In doing so, in places, we find him extremely confused and see him take self-contradictory stances. He tries to keep a distance from hard positivism, but his methodology gives us a sense that, in some cases, he embraces positivism more strongly than many positivists.[2] He claims that judges do not have any discretion and they do not create law at all, but his 'chain novel analogy'[3] stands in complete contrast to his position.[4] He undermines the importance of liberty as a virtue, but it is the most important precondition to his material equality theory.[5] He claims that slavery is immoral, but fails to explain why.[6] He claims that an act may be considered wrong only because a statute or political official deems it so, but he also maintains that a person driven by the principle of integrity can legitimately disobey such laws.[7] How can we explain such striking contradictions of Ronald Dworkin? Nerhot, in his conclusion to an editorial introduction, states:

[1] The portion of Dworkin's theory that has been covered in this thesis is presented in - Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Trade Paperback Edition, Harvard University Press 2002); Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing 2013); Ronald Dworkin, *Law's Empire* (1st edition, Belknap Press of Harvard University Press 1986); Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985); Ronald M Dworkin, 'Lord Devlin and the Enforcement of Morals' The Yale Law Journal 21; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1997); Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 Alberta Law Review 324.

[2] Dworkin, *Sovereign Virtue* (n 1); Dworkin, *Taking Rights Seriously* (n 1); Rudy V Buller, 'A History and Evaluation of Dworkin's Theory of Law' (1993) 16 Dalhousie Law Journal 169; Dworkin, *Law's Empire* (n 1). Dworkin's leaning toward legal positivism is demonstrated times and again in the narrative of his theory. The foundational structure of his theory, for instance, is built on legal positivism. His emphasis on the centralized authority, dependence on the formal black-letter legal texts for the interpretation of political morality, etc indicate that he is more a positivist than a neutral scholar. To be precise, he never subscribes to the natural law theory, his interest in the merit of law is just an outcome of his reaction against some pathetic incidents like Nazi massacres, or slavery for what legal positivism is responsible. Dworkin's narrative seems to be aimed at reforming legal positivism by introducing a concept of merit that will save positivism from producing such pathetic outcomes.

[3] Dworkin, *A Matter of Principle* (n 1) (see chapter 6 - How Law is Like Literature) .

[4] If we analyse the role of each of the authors of his chained novel, it can never be said that the author is not contributing create the novel. At best, what he can say is that the authors of the novel are more than one. Only because the novel is written by more than one person does not mean that they are not the creator of the novel. Further, on a more specific note, we will show, as his narrative goes, his Hercules judge does create law, when law is taken from the mistaken sense of treating providing of law as law. Judges do create the provisions of law.

[5] For detailed explanation of the material equality theory see Dworkin, *Sovereign Virtue* (n 1). Although the scope of the thesis is not enough to show to what extent his material equality theory is dependent on the concept of Freedom, we will get some hints demonstrating that his theory is of no significance without accepting the Freedom as the foundation of his theory.

[6] Dworkin, *A Matter of Principle* (n 1) 171–173.

[7] Dworkin, *A Matter of Principle* (n 1) 107–110.

> In conclusion, I note that I have not really presented my own paper. This is perhaps because presenting oneself is too hard an exercise; either one displays excessive modesty and the picture one presents is obscured, or one tends to lack discernment towards oneself, which is always possible, so that what one says becomes frankly confusing.[8]

Nerhot's concluding remarks are apparently more suitable as a conclusion to the political theory of Dworkin; apparently, Dworkin fails to present the paper that he intends to present. Reading Dworkin is a huge task; his political theory covers a wide range of issues with his atypical methodologies. The most significant feature of his theory is that it tries to connect a wide range of points that are apparently contradictory to each other. This, automatically, increases the risk of presenting a wrong and confusing paper to a significant extent. However, the thesis submits that, apart from the natural barriers, the **'Lawjon approach'**, an approach that he chooses to present his theory, is the main barrier that prevents him from presenting the theory he intends to present.[9] The lawjon approach considers every aspect of human life through their narrow versions of laws as if the law, predominantly the positive law,[10] blesses the human life that humans have. Central to the approach is the claim that law is everywhere in our life, and it is impossible to think about any aspect of our life without the intervention of law.[11] 'Freedom'[12], the most important and intrinsic aspect of human life, is also subject to the approval or recognition of the positivist law and, to their opinion, human Freedom cannot, meaningfully, exist without the protection of the law.[13]

Slavery, criminalization of homosexuality, objectification of women, the holocaust, and many incidents of brutal nature like these were the 'side-effects', if not the effects of the lawjon approach. This approach

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[8] PJ Nerhot, *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Springer Science & Business Media 2012) 11.

[9] To clarify, it is not only Dworkin who follows the lawjon approach, scholars from all classes of legal theories, by default drawn to this approach.

[10] However, it should be clarified that it simply does not matter whether the law associated with the lawjon approach is the product of legal positivism or natural law theory, or social law theory or other theories; the impact of the approach is similar.

[11] Schauer states – 'There is no place in the world in which one can escape the law, although its presence is felt more in some places than in others. And because of law's very inescapability, its coercive capacity is largely (although, again, both necessity or universally so) mandatory'; cited in Maria Borrello, 'Defining Law: The Concept of Force and Its Legitimacy - Some Considerations on Frederik Schauer's Book "The Force of Law"' (2016) 1 Società e diritti - rivista elettronica 82, 92.

[12] Different authors prescribe different versions of freedoms. For the purpose of this thesis, Freedom (with the capital letter F) means the freedom every human is born with by virtue of being a human being. Further, many authors consider freedom and liberty synonymous. To avoid the linguistic complexities, we will stick to the word Freedom alone.

[13] Harrison P Frye, 'Freedom without Law' (2018) 17 Politics, Philosophy & Economics 298, (see generally); Laura Valentini, 'There Are No Natural Rights' (see generally) <https://www.law.nyu.edu/sites/default/files/upload_documents/Valentini%20NYU%20Rights.pdf>; HLA Hart, 'Are There Any Natural Rights?' (1955) 64 The Philosophical Review 175, (see generally).

is responsible for structural racism, discrimination, minority suppression, and the draconian laws passed by dictators around the world. This approach is responsible for perpetuating complexities in relation to numerous issues like homosexuality, prostitution, personal freedom, health, well-being, etc. However, the objectives and the general contents of Dworkin's theory clearly demonstrate that he always wants to eliminate these kinds of pathetic consequences. Evidently, he, as he is expressed through his theory, is fundamentally against the lawjon approach. Nevertheless, the lawjon approach prompts his theory to deviate and be contrarily shaped to his objectives on several occasions. Not only Dworkin, but also many other legal scholars, lawyers, and judges are, unconsciously and inevitably, drawn to this approach and thereby fail to present their theories. They would have easily escaped the trap of the lawjon were they aware of it. Had they been aware of or convinced by an opposite or an alternative approach, they would not have been trapped in this approach.

The thesis submits an alternative approach keeping the human and his or her intrinsic freedom at the centre of the discourse. We want to submit that each human being is born free in the world and he or she is entitled to exercise and involved in his or her Freedom expressing or Freedom reflecting activities. The approach holds that the law is an abstract sense derived from the general and shared commitment of the evaluative self of the people and the law, by virtue of being law, is automatically known and verified by people. The application of law starts where the sphere of Freedom ends. Thus, the approach, effectively, avoids the possibility of conflict between the law and freedom; this brings the personal life within the plot of Freedom, while the issues of the interpersonal life, subject to the fulfilment of other conditions of law are, meaningfully, facilitated by law. Thus, this approach places Freedom and law exactly in the opposite order as that of the lawjon approach. We call this approach the **'Freejon' approach**. The thesis reveals that Dworkin's theory is more in tune with the freejon approach and many of the confusions of his theory will be eliminated if we explain his theories through the prism of the freejon approach.

One of the two main objectives of the thesis is to introduce and explain the foundation, mechanism, and major features of the freejon approach. The second principal objective is to demonstrate the overall prospects of the approach in resolving the fundamental legal questions and confusions by applying the approach to Dworkin's dilemmas that are reflected in the narrative of his theory. Unfortunately, the extent of his dilemmas or confusions is proportionate to the vastness of his theory itself. Therefore, considering the scope of this thesis, the assessment of the freejon approach is limited to the question of the 'practical'[14] authority of law, a question that troubles Dworkin throughout his life and that,

[14] Although Dworkin's narrative does not specifically use the word, we find the word best reflect his dilemma associated with the question of the authority of law. We borrow the word from the narrative of Raz, Lamond, and Yankah; see Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 Legal Theory 35, 54, 55, 57; Joseph Raz and Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999); Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' (2007) 42 University of Richmond Law Review 1195.

eventually, shapes his theory.[15] Dworkin's dilemma associated with the questions leads to all other dilemmas that are reflected in his narrative. The practical authority of law is significantly distinguishable from the mere authority of law. All normative systems ie morality, ethics, religion, culture, etc have the authority of their own, and so does the law. However, when we talk about practical authority as distinguished from mere authority, we must understand the law with its distinct nature of the coercive force that is significantly distinguishable from the rules connected to religion, society, culture, politics, and so on; this distinct nature of the coercive force of law is different from the coercive force that other normative systems may have.[16] The nature of obligation that is generated from the sense of law is outwards and inter-personal whereas the nature of obligation generated from other morals is typically inwards and personal.[17]

In Dworkin's theory, the practical authority of law is not the authority only to impose coercion of legal nature but also an authority that justifies the imposition of legal coercion.[18] This point needs further clarification. Many prominent legal scholars think that the very fact that law has this special nature of coercion is the ultimate justification of the law itself and this feature ie the presence of the special nature of coercion, alone distinguishes law from other normative systems.[19] Legal positivism dominated legal arena claims that the special significance of legal coercion lies in the externality of law; the very fact that the law is supported by an external force to impose coercion is sufficient to claim its practical authority by virtue of which law is distinguished from other normative systems. Dworkin's position on this point is not as naive as this; while he accepts the externality aspect of legal coercion, he thinks that

[15] In fact, the question is the most fundamental question for every legal scholar and, eventually the countless dilemma and the confusions their theories reflect are due to the fact that they either fail to get the correct answer to the question or prefer to ignore the question, and thereby, proceed to the next stage of their exploration without laying the foundation of their theory. No one is likely to lay a reasonably acceptable foundation of legal theory without facing and resolving this question.

[16] Although, we must remember that coercion is not a constitutive element of law; it is just a special features of law the sense that the legal coercion is backed by normative justification; see generally Lamond (n 14). He states – 'law itself does not have to be coercive even if it requires coercive support' (page 49). For a similar discussion and position see Yankah (n 14) (see generally); Borrello (n 11) (see specially pages 85-90).

[17] To avoid confusion and for further reference we must clarify that the outward obligation associated with the sense of law is not necessarily refers to an external nature of the force as Kelsen and other positivists think. The nature of the obligation will be explained in chapter 8.

[18] Kelsen, Yankah, Lamond and many other scholars distinguishes legal coercion from other coercion suggested by other normative regimes. See Yankah (n 14); Lamond (n 14); Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, Ltd 2005). They, specially scholars like Kelsen, Dworkin, and many others considers external nature of the coercive force of law is the distinguishing feature of the legal coercion. Nevertheless, we will show that externality of the legal coercion is not the unique feature of the legal coercion; there is something more significant feature of legal coercion.

[19] Kelsen (n 18); John Austin, *Austin: The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, Cambridge University Press 1995); John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 The American Journal of Jurisprudence 199; John Gardner, 'The Legality of Law' (2004) 17 Ratio Juris 168; Jeremy Bentham, *Principles of Legislation: From the Ms. of Jeremy Bentham ... By M. Dumont ...* (Wells and Lilly 1830); HLA Hart, 'Bentham and the Demystification of the Law1' (1973) 36 The Modern Law Review 2.

the external feature of legal coercion is not sufficient to be the practical authority of law.[20] According to Dworkin, the merit of the law, although not an essential element, but an important element of the law. To him, law can be both good and bad; hence, the merit of law is the decisive element that distinguishes good law from bad law. Consequently, he is obsessed throughout his life to find an external authority powerful enough to make sure that its authority is not as fragile as the internal authority attached to the normative systems, while, at the same time, safe enough to guard against the political authority committing pathetic incidents like Nazi massacre or dehumanization of the blacks, etc. Eventually, Dworkin's practical authority not only refers to the externality of legal coercion but also the authority that justifies such coercion.[21]

To Dworkin, to his followers and to many other contemporary scholars, the practical authority of law is the outcome(s) of the objective quest for identifying an authority that will make sure that law has more enabling force (predominantly, external force) than that of other normative systems and, at the same time, law has the disabling force enough to defend against the political official's arbitrary and tyrannical legal actions. His quest brings out political morality as the practical authority of law. His quest follows a wrong approach and eventually brings out a wrong result. The lawjon approach tricks him to find the authority and its intrinsic merit that will eventually distinguish the good law from the bad laws, and hence his quest is to identify the important conditions of the law, not the essential conditions of the law. The freejon approach clarifies that the quest for the practical authority of law is not a quest for identifying the important conditions of the good law or the law, rather it is a journey to identify the inevitable conditions of law; law without its inevitable merits is simply a no-law. The freejon approach clarifies that the related legal quest cannot be objective at all as the sense of law enables us to comprehend that the law is not an objectives-bound venture. Finally, the thesis demonstrates that the practical authority of law lies in the very sense of humans, and not in somewhere else outside.

The thesis is presented in two parts divided into eight chapters. The first part deals with the first objective of our thesis ie introducing and explaining the foundation, mechanism, and major features of

[20] Bobbio, Hart, Lamond many other scholars have a similar opinion. See HLA Hart and others, *The Concept of Law* (3rd edition, Oxford University Press 2012); Lamond (n 14) 44; Lon L Fuller, *The Morality of Law* (Revised edition, Yale University Press 1969). To support the position of Bobbio, Dworkin, and his own, he states 'what characterizes law is not the fact that it uses or relies upon coercion, but rather that what it regulates is the use of coercion. …articulated by Bobbio … Instead of seeing coercion as an integral part of laws, it should be regarded as the object of all laws…. Dworkin, the central point of legal practice is to guide and constrain the power of the state, in particular state force. From this perspective, although the content of the law is determined through the morally best interpretation of existing legal practices, law is primarily concerned with how state coercion may be used'. For Hart, the practical authority is needed to be supported by his secondary rules, while for Fuller, it is to be supported by his eight desiderata.

[21] Lamond is take a similar stance. To him, the practical authority refers to the extra authority law has beyond the internal authority of that of the other normative systems. See Lamond (n 14).

the freejon approach. This part starts with a smaller chapter depicting the lawjon approach. The second part deals with the second principal objective ie demonstrating the overall prospects of the approach in resolving the fundamental legal questions and confusions by applying the approach to Dworkin's dilemmas that are reflected in the narrative of his quest for the practical authority of law. The first part of the thesis consists of five chapters ie chapters 1 to 5, whereas the second part consists of three chapters ie chapters 6 to 8.

Chapter 1 explains the prevalent lawjon approach that is considered an inevitable approach to be followed by the legal arena. This chapter depicts a tentative picture of the lawjon approach and then discusses the background or foundation, and finally critically describes the nature of the approach. According to this approach, rules that are incorporated in the statutes, case references, and legal texts are considered laws. On the other hand, jurists, who take a softer stance for example like Dworkin, are of the opinion that these statutes or texts are not law, but laws are deduced from these formal sources. The introduction and popularization of the lawjon approach have been sparked by the same assumptions on which legal positivism is founded. The narrowest version of the assumption is that every human by the state of nature is evil, greedy and anarchist. In this state of nature, there cannot exist any kind of order among humans; no right can exist in this state of disorder and solipsism, as they cannot reach any agreement without a guarantee that everyone will follow the agreement. Therefore, to control these unruly humans there must have a central authority or political authority and this authority will make law, implement the law and thus protect the rights of the people. Lawjon holds that one cannot have any right other than a right listed in the positive law enacted by the central authority and one cannot ignore a duty set by such authority even if the duty is against his or her existential needs. Thus, the lawjon approach provides a closed regulatory regime, and it claims that this closed regime is the only denominator of the rights and the duties of the people.

Chapter 2 outlines the freejon approach and describes the foundation of the approach. The central claim of the freejon approach is quite the opposite of that of the lawjon approach; this approach sees law through the prism of humans instead of seeing humans through the prism of law. We are not free because the law gives us freedom; we are free because we are born free and the Freedom is the 'sovereign' virtue for humans. We are not created for law, but the law (to be specific 'the sense of law') is 'evolved' for us. We need law when our freedom is threatened as we need medicine when we fall sick. The freejon holds that law is not here to rule us but to facilitate our freedom, and our inter-personal lives. As human enters interpersonal, social, political, and national life, he or she needs law when there is an issue involving the question of 'legal value' or 'morality of law'. This law is nothing but an abstract sense that gives rise to a general and shared commitment among humans. Statutes, precedents, legal texts or

other 'positive laws' are just, as Professor Nerhot posits, 'result'[22] or effects of the sense of law. While the lawjon approach is based on the assumption that all people are evil or some are evil and others are good, the freejon approach neither claims that all people are good nor does it classify people as good and evil. Instead, the approach is based on the fact that the same human being has the likelihood to play both roles ie good or evil, rational or irrational, neutral or biased, altruistic or narcissistic, and so on.

Upon sketching the freejon approach, the chapter moves on to explain the 'sovereign' virtue ie Freedom, on which the freejon approach is founded. The chapter makes it clear that the fear and the discomfort that exist in the question of accepting Freedom as a 'sovereign' virtue in the legal discourse is primarily because of the misconceptions about the meaning of Freedom. To this end, the chapter focuses on the misconceptions that have no connection to the conception of Freedom. The chapter demonstrates that all these misconceptions will be eliminated if we just eliminate the wrong answers. The wrong answers or the wrong meanings of Freedom start to originate because of the traditional terminology of law.[23] Not being able to distinguish between the general meaning and disciplinary meaning of terms[24], defective and ambiguous terminology[25], repurposed use of common words, contextual barriers or 'paradigm of fact'[26], subjective and objective variation in focus, etc are responsible for the prevalent misconceptions about the meaning of Freedom. The chapter shows that traditional conceptions of Freedom such as - 'I can do whatever I want' or other meanings, which are connected to solipsism, authoritarianism, despotism, totalitarianism, etc, are certainly the wrong answers with which the term Freedom has nothing to do. Neither the terms like opportunity, privilege, capacity, rationality, education, power, reason, choice, absence of necessity, autonomy, free will, etc have anything to do with Freedom.

Chapter 3 presents the central submission of the thesis, ie the actual conception of Freedom. On the way to the conceptualization, like Nerhot, we find that the method of coherence is more authentic and relevant than the method of correspondence.[27] The chapter takes note of philosophical, historical,

[22] Patrick Nerhot, 'Interpretation in Legal Science' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Netherlands 1990) 196.
[23] Ruth Nanda Anshen, *Freedom: Its Meaning* (Routledge 2019); Angela Y Davis and Robin DG Kelley, *The Meaning of Freedom* (2012) <http://www.scranton.edu/academics/wml/bookplates/index.shtml> accessed 6 June 2021; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ETS); Bruno Leoni, *Freedom and the Law* (Liberty Fund 2012) <https://muse.jhu.edu/book/18231> accessed 6 June 2021; Martin Heidegger, *The Essence of Human Freedom* (Continnum 2002); Eric Foner, 'The Meaning of Freedom in the Age of Emancipation' (1994) 81 The Journal of American History 435.
[24] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 The Yale Law Journal 710; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 The Yale Law Journal 16.
[25] Heidegger (n 23); Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24).
[26] Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Netherlands 1990).
[27] Nerhot, *Law, Interpretation and Reality* (n 26) 8.

linguistic and other accounts to demonstrate that the current legal arena is devoid of the privilege of understanding the meaning of Freedom. Freedom has no connection with the words like privilege, immunity, power, authority, autocracy, etc that either affects the legal 'plot' or limit and threaten the legal landscape. In its core meaning of Freedom, it means remaining 'in charge of self'. It has nothing to do with going beyond the self; all it has to do is to affect the self. Consequently, the exercise of Freedom in its core meaning does not constitute any jural fact of its own. In this thesis, we are not merely referring to the word Freedom; we are refereeing to the whole of it: the sense, phenomenon, and context the word is supposed to reflect and convey. Intrinsic Freedom, by virtue of its own nature, does not have any conflict with the interpersonal, social, political and national distribution of rights.

To talk about the foundational validity of the freejon approach, the thesis will demonstrate that in every regard ie theoretically, practically, philosophically, or technically, freejon approach holds higher prospects than its counterpart does. Legal, philosophical, or practical, whatever perspectives we are talking from, Freedom is the most appropriate point of reference to start a legal discourse with. To deny Freedom is to accept the antithesis of Kant that 'everything in the world happens solely in accordance with laws of nature'[28] and hence there is no Freedom. To deny Freedom is to accept the deterministic theory that puts an end to free will which is the precondition of legal responsibility. Thus, accepting Freedom as a fundamental value of law is the only solution that will set humanity free from the deterministic automata; otherwise, no arrangement or system of this world makes any sense, whatsoever.

Chapter 4 is dedicated to defending against the probable attacks that the conception of Freedom may logically faces. The chapter offers answers to questions like - Will this approach work at all, as humans are generally evil? Can the self be separated from its context or milieu? Can actions or impacts of the self be meaningfully distinguished from the actions and effects of other related factors and environments the self acts in? Can the self have any stance of its own at all, apart from the system or environment consisting of other individuals, society, culture, etc.? How logical is it to claim that the self has its role to play at all when determinism claims that everything is pre-determined? How do we know if the self is in charge or not? What is the scope of Freedom? Are we patronizing and preaching irrationality or inciting chaos as we are claiming that Freedom has no limit? Are we set to destroy the human civilization that has claimed to be built on the human rationality and reasoning of hundreds of years? How would the government function? How would the judiciary function? How would the executives execute the judicial orders? What will happen to moral, social, political, and religious values? Are not we sensitive or respectful of the human institutions built over time?

[28] Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen W Wood trs, CUP 1998) 485.

Chapter 5 serves two purposes; on the one hand, it shows the higher compatibility of the freejon approach in comparison with the lawjon approach, on the other hand, it demonstrates the compatibility of the freejon approach with the existing legal landscape. The two approaches have been compared from three broader perspectives – foundational strength, functional strategy, and objectives and efficacy. The chapter shows that the lawjon approach with its coercive force does not have any viable foundational theory to present whereases the foundation of the freejon approach is supported from every perspective, be it empirical, theoretical, philosophical or practical. As is the case in the foundational perspective, so is the case in the case of the functional perspective; lawjon's top-to-down functional strategy to rule people and regulate people through a centralized and external mechanism is not only repressive but also counterproductive. This, eventually, leads to the third perspective of the comparison ie objectives and efficacy and with the same result ie the triumphant of the freejon approach. The lawjon approach, an approach based on misinformation, biased information, sadistic information, and no-information and that has no specific and viable functional strategy, is bound to produce some unexpected and hopeless outcomes.

On the point of the freeman's compatibility with the existing legal landscape, the chapter demonstrates the success of the approach. This section of the chapter deals with questions that the traditional legal arena may throw in front of the freejon approach - Will not this approach impede state actions? Will we be able to establish any unity in regulating the people? Can there be any right without corresponding duty? Why should law protect Freedom, if freedom is not a part of jural fact? What is the basis of freedom if it is not the positive laws? Who is to be blamed? What about corresponding duty? Why should the law take positive action to facilitate Freedom? The chapter not only responds to all these questions but also clarifies other confusions associated with these questions. We submit that right is created by virtue of the law not by virtue of the provisions of law and a right cannot be denied only on the reason that an accident may happen and then we will not find a person to blame. The chapter submits that Freedom although outside of the plot of law, the law owes a responsibility to uphold Freedom for, otherwise, the law will lose its own legality. Therefore, we find it illogical even to accept that this is a positive action of the state or law; it is the duty of the law to act towards upholding Freedom as the foundation of the law is subject to upholding the duty. Thus, the law is not authorised to intervene in the plot of Freedom, but an aspect of Freedom may introduce a legal plot that may draw legal action towards upholding Freedom, alone and not for upholding the law itself. Further, the chapter demonstrates that the common claim - legal action led to the curtailment of freedom – is a myth.

Chapters 6, 7, and 8 of the second part of the thesis demonstrate that Dworkin's mistake of not giving due attention to the sense of law and the foundational importance of Freedom makes his theory about the practical authority of law not only substantially flawed but also of no use. The chapters demonstrate that political morality can never be the practical authority of law; it cannot be the denominator of the

legality of the law. To this end, we will identify the fundamental features of political morality that are incompatible with the compelling and obvious sense of law and then, we will reveal the actual denominator of the legality of law. To this end, the sixth chapter is started sketching Dworkin's philosophical position on the sense of law followed by tracing his journey that led to political morality. Then we try to have a sense of his political morality and its inevitable features that are evaluated with reference to the sense of law in the seventh chapter. Finally, the last chapter of this part not only presents and defends the actual practical authority of law following the Freejon approach but also resolves the fundamental dilemmas that Dworkin faces in the quest for the practical authority of law.

Chapter 6 sheds light on Dworkin's philosophical groundworks that he has conducted to show what should be the foundation of a philosophical journey if any philosopher, meaningfully and logically, wants to get the meaning of law and accordingly formulate the concept of law. The philosophical groundworks convince him that such a journey is incapable of producing any outcome and hence his decision to withdraw himself from such philosophical investigation and thereafter his engagement with the political theory of law, which, eventually comes up with political morality as the practical authority of law. The chapter shows how the whole process starting from his withdrawal from a philosophical journey to his engagement in political theory is the inevitable consequence of following the lawjon approach. The lawjon induces him to, categorically and hastily, reject the significance of the metaphysical entities as profound as humans' moral faculty and thereby missing the opportunity to be aware of the humans' evaluative faculty that gives rise to the sense of law as profoundly as the sense of music, dance, languages, etc produced by other respective human faculties. The lawjon tricks him to ignore the obvious and to skip the inevitable stage of the investigation. Consequently, he ends up with the wrong result ie political morality. Given the fact that the lawjon approach precipitates him to reach a decision about the concept of law without being touched by a comprehensive sense of law, he rushes to declare political morality as the practical authority of law.

The chapter reveals further chaos when it is found that his political morality is not the political morality in its traditional and prevalent sense; instead, it is substantially a different concept that is devoid of (or with confusing connection) conventional and fundamental political factors ie democracy, representation, public opinion, a general sense of community, political practices, conventional utilitarian political morality, politically neutral decisions, etc. Instead, Dworkin's version of political morality is constituted of the political decisions of, preferably, judges. Dworkin's morality is also shaped by and may be reflective of judges' own political position, 'a justification drawn from the most philosophical reaches of political theory', 'practical politics of adjudication', and so on. Therefore, to avoid confusion we have decided to term Dworkin's political morality as prospective political morality (PPM). The chapter also tries to depict the essence of his theory of PPM in a manner that supports Dworkin's position to its best. Central to the theory is a hypothetical genuine political community and

the morality of which will be interpreted and extracted as PPM by the political officials (preferably judges).

Chapter 7 evaluates Dworkin's political theory of law from two perspectives – a. evaluating the coherence of the theory with reference to his own narrative; and b. evaluating the compatibility of the theory with reference to the sense of law. In both counts, Dworkin's PPM is evaluated negatively and proved to have no significance in the discussion of the practical authority of law. His genuine political community is a narrative misnomer as it fails to comply with the consistency either because it contradicts his own narrative or because it fails to provide us with enough narration. Dworkin himself presumes a comprehensive theoretical framework that would guide his activity of the construction and interpretation of the community. Unfortunately, he does not have it as he is tricked by the lawjon not to have it. His theory seriously lacks a narrative explaining the nature of the relationship among the community members, whereas understanding the nature of the relationship is a central requirement for the interpretation of the PPM so as to make sure that the PPM remains humble to the requirements of the relationship. This, eventually, renders the extraction of PPM an endless, confusing and misleading journey.

Dworkin's PPM is extractable from the result of a complex activity that presupposes political integrity, legislative integrity, and adjudicative integrity along with the integrity of the law, itself. His narrative fails to support these integrities; the ocean-like compromises his theory makes on numerous occasions destroy the possibilities of such integrities. Dworkin's PPM extraction process must reflect the participants' internal point of view, while, at the same time the result of extraction must not be biased by the participant's individual morality. This is something we call the role-switching twist. Dworkin, without resolving this role-switching twist, moves too quickly to rely upon the political officials for the extraction of PPM without showing no reasonable ground as to why we should rely on them. Further, although he distinguishes principles from policy, his failure to detach the extraction or interpretation process from the policy renders the whole legal reasoning process questionable as the making policy is an inherently evaluative and utilitarian process, whereas the sense of law inevitably connected to the post-evaluative and non-utilitarian process.

The chapter demonstrates that the narrative inconsistency is rampant when his supposed and misleading authority of law is evaluated with reference to the basic sense of law. Dworkin fails to support a central conviction of his community that holds that individuals are responsible for the action of the community, whereas the conventional legal concepts cannot simply accept such responsibility of the individuals for the actions of the community. In addition, there is a basic distinction between the political atmosphere and the legal atmosphere and since, the PPM is meant to function in the political atmosphere, many of its substantial features are incompatible with many fundamental features of law and its overall atmosphere. Dworkin's narrative of PPM, if makes any sense at all, makes sense from the vertical

perspective of governance ie ruler rules the ruled; in fact, the PPM is, precisely, all about the vertical morality of the political officials. The sense of law reveals that the atmosphere of law is and, also, must be horizontal. Further, law, in its concrete sense, never governs but facilitates the part of the interpersonal sphere of human beings.

Above all, the political atmosphere is a 'Value' neutral atmosphere and, hence, if a person loses in bargaining in this atmosphere, he or she loses nothing. On the other hand, the legal atmosphere is dictated by the 'Value' which is already evaluated and hence, not subject to any form of evaluation, bargaining, and so on. Further, although Dworkin expressly clarifies that law's empire is detached from the 'power or process', the centre of gravity of his political theory of law is revolving around the 'power and process', whereas power has no contribution in making the sense of law. Instead, when power is fed into the sense of law, it destroys the very nature of the law, itself. Law, although it does not have any objective, counters the effect of power; the rule that acknowledges, patronises, and increases the effect of power is not law at all. Other distinguishing features of PPM are equally defective and hence liable to be rejected as the practical authority of law. He prescribes, for instance, judges should protect the interest of the people with no or less political power. Why? Under what basis?

The last chapter of the thesis ie chapter 8 addresses, explains and resolves the confusions and dilemmas that Dworkin face. This chapter submits that the legal practice and its morality are identifiable and comprehensible through the very sense of law and the philosophy behind the scenes. This chapter reveals that once the legal practice is distinguished and the morality of law is comprehended, not only Dworkin's question as to the practical authority of law will be resolved, but also the major confusions associated with the concept of law will be resolved. Dworkin associates the sense of law with the political process and claims that the sense of law is inseparable from political morality, political practice, and its processes. Dworkin's failure to distinguish the sense of law is due to his omission of the comprehensive sense of law and the associated philosophy. The freejon approach enables us to get the sense of law and the philosophy associated with it and hence, it enables us to draw a tentative line between law and other spheres ie Freedom, politics, etc.

To begin our demonstration of the separateness of law, we find Nerhot's conception of 'plot' worth noting. The plot is, as Nerhot states, 'that which makes the interpretation come about - is constructed by this philosophy: reality will be perceived through this contemplation'[29]. In the same vein, we submit that Freedom, law, politics, society, religion, etc have their own respective and unique plots and based on the plots, they have their own respective meaning, reality, function and so on. No doubt, the political situation or set-up has an immense impact on law and the morality of law. Nevertheless, the point of significance is that political morality or PPM is not an inevitable element of the law. The plot of law

[29] Nerhot, *Law, Interpretation and Reality* (n 26).

starts where the sphere of Freedom ends and the latter ends where the spheres of politics, democracy, etc start. The plot of Freedom consists of the personal sphere, and as long as the matter one does is self-concerning and self-addressing, the matter is within the plot of Freedom. The plot of law is constituted of matters which are interpersonal and with the question of the morality of law (GSEC). On the other hand, other plots ie social, political etc are constituted of matters which are interpersonal but not with any question of the morality of law (GSEC).

Since, as Nerhot posits, there is no given fact or incident in the premises of the plots, it is neither logical nor safe to accept or classify a fact or incident as a legal incident or social incident or political incident and so on. Whatever the case and however complex an incident is, the plots maintain their separability. As the structure of a building is constituted of different elements like sand, steel, bricks, cement, etc, an incident may have different elements of composition or different features. The elements of the structure are distinguishable from each other. So is the case for the features of the issues connected to a particular incident; each feature is subject to its respective plots. Human life is facilitated by different facilitating regimes ie Freedom, law, politics, etc and while all of these function in combination, each function or plays their own respective roles in their own way separately hence, the separability is not only demonstrated but also important. In the absence of the legal plot, which could conveniently guide him in maintaining the separateness of law, Dworkin presents law and legal practice in the disguise of politics and political practices; this mistake leads him to present law and legal practices as appendices of politics and political morality. In this process, he makes the greatest mistake of all; he fails to comprehend the very morality of law, itself.

Social rules are subject to social morality, political rules are subject to political morality, religious rules are subject to religious morality and so on. Similarly, chapter 8 shows that law is necessarily associated with the morality of law and with no other morality. All questions and confusions associated with the normative force of law are answered and resolved as the chapter identifies and helps comprehend the unique morality intrinsically coupled with the sense of law or GSEC. The freejon approach submits that law cannot exist without morality and this morality is the morality that is not necessarily linked to any other morality but the morality associated with the GSEC. While all other moralities are prone to be questionable because of their internality, subjectivity, and biases, the morality of law is blessed with externality, generality, and neutrality. Eventually, the morality of law conveys significantly higher coherence essential to ensure the legality of the legal actions because of its nature and when we follow the freejon approach, we get the highest coherence. The freejon approach justifies why the ‘Value’ of the morality of law is of the most acceptable nature in justifying legal obligation or coercion. What the Value does is to offer a strong normative foundation for the law by certifying that the matter in the issue comes within the ‘plot’ of law, and it reconfirms that we have Freedom and hence, we take responsibility

for our actions or omissions. In fact, it is the very person, who is subject to coercion or legal obligation, is participating in the development of the Value and is committed to living by the Value.

The chapter further demonstrates that our claim about the morality of law and its associated Principles and GSEC is not a silly faith that Dworkin always wants to avoid. The energy of the evaluative self in generating the sense of general and shared commitment can outmatch everything, every external and institutional system. The evaluative self plays its role perfectly; it plays its role neutrally, generally, fairly, orderly, with consistency, and without prejudices, and hence, its general and shared commitment and the associated morality is the practical authority of the law. Finally, the chapter answers the questions Dworkin fails to answer and clarifies his confusions and dilemmas in the light of the freejon approach.

Chapter 1: The Lawjon Approach

The lawjon approach is irresistible and ubiquitous; the legal arena and the legal scholars of all possible segments follow this approach blindly. Although the approach is not documented, concrete, and expressly prescribed, none can ignore the gravitational force of the approach; consciously or unconsciously everyone in the legal arena is drawn to it. This chapter tries to depict a tentative picture of the approach. Then, we try to identify the foundation or background of the approach. Finally, the chapter critically analyses the nature of the approach.

1.1 The Lawjon Approach:

'We live in and by the law'.

--- Ronald Dworkin, *Law's Empire*[30].

If we want to get an idea about the lawjon approach in one sentence, Dworkin's quote is that sentence. We do not know exactly what message Dworkin wants to give us with this sentence.[31] Nevertheless, when the legal positivism dominated legal arena tries to encrypt the message literally, the statement delivers a message which is like - 'law is everywhere in our life', 'our every aspect of life is determined by law', 'it is impossible to think about any aspect of our life without the intervention of law', and so on. Accordingly, if we want to depict a detailed picture the lawjon approach is inevitably associated with, we find that Australian Professor Joshua Neoh's relevant narrative is the most appropriate and relevant portrayal of the lawjon approach:

> To be a subject, and not merely an object, of law means to be in jural relations with other subjects. To be in jural relations means to be bearers of rights and privileges in the Hohfeldian sense. Slaves held neither rights nor privileges under law. A slave is an object, not a subject, of law… To free a slave is to extend the good of law to the slave by making them a subject of law. As the property of the owner, a slave could neither sue, nor be sued…A child born into slavery was born a bastard…Slaves were property, like livestock. …Without jural relations, the slave is barely human, or rather, the slave is a bare human…law guarantees a degree of freedom as non-domination to all subjects, or legal persons, within its jurisdiction…All human beings are moral persons. But not all moral persons are legal persons. Only the subjects of law are legal persons. A legal person is brought into being by a legal frame that creates a "distinctive kind of relationship between

[30] Dworkin, *Law's Empire* (n 1) VII.

[31] If we follow his narrative and the background and the spirit of his narrative, we will understand that the message Dworkin wants to deliver with this statement and the message we get are, probably, different; like any other message, his message comes to us in a distorted form because of the linguistic blunder the legal positivism dominated legal arena is entangled with.

> authority and those subject to it," which is unavailable to those "positioned outside of that frame." Legality secures a certain quality of existence for subjects who live under law. Legal persons who live under law have domains of liberty…for the master can beat the slaves for rule-breaking, or for no reasons at all. The master can do so willy-nilly. Legal subjects have the protection of law, while slaves do not. The slave is denied any protection from arbitrary violence. The slave's condition is not one that is under law. To live under law is to be able to "avoid being exposed to violence or physical restraint by observing the relevant rules," whereas "slaves are exposed to the use or threat of violence and physical restraint at almost any time, and for any reason."… These conditions [legal conditions] trigger the incidence of a duty incumbent upon a duty-bound official [to protect the subject of law] … [even if law, ever, protects such non-existent legal person that is because] slave cruelty laws are analogous to animal cruelty laws. Just as an animal owner cannot do certain things to the animal that they own, so a slave owner cannot do certain things to the slave…Freedom in the state of civil society is civic freedom. It enables one to live in community with others, without being subject to their will. By being a subject of law, one is not then subject to the will of others.[32]

Neoh's narrative is a concrete and precise depiction of what the lawjon approach is meant to be like. The law seems to be a 'ghostly', 'divine' or 'alien' component that has emerged out of anywhere (as per his narrative from Officials)[33] and then it recognises people as the subjects of it. Law extends its protection to the subjects who submit themselves and their every aspect of life to its provisions or, as it is often termed, positive law. Thus, the positivism-dominated legal arena considers every aspect of human life through their narrow version of the law as if the positivist law blesses the human life that humans have - as if the law precedes the humans, to the least, in the eye of the law. Central to the approach is the claim that law is everywhere in our life, and it is impossible to think about any aspect of our life without the intervention of law.[34] Even the most personal and intimate aspects that contribute to making a human being what he or she is as an individual life is subject to the recognition and

[32] Joshua Neoh, 'Law, Freedom, and Slavery' (2022) 35 Canadian Journal of Law & Jurisprudence 223, 231–235.

[33] However, we will show in a little while that such a claim, although apparently correct and sound, is misleading; the source of law still remains mysterious, ghostly, etc.

[34] We must admit and clarify that law does owe responsibility and obligation to play its role in diverse issues connected to every sphere of life but all the issues of every sphere of our life are not subject to the legal reasoning or legal justifications. Eventually, although law may play its facilitating legal roles in connection to every sphere of our life, there is no justification whatsoever for permitting legal intervention in every sphere of our life.

censorship of the positive law. What one says[35], what one listens to[36], what one believes[37], what one eats,[38] how one dresses up[39], or whom one is having sex with[40] – everything on the radar of the lawjon approach.

Accordingly, even the most substantial and personal relationships one may get into like fatherhood, motherhood, etc are subject to the recognition of the provision of law. In the absence of the recognition or licence, a person is not only disqualified for any protection of the law but also an eligible candidate for facing the rage of the law. Since slaves are not considered subjects of law, they are not persons in the eyes of the law. Eventually, a child born into slavery, for instance, is identified as a 'bastard'; such people without the blessing of the law are simply 'livestock'. A human simply has no existence in the eyes of the law until the human is recognised as a legal person following the formalities prescribed by the provisions of the relevant positive law; there is no legal person before the recognition of law as a legal person.[41] Law is completely a detached and alien system that has nothing to do with the existence of the human being. Law owes no responsibility or obligation to save such a 'non-existent' subject from torture, inhuman treatment, and so on. Consequently, such a 'non-existent person' can be subject to any form of cruel treatment. Law owes no responsibility because that cruelty simply does not exist in the eyes of the law because the person, who is subject to such cruelty, is non-existent.

Therefore, to be graduated as legal persons, humans are bound to surrender themselves to the power of a particular type of authority as prescribed by the positive law; humans must have a 'distinctive kind of

[35] For example, consider the recent proposal of the Italian government to penalise the use of foreign words; or the Indian Government's attempt to force a particular language on all Indians; Or the Bangladesh Government's ban on using the word 'Adivasi' (indigenous) to acknowledge the identity of the indigenous people of Bangladesh. See Barbie Latza Nadeau, 'Italian Government Seeks to Penalize the Use of English Words' *CNN* (1 April 2023) <https://www.cnn.com/2023/04/01/europe/italian-government-penalize-english-words-intl/index.html> accessed 15 April 2023; Hannah Ellis-Petersen, '"A Threat to Unity": Anger over Push to Make Hindi National Language of India' *The Guardian* (25 December 2022) <https://www.theguardian.com/world/2022/dec/25/threat-unity-anger-over-push-make-hindi-national-language-of-india> accessed 15 April 2023; *Bangladesh Government Orders Media Ban on Word 'Indigenous'* (Directed by Al Jazeera English, 2022) <https://www.youtube.com/watch?v=_9n1eS_-Qq4> accessed 15 April 2023; 'Bangladesh Government Instructs TV Channels Not to Use the Word "Indigenous" When Referring to Ethnic Tribes' (*Global Voices*, 9 August 2022) <https://globalvoices.org/2022/08/09/bangladesh-government-instructs-tv-channels-not-to-use-the-word-indigenous-when-referring-to-ethnic-tribes/> accessed 15 April 2023.

[36] Withdrawal of information or providing limited information about certain persons, groups, ideologies, etc.

[37] For instance, the laws against Freedom of expression.

[38] For instance, the laws prohibiting alcohol, and other things.

[39] For instance, the laws prohibiting public nudity or the laws against obscenity.

[40] For instance, the laws against homosexual practice.

[41] Interestingly, however, his confusion is obvious here. In one place of the paragraph mentioned above, he does mention that a person not recognised by law is, although not a legal person, a moral person. How on earth can a person at the same time be considered as a moral person when he or she is by birth 'bastard'?

relationship' with the authority they are subject to. 'Freedom'[42], the most important and intrinsic aspect of human life, is also subject to the approval or recognition of the law and, to their opinion, human Freedom cannot, meaningfully, exist without the protection of the law.[43] Thus, the standard set by the formal law becomes the only standard of measuring the well-being and Freedom in human life. In the eyes of the law one's Freedom is relatable to only those actions that are acknowledged by the provisions of law to be considered as freedom as they call it; just mere recognition by law that someone is a person in the eyes of the law does not automatically avail him or her to be involved in Freedom expressing conducts. From the lawjon perspective, Freedom is detached from legal personhood. Freedom is part of legal personhood to the extent it is licensed by the law, and this is expandable to only those Freedom reflecting activities as recognised by law. If one's Freedom reflecting acts are not covered by the list of activities licensed by the relevant law, the law owes no responsibility to protect the acts.[44]

This is apparently the most concrete and strict version of the lawjon with which the hard version of legal positivism is, inevitably, associated.[45] As there are different versions of positivism, so there are different versions of corresponding lawjon approaches. More interestingly, we should not think that only the positivism-dominated legal regimes follow this approach, others also, by and large, follow the same approach; the legal discourses that want to maintain distance from the legal positivism of any sort fall prey to this approach. Followers of the approach, be they positivists or subscribers to the natural law theory or social law theory or any other theories, the key features of all these lawjon approaches

[42] Different authors prescribe different versions of freedoms. For the purpose of this thesis, Freedom (with capital letter F) means the freedom every human is born with by virtue of being human being. Further, many authors consider freedom and liberty synonymous. To avoid the linguistic complexities, we stick to the word Freedom alone.

[43] Frye (n 13); Valentini (n 13); Hart, 'Are There Any Natural Rights?' (n 13); Jeremy Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (1994) 13 Law and Philosophy 259, 270–271. Waldron, referring to Hayeks states – 'FA. Hayek pursues this argument to an extreme in The Constitution of Liberty (London: Routledge and Kegan Paul, 1960), insisting that the coercive pursuit of any end by the government is compatible with individual freedom provided it is pursued through law… it is only through legal institutions that freedom may be channelled and promoted'. Legal positivists, who are mostly political-legal philosophers, believe that '[u]ntangling the relationship between law and liberty is among the core problems of political theory'; see Frye page 298. Locke states – 'where there is no law, there is no freedom'; see John Locke, *Two Treatises on Civil Government* (G Routledge and sons, limited 1887) 219.

[44] For example, we can quote a statement of USA Justice Scalia. He states – 'State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity…based on moral choices. Every single one of these laws is called into question by today's decision…[statute prohibiting homosexuality] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin…But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex'; See *Lawrence v Texas, 539 US 558 (2003)* (Supreme Court of the US) 590, 591, 600. How absurd his statement is. He is stating that the state is not doing discrimination against a homosexual people by preventing him or her involving in same sex relationship because state allows him or her to have sex with people of opposite gender. This is the real face of the lawjon approach.

[45] Benthamite, and Austinian version of lawjon approaches are easily fit into this category. Gardner, seem, also fits well in this category; see Gardner, 'Legal Positivism' (n 19) (Read generally).

remain the same: seeing the human life, including Freedom, through the prism of law and considering every aspect of human life subject to the validation of their respective concepts of laws.[46] The Lawjon, in its strictest version, is subject to the approval of the sovereign with no chance of bargaining. From this perspective, Freedom is just the kindest gift from the sovereign. Slavery, objectification of women, the holocaust, everything looks legally sound when the related decisions are the decisions of the sovereign.[47]

Other scholars, who follow a milder version of the lawjon, claim that Freedom and other decisions of individual life are subject to the decisions of the sovereign or political officials provided that such sovereign or political officers take the decisions following the secondary rules.[48] This version of the lawjon approach may include other scholars who like to add some merits to law such as rationality, morality, reasonableness, due process, fairness, equality, goodness, etc.[49] Once the law is made by the political officials in compliance with the secondary rules, or other merits, the relevant law becomes binding, and one's personal life including his or her Freedom becomes subject to those laws.

There are other scholars who seem to follow the softest version of the lawjon approach. They claim that the decision relating to human life is subject to the political officials' decisions taken in the political process and hence there is a chance of 'symbolic' or 'hypothetical' bargaining for one's Freedom.[50] Although this version justifies the intervention of law in the personal life based on the consent of the people who, eventually, become subject to the law, the version cannot avoid the risk of tyranny of law in human life and in their Freedom. The said assurance of consent is nothing but a mirage and, more importantly, surrender of the intrinsic Freedom and the intrinsic aspects of human life are the inevitable consequences. Therefore, be it the strictest version of lawjon or the subtlest version of lawjon, nothing is for granted here; everything, every single aspect of human life or every decision of one's life is subject to political decision and subject to external preference of X, Y, Z and so on. Whatever the case is, lawjon's conviction is that every sphere of human life is subject to bargaining with and sympathy of the

[46] For example, Duguit, who believes that social norms play the central role in the formulation of acceptable law, places all decisions associated with human life subject to the prescription of the social norms. See Léon Duguit, 'Objective Law' (1920) 20 Columbia Law Review 817; FW Coker, 'Review of The Law and the State' (1918) 12 The American Political Science Review 536.

[47] T Anansi Wilson, 'And What of the "Black" in Black Letter Law?: A BlaQueer Reflection' (2021) 30 Tulane Journal of Law & Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 147, 150. Wilson states - 'Fugitive Slave Law allowed for willy-nilly abduction, abuse, and sale of free and formerly enslaved Black people on the description of appearing as absconded "property."'.

[48] Hart and others (n 20); Kelsen (n 18); Fuller, *The Morality of Law* (n 20).

[49] Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty* (Henry Hardy ed, 2nd edition, Oxford University Press 2002) 199; Xunwu Chen, 'Positive Law and Natural Law: Han Feizi, Hobbes, and Habermas' (2016) 1 Journal of East-West Thought 11, 11.

[50] Dworkin, Waldron, and many other scholars on several occasions follow this version.

sovereign or of the officials having the 'ghostly' authority to this end. Thus, the law defines life, and recognises life - this is what the lawjon is.

Prior to proceeding to the next section, we must mention that it is quite common to observe that many scholars follow different versions of the lawjon approach in different situations or, at times, even in the same situation. Further, the lawjon approaches can be classified from other perspectives too.[51]

1.2 Background or the Foundation of the Lawjon Approach

We have not found any foundation of the lawjon approach as such; it, simply, is not based on any concrete and comprehensive legal theory or philosophy. Neither is it supported by any systematic research, scientific studies or demonstrable evidence supporting its efficacy. Instead, its background is associated with some scattered and random assumptions, heuristic objectives, and flamboyant promises. The central assumption that sets the background of the lawjon approach is that humans are evil; by nature, humans are, as the assumption goes on, 'vicious, wicked, cowardly and bad' and if they are allowed to live without some strict rules, they 'will tear each other to pieces'.[52] The assumption holds that these evil, nasty, and dangerous creatures always live in the warzone where they are haunted by the constant terror of being attacked, tortured, smashed, killed, and butchered by their fellow evils or other outgroup evils; they are engulfed by the fear that their properties will be demolished, snatched away, and appropriated by other two-footed devils.[53] Unless these beasts are 'clamped with iron rings and held down by means of the most rigid discipline', they 'would devour each other alive' and thus, humans will be annihilated from the surface of the earth.[54]

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[51] For example, based on the possibility of the extent and availability of Freedom, the lawjon approach could further be classified - where one lawjon approach might allow no such possibility whereas another lawjon approach may leave some scope of such possibility or for a certain type of Freedom. Pock's narrative, for instance, resembles one such classification. He states - 'law is that measure of outer liberty without which the inner liberty required for ethical decisions cannot exist'. See Max A Pock, 'Gustav Radbruch's Legal Philosophy' (1962) 7 St. Louis University Law Journal 57, 65. Thus, he wants to say that the lawjon approach to its subtlest form holds that at least the law must control external liberty in order to make sure internal liberty. However, we do not think, for reasons to be disclosed in the next chapters, such classifications may have any relevance for our purpose. Neither does the very nature of Freedom accept such classifications.

[52] Isaiah Berlin, *Freedom and Its Betrayal: Six Enemies of Human Liberty* (Henry Hardy and Enrique Krause eds, 2nd edition, Princeton Univ Press 2014) 13; Lon L Fuller, 'Human Interaction and the Law' (1969) 14 The American Journal of Jurisprudence 1, 20. To present what his critics claim about human nature he states – ' that "law serves as an instrument of social control." Sometimes this conception is coupled with the notion that the necessity for law arises entirely from man's defective moral nature; if men could be counted on to act morally, law would be unnecessary'.

[53] John Stuart Mill, *On Liberty* (David Bromwich and George Kateb eds, New edition, Yale University Press 2003); Neoh (n 32) 235. Neoh depicts how this warzone looks like – 'This condition in the state of civil society is in stark contrast to the condition in the state of nature, where one is constantly exposed to violence, or the threat of violence, from others'.

[54] Berlin, *Liberty* (n 49) 13; stating the statement of Maistre. ; Walter S Wurzburger, 'Law as the Basis of a Moral Society' (1981) 19 Tradition: A Journal of Orthodox Jewish Thought 42, 47; Richard Quinney, 'The Ideology of Law: Notes for a Radical Alternative to Legal Oppression Author' (1972) 7 Issues in Criminology 5. Quinney states – 'The fear is taken to the point that such society would not merely be a "society without order" but would be

In such a state, as the assumption holds, humans cannot have any trust in themselves and hence, they cannot proceed to live side by side peacefully as a community. Therefore, the very first task is to make sure that the evil humans must not be left unchained and uncontrolled in their state of nature; they must be regulated by some principles, and rules which must not have their force in the human's state of nature which is evil. Driven by such an irresistible objective to establish peace and order in society or to save the race of humans from possible annihilation by regulating and chaining humans successfully and thereby, creating trust among humans, the initial proponents of the lawjon approach had to find out an authoritative and reliable source to which all people would surrender their Freedom. To this end, initially, transcendental, unknown or 'ghostly' metaphysical sources or ideas like God, nature, the destiny of humanity, supreme will, supernatural will, etc were referred to as the source of all rules and regulations to regulate, literally, every single aspect of human life.[55] State and sovereign authority are often presented as the representatives and protectors of the sanctity of those sources and ideas. The sources and the ideas and their associated objectives were so important that even the existence of humans was, often, denied, if the human existence were not in compliance with the objectives the states and the sovereign were supposed to take care of.[56] Ironically, Neoh's narrative of the lawjon approach reflects exactly this reality where the slaves are simply non-existing legal persons.[57]

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the very negation of the society. … The traditional idea of law is bound by the assumption that must be regulated. Man must be controlled…Emile Durkheim set the pace for modern times by suggesting that man must be restrained because of his insatiable passions'.

[55] Mill (n 53) 83. Mill states – 'The ancient commonwealths thought themselves entitled to practise… the regulation of every part of private conduct by public authority, on the ground that the State had a deep interest in the whole bodily and mental discipline of every one of its citizens'. Comte states – 'True laws could only exist in so far as the regulating powers emanated from supernatural wills", is as true of duties as of laws'; Cited in Duguit (n 46) 826.

[56] Duguit (n 46) (see generally); 'Ayn Rand on Applying the Principle of Objective Law' <https://newideal.aynrand.org/ayn-rand-on-applying-the-principle-of-objective-law/> accessed 9 April 2023. The Lawjon approach presupposes some specific objectives. In fact, the approach is valued for its objectives. Accordingly, the law associated with the approach is also objectives-bound. Central to such law, depending on whether one is the follower of positivism or natural law theory, are their respective objectives ie certainty, predictability, justice, protection of human rights, stability, establishing order in the society, saving the society, saving the nations, protecting the culture and heritage, state security, protecting the interest of the society, and what not. To Fuller, the objective of the law is to 'furnish base lines for human interaction'; see Fuller, 'Human Interaction and the Law' (n 52) 24.

[57] Neoh (n 32) 236–239. He states – 'In the relation between master and slave, we have two moral persons, but only one legal person…The slave exists entirely in the state of nature, while the master exists in two realms simultaneously. … Slaves need not be viewed as sub-humans in order for this state of affairs to hold true. The masters can recognize their slaves as fully human, as they did in ancient Rome'. The statement reflects a sadistic conceptualisation of humans; he wants to say that a slave, who does not have Freedom, is still not a sub-human. This indicates his version of the law can perfectly afford a reality that claims an entity may be identified as a human without Freedom. This is a sort of pure organic and biological conception of Human and the conception is devoid of any idea what human consists of. As we will proceed further, we will demonstrate Human Freedom is an inevitable part of the abstract human body. Therefore, a conception of law, which denies human Freedom, is in fact denies the human existence.

Over time, as the people's fascination, reliance, and loyalty in connection to the imaginary sources and ideas starts decaying, they start claiming their authority over their respective life back. Thus, the source of authority is promised to be shifted back on the humans but without the possibility of re-emergence and influence of the state of nature in the process of the making of law, its application, and its authority. In this process people are promised that the sources of law and legal principles are no longer the unknown or undefined entities or ideas; instead, people themselves are the sources of the authority of all laws.[58] They are further promised that for general convenience and to ensure that the state of nature of humans does not have its evil effect on the laws, the associated roles and authority of the people have been delegated to their representative political authorities and/or political institutions. People are promised that these laws made and executed by the external authorities ie political authorities will not only ensure the certainty, predictability, and neutrality of the laws but also ensures higher enforceability of the law and eventually, this will justify and reemphasise law's distinctive higher authority in comparison to other rules in regulating the humans.[59] This promise is supported by another fundamental assumption that the law's authority is attached to its nature of externality; the external political authority and their methods of imposing external force or coercion not only demonstrate the law's enforceability but also justify its authority of doing so.[60] Their promise of certainty and predictability is supported by

[58] John Bruegger, 'Freedom, Legality, and the Rule of Law' (2016) 9 Washington University Jurisprudence Review 081, 92. Bruegger's statement – 'The people, being the authors of the law (since all power emanates from their consent)…'

[59] Donald H Zeigler, 'Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts' (1986) 38 Hastings Law Journal 665, 679; FA Hayek, *The Constitution of Liberty: The Definitive Edition* (Ronald Hamowy ed, University of Chicago Press 2011); Ronald Hamowy, 'Freedom and the Rule of Law in F.a. Hayek' (1971) 36 Il Politico 349; Robert Westmoreland, 'Hayek: The Rule of Law or the Law of Rules? (Reviewed Book: The Constitution of Liberty by Friedrich Hayek' (1998) 17 Law and Philosophy 77; Fuller, *The Morality of Law* (n 20); Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston University Law Review 781 ; It is stated that 'a fair degree of certainty concerning its enforcement advances the supremacy of law in society'. Neoh (n 32); Lamond (n 14) 35. Neoh states – 'To be treated as subject of law humans have to prove that they are 'able to "avoid being exposed to violence or physical restraint by observing the relevant rules,"'. If we follow his line of argument, it will not be a mistake to claim: X can logically claim him or her as healthy only on the availability of the drugs that he or she might need when he or she will be sick. Or X is said to be alive only on the guarantee that he or she will not die. *Prima facie*, it may seem that Lamond also have the similar opinion as he states – 'Legal rights and legal duties matter so much in stable legal systems because they are relatively effective. Their effectiveness rests to some extent upon their enforceability'; see Lamond (n 14) 35. Borrello points out - 'When we are dealing with law, we usually consider the legal force as a legitimate one, for the only reason that it comes from the State institutions'; see Borrello (n 11) 92.

[60] Austin (n 19); John Austin and Robert Campbell, *Lectures on Jurisprudence, Or, The Philosophy of Positive Law* (J Murray 1875); Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd 2007); Quinney (n 54) 25; Zeigler (n 59) 665; Steven J Heyman, 'Positive and Negative Liberty' (1992) 68 Chicago-Kent Law Review 81, 84. Zeigler, like many other legal scholars, comes to the conclusion that the enforceability is precondition for the authority of law referring to the dual relationship schemes of Hahfeld. He wants to say that Hahfeldian terms necessarily require that a right must be supported by its corresponding duty. He states – 'Unless a duty can be enforced, it is not really a duty; 'it is only a voluntary obligation that a person can fulfil or not at his whim … Thus, a right without a remedy is simply not a legal right'; see Zeigler (n 59) 678. Further, McNeilly explains what Austin states about the enforceability assumption ' all law is command, and what distinguishes command from

another fundamental assumption of the lawjon approach that the reality is given; proponents of the lawjon approach know, in advance, all legal problems people may face and all the solutions thereto. This assumption is supported by another assumption that they know the objectives of the law.[61] How do they know it? The answer is another assumption that they know the objectives of the life of the people, and they further assume that the law's objectives must be in line with the objectives of the people.[62] This is associated with another assumption that 'all things are caused and ordered'.[63]

Why should people have trust in such external authority? How can they be assured that the representatives are representing their interests, values, and morals properly? How can they rely on the political authorities for their Freedom? Again, the answers to these questions are some promises and assumptions, although followers of the lawjon approach have no demonstrable evidence in support of their promises and assumptions. They assume that neither the political officials nor the political institutions are as biased and inconsiderate as the natural human being in reasoning; the political authorities are driven by a professional and institutional spirit that filters out the possibility of biased and inconsiderate reasoning. Therefore, the political authorities are more reliable, and this gives rise to another assumption that their higher reliability ensures the law's higher authority. This leads to further assumption that the higher authority of law justifies more interference of law in one's personal life, and hence, the lawjon approach is further justified.

On the question of assurance of the acts of the political authorities, the assumption is that the voting rights of the people are an effective tool in this regard. The dominant section of the legal arena that follow the lawjon approach assumes that the making or promulgation of the related positive laws by the political officials are well justified for they play the role on behalf of people in general; they assume that the politically elected political officials are duly authorised to play the role. They believe that the voting mechanism and the publication requirements generally legalise the laws that those political

other expressions of desire, such as wish, is "the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded"; see FS McNeilly, 'The Enforceability of Law' (1968) 2 Noûs 47.

[61] Duguit (n 46) 828; Fuller, 'Human Interaction and the Law' (n 52) 20. Duguit states – 'I set up the social norm as a law of purpose regulating the coordination of individuals forming a social group, limiting their action, imposing certain acts upon them…the object of the social norm is the regulation of individual activity, the determination of the acts which man is obliged to perform or not to perform'. Fuller states –'As for the general purpose of enacted law, the standard formula — in both jurisprudence and sociology — is to the effect that "law serves as an instrument of social control'.

[62] NE Simmonds, 'Law as a Moral Idea' (2005) 55 The University of Toronto Law Journal 61, 61.

[63] Quinney (n 54) 4.

officials enact.[64] In addition, there are other scholars who believe that even voting is not an essential requirement to this end if the law is rational, reasonable, fair, and so on.[65]

On the question of Freedom, the lawjon approach claims that where there is no law there is no Freedom; there is no meaningful sense of Freedom in the state of nature; there exists only tyranny or atrocities.[66] The lawjon approach and its followers irrespective of their generations make the superficial promise that only law can bless humans with Freedom, and law inevitably does so and, in time, increases Freedom more than the freedom humans have in their state of nature.[67] Neoh states that '[t]he horrors of slavery show that it is good to live under law and it is bad to live outside it… lesson of slavery teaches us that it is good to be in jural relations and to be a bearer of legal rights'.[68] They promise that if people live in accordance with the law's will, the law enables them to live in the community without being subject to the will of other people of the community; thus, '[b]y being a subject of law, one is not then subject to the will of others'.[69] The enforceability assumption, which holds that law's authority is subject to its enforceability, is often used to justify lawjon's promise of ensuring and increasing meaningful freedom.[70] The enforceability assumption necessarily gives rise to another assumption that one's Freedom is necessarily and reversely connected to the Freedom of another as if the equation is, as Berlin

[64] Chen, 'Positive Law and Natural Law: Han Feizi, Hobbes, and Habermas' (n 49) 13. Chen states – 'public publication not only announced their authority and validity, but also defined the totality of their existence'. Radin and Fuller have the same opinion to which Raz agrees partially with further suggestions of his own. See Radin (n 59) 785; Fuller, *The Morality of Law* (n 20) 162–163. Bruegger, with reference to a statement of Rousseau, states – ' As long as this "legislation for your own good" is approved by a majority vote, the general will prevails. The general will is infallible—". . . the general will is always right and tends to the public advantage'; see Bruegger (n 58) 93.

[65] Berlin, *Liberty* (n 49) 199. Berlin has such an assumption; to him, if the law is rational all rational people will accept it. He states – 'If I am a legislator or a ruler, I must assume that if the law I impose is rational … it will automatically be approved by all the members of my society so far as they are rational beings. For if they disapprove, they must, pro tanto be irrational'.

[66] Thomas Hobbes, *Leviathan* (Edwin Curley ed, Hackett Publishing Company, Inc 2011); Valentini (n 13); Rex Martin, *A System of Rights* (1st edition, Clarendon Press 1993).

[67]Berlin, *Liberty* (n 49) 194; Bruegger (n 58) 81. Berlin quotes Rousseau – 'In giving myself to all, I give myself to none and get back as much as I lose, with enough new force to preserve my new gains'. He also quotes Kant – ''the individual has entirely abandoned his wild, lawless freedom, to find it again, unimpaired, in a state of dependence according to law, that alone is true freedom, 'for this dependence is the work of my own will acting as a lawgiver'. Berlin himself believes that despite law, in time, restricts freedom, such restriction 'leads to an increase of the sum of liberty'; see page 19. Bruegger states 'Adherence to the rules of formal legality promotes freedom by creating stability and predictability in the law, on which the people can then rely to plan their behaviors around the law—this is freedom under the law'. Hayek states –' '[w]hen we obey laws ... we are not subject to another man's will and are therefore free'; cited in Frye (n 13).

[68] Neoh (n 32) 240.

[69] Neoh (n 32) 235.

[70] Berlin, *Liberty* (n 49) 171. Berlin asks – 'What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?'. Thus, he wants to claim that Freedom without its associated legal conditions is worthless. Enforceability is one of such conditions and only law's promise to enforce Freedom is reliable.

states, ''Freedom for the pike is death for the minnows'[71] because as the lawjon holds '[t]o consider man alone and in himself is to see only a part of the reality'[72]. Eventually, as they assume, enforcement of one's Freedom necessarily leads to the restraint of others' Freedom, and hence, the further assumption that the enforcement of Freedom is necessarily linked to the curtailment of Freedom.[73]

1.3 Nature of the Lawjon Approach

We understand that when we are supposed to depict the nature of any subject matter, the related narration should be as neutral as possible. Unfortunately, the lawjon approach is intrinsically so short-sighted that the narration of the nature of it may automatically seem biased against it as if we narrate the nature of intrinsically negative subject matters like punishment, death, diseases, etc. Although it may seem we are noting down the negative sides of the approach, our main intention is to portray the nature of the approach.

1.3.1 Sadistic

The Lawjon approach is a glaring example of the extent of sadism a human system or approach can accommodate. Something can naturally be evaluated negatively and because of this negative evaluation, the evaluator cannot be blamed as sadistic if the method of evaluation is correct. Lawjon's fundamental assumption that people are necessarily evil and dangerous does not necessarily prove that the approach is sadistic; instead, what makes it sadistic is its method of conviction that people are evil. How do the followers of the approach conclude that people are so? What evidence do they have in support of such a rudimentary, pathetic, negative, and far-reaching conclusion that would eventually and inevitably affect the lives of billions? Do they have enough, if at all, empirical and theoretical support in favour of their claim? We have not found any evidence reflecting that they had any support in favour of their claim. Instead, almost all the empirical studies and scientific theories claim exactly the opposite ie humans are intrinsically good, altruistic, kind, social, law-abiding, and so on.[74] The

[71] Berlin, *Liberty* (n 49) 171.

[72] Duguit (n 46) 829.

[73] Berlin, *Liberty* (n 49) 171; Bentham (n 19); Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (n 43) 268; Bruegger (n 58) 88. Bentham states – 'every law is an infraction of liberty'. Waldron states- 'we take it for granted in political theory that liberty may need to be balanced against other social values (such as equality); we accept that liberty for some may mean oppression for others'. Bruegger goes too far to state - 'The sanction for robbing banks is a severe curtailment of freedom'.

[74] Alfred Adler, 'The Child: Neither Good nor Evil' (1974) 30 Journal of Individual Psychology 191; Tom Aglietti, 'Are we born good or evil? | BBC Earth' <https://www.bbcearth.com/news/are-we-born-good-or-evil-naughty-or-nice> accessed 17 April 2023; Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Knopf Doubleday Publishing Group 2012); Tom Stafford, 'Are We Naturally Good or Bad?' (14 January 2013) <https://www.bbc.com/future/article/20130114-are-we-naturally-good-or-bad> accessed 17 April 2023; Cindy Brandt, 'Are Children Born Evil? Challenges for Christian Parenting' (*Sojourners*, 30 December 2015) <https://sojo.net/articles/are-children-born-evil-challenges-christian-parenting> accessed 31 October 2022; Adrian F Ward, 'Scientists Probe Human Nature--and Discover We Are Good, After All' *Scientific American* <https://www.scientificamerican.com/article/scientists-probe-human-nature-and-discover-we-are-good-after-

business success of Amazon and the enormous success of Wikipedia are just a few examples that conclusively demonstrate that the assumption of the lawjon approach can never be correct.[75]

Although most of the statistics and scientific studies favour our position, knowing and proving whether humans are good or bad is not an important issue for our conviction that the lawjon is sadistic. Their methodological flaw alone is sufficient to justify our conviction. Their method of convicting people as evil is unacceptable in any balance because they never follow a standard process of evaluation of any sort. In fact, their conviction is not any evaluation at all; their conviction is pre-evaluative whereas the law or legal reasoning is a post-evaluative process. We will never find a single human being who has never been betrayed, or deceived; we will not find a person who never has the feeling of deprivation, discrimination, injustice, and so on. As these feelings and associated experiences are very common and everyone, invariably, goes through these, it is not a matter of surprise that almost everyone, if not all, develops an immediate reaction against humans in general.

The obvious reality is that a person, although he or she may have met with thousands of good people in his or her life, he or she usually remembers the few people who have done something wrong with him or her. Eventually, he or she develops a reaction of revenge, a drive to save himself or herself; he or she becomes too protective, vigilant, critical, or aware. He or she adopts and employs such reactions and drives against all people in general. This process is natural; this process is intrinsic to all of us. In fact, we are designed in this way to save ourselves from an upcoming danger; this is our survival instinct. We remember the events or things that go against us or our interests or the events that are associated with our discomfort. We have confirmation bias, we tend to automatically generalise everything, and we form immediate reactions ie anger, disappointment, etc. When we are claiming that all people are evil, it reflects our immediate reactions, generalisations, survival instincts, anger, disgust, insecurity, disappointment, the feeling of deprivation, protectionism, and so on. This is not a decision out of the evaluation of any sort; this is just a pre-evaluative reaction, even not a decision. When such a negative conviction or conclusion about human beings is made just based on some pre-evaluative reactions and drives, the associated process or the system that makes such convictions or decisions is bound to be considered sadistic. Continuing with such sadism not only increases the gravity of sadism but also keeps

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all/> accessed 2 January 2022; Ervin Staub, 'Good and Evil and Psychological Science' (2001) 14 APS Observer <https://www.psychologicalscience.org/observer/good-and-evil-and-psychological-science> accessed 31 October 2022; Caroline Zink, 'Why the Brain Follows the Rules' (2008) Mind&Brain *Scientific American* <https://www.scientificamerican.com/article/why-the-brain-follows-the/> accessed 11 April 2023. Zink states – 'People are incredibly social beings, and we rely heavily on our interactions with others to thrive, and even survive, in the world'.

[75] For the business model, for instance, Amazon follows, it could not have even survived had a fraction of people shown evil characteristics in their transactions. Just consider their return and refund policy, for instance. On a similar note, we may consider the EU customer's statutory rights to return goods within 14 days of purchase; see Directive 2011/83/EU on Consumer Rights 2011. Were a fraction of the customers evil or bad, all the business ventures would have collapsed by now.

endorsing and boosting Jefferson, Churchill and others' sadistic convictions that keep the door open for possible upsurges of discrimination, subjugation, exploitation, extermination, and massacres of humans based on their race, ethnicity, religion, culture, and so on.[76]

1.3.2 Repressive, Power-patronising, and Tyrannical

Lawjon's other convictions that are reflected in its assumptions such as the enforceability assumption also reflect sadism. Recognition of Freedom based on its enforceability is identical to defining a healthy person based on the availability of medicines he or she might need when he or she will be sick. This is like defining health with reference to the absence of diseases. This is absurd sadism, and this has far-reaching negative impacts. Justifying the authority of law based on its enforceability is prone to pave the way for repression. When law's authority is justified with reference to its enforceability, it, inevitably, unconsciously, and indirectly, take-overs our mind to accept and justify things, which the legal arena always wants to reject and oppose expressly, such as - the rule of power, gun men's authority, victors' justice, etc.[77] No matter how strongly and openly the lawjon followers want to avoid such repressive consequences, it cannot be avoided; after planting a neem tree, we cannot logically expect to get strawberries. The whole approach and the associated law are designed to foster power, influence, and politics with the hope to avoid physical wars. Since their assumption goes on that humans

[76] Great figures of the history like Jefferson, Churchill, Macaulay and others, who played extensive role in the shaping of the positive laws, specially in the anglophonic world, despite their fame, have their infamous side for being extremely racist. Finkelman states – 'Jefferson asserted that a harsh bondage did not prevent Roman slaves from achieving distinction in science, art, or literature because "they were of the race of whites"; American slaves could never achieve such distinction because they were not white. Jefferson argued that American Indians had "a germ in their minds which only wants cultivation" and they were capable of "the most sublime oratory." But he had never found a black who "had uttered a thought above the level of plain narration; never seen an elementary trait of painting or sculpture." He found "no poetry" among blacks. Jefferson argued that blacks' ability to "reason" was "much inferior" to whites, while "in imagination they are dull, tasteless, and anomalous," and "inferior to the whites in the endowments of body and mind." Jefferson conceded blacks were brave, but this was due to "a want of fore-thought, which prevents their seeing a danger till it be present."'1 29 Thus, Jefferson could assert the equality of mankind only by excluding blacks.' See Paul Finkelman, 'Let Justice Be Done, Though the Heavens May Fall: The Law of Freedom' 70 Chicago-Kent Law Review 325, 349. There are evidence of racism against other great figures, too. Richard Toye, 'Yes, Churchill Was a Racist. It's Time to Break Free of His "great White Men" View of History' *CNN* (10 June 2020) <https://www.cnn.com/2020/06/10/opinions/churchill-racist-great-white-men-view-toye-opinion/index.html> accessed 20 April 2023; Jeng-Guo S Chen, 'Gendering India: Effeminacy and the Scottish Enlightenment's Debates over Virtue and Luxury' (2010) 51 The Eighteenth Century 193. While their racism is a historical testament of their sadism these instances have further important messages to convey. Racism corroborates sadism and vice versa. Accepting the sadistic assumption that the people are evil, bad, or barber, inevitably corroborates the racist and pathetic comments of those great figures and thus dishonours the people the comments were addressed to. At the same time, accepting such racist comments is identical to keeping the door open to argue that sadism is justified.

[77] James Meernik, 'Victor's Justice or the Law? Judging And Punishing At The International Criminal Tribunal For The Former Yugoslavia' (2003) 47 Journal of Conflict Resolution 140; Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 Journal of Human Rights 213; Jonathan Coppess, 'The Rule of Law vs. the Rule of Power: A Reflection' (2020) 10 farmdoc daily <https://farmdocdaily.illinois.edu/2020/09/the-rule-of-law-vs-the-rule-of-power-a-reflection.html> accessed 25 May 2023.

are in continuous war zones and always surrounded by brutal enemies, the approach and the associated laws must have been designed to deal with the emergency of war and replace physical war through other political and diplomatic means. This is not just our presumptive submission, but a submission supported by countless empirical and theoretical evidence and the acknowledgements of the very lawjon followers.[78]

The followers of the approach acknowledge that the law is evil on its own because it uses force.[79] However, we are not considering the approach repressive only because it uses force; the use of force itself is not repressive. This approach is repressive because it considers the force itself as the justification for its imposition; it is repressive because its associated force is not only useless but also counterproductive as the nature and justification of the force are not in compliance with the nature and justification of the force the actual law is associated with.[80] Verdicts of war are always shaped by power, influence, politics, opportunity, tricks, etc, while the verdicts of law must be devoid of the influence of these factors. To be more precise, the urgency of the application of law arises to counter the influences of these factors. Unfortunately, the repressive approach and its associated law are doing the opposite; the nature of war verdicts is eminently reflected in their convictions.[81] Quinney points out that the lack of enforceability is not a problem, instead, the root of all unrest lies in the 'unwillingness of those in power to listen and act in a way that would solve the just grievances'.[82] In such a ground reality, the enforceability presumption and its associated presumptions justify, motivate and instigate the people in power or with influence and the so-called political role players not only to unleash more power and influence, and unnecessary power and influence, but also to overlook the value associated with the

[78] Scott Ingram, 'Replacing the "Sword of War" with the "Scales of Justice": Henfield's Case and the Origins of Lawfare in the United States' 9 Journal of National Security Law & Policy; Sida Liu, Ching-Fang Hsu and Terence C Halliday, 'Law as a Sword, Law as a Shield' (2019) 2019 China Perspectives 65; Robert N Wilkin, 'The Science of Law as Substitute for War' (1946) 32 American Bar Association Journal 22.

[79] Bentham (n 19) 259.

[80] This point has been explained in the Chapters to come.

[81] Lawmakers' personal feelings of being ditched, discriminated against, and intimidated are reflected on countless occasions. Laws promulgated against a language, culture, or religion clearly reflect the psychological insecurity of the lawmaker against the respective languages culture, etc. The same pattern of incidents also reflects their superiority, in terms of power or influence. Therefore, we see the Bengali-speaking majority people make laws against the use of indigenous words; or Hindi-speaking legislatures try to ban other languages in official communication in India. Eventually, lawmakers are prone to reflect and support the concentration of power. This also partly explains why they are more interested in the eternality of power or the impact of law or why they put more emphasis on external agencies. This further implies how the lawjon approach in its apparent *bonafide* gesture patronises the process of systematic terrorism by the powerful or influential.

[82] Quinney (n 54) 27.

actual sense of law by using the shield of lawjon approach and its associated law.[83] Thus, the law acts as the 'first and last weapon of repression'.[84]

This enforceability assumption gives rise to the justification of as tyrannical convictions as – we are bound to follow the law 'for the sake of the law itself'; or 'to uphold order for the sake of order'; or to tolerate everything that the political officials do.[85] Whatever version of positivism we talk about, central to the lawjon approach is the essence that humans are not the source of the authority of law. Despite its reiterated and expressive promises, the approach and its laws' source of authority is in the 'transcendental and mysterious entity'[86] and this authority is applied through a centralised authority and hence the approach is prone to be tyrannical.[87] We hope we do not need to discuss how the Austinian and Benthamite versions of the lawjon approach are tyrannical as their narratives of law sufficiently give a sense of how the authority associated with the law is exercised through a central sovereign authority.[88]

Subscribers to the lawjon approach may be hopeful with lawjon's milder versions that reflect the narratives, for instance, of Hart, Dworkin or Fuller who, seemingly, try to prevent the centralisation of

[83] Quinney (n 54) 28; William Chin, 'Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America' (2019) 16 Hastings Race and Poverty Law Journal 109, 112–113.; Quinney states how the lawjon approach and its assumptions trick us to delegate our own collective force and power – 'We have been led to believe for ages that the population is to submit to the sovereignty of the nation. We were told that only a few people were capable of leading the rest. And that our leaders were to be trusted, that we were to turn our fates over to those in authority, merely because they were in authority. In the same way, we have taken at face value the belief that law is an absolute good in itself. Order, as well, has become an absolute value, a value that actually benefits those who rule at the expense of those who are ruled'. Chin states – 'Indeed, law can be used to inflict the worst oppressions imaginable as shown below…Whites have used various means, including a racist legal regime, to terrorise African Americans since pre-Revolution times'. Discussions in the next chapters will further clarify this point.

[84] Quinney (n 54) 28.

[85] Quinney (n 54) 32.

[86] We will explain this point in a little while.

[87] Lawjon still presupposes the 'ghost' possessed by the central authority. Fuller's related statements support our submission. He submits that the legal arena is still consciously and unconsciously prone to search for a centralised locus whence the law may come from and from no other place. He states – 'The reason that legal theorists have difficulty in dealing with customary law derives from the fact that it does not emanate from some identifiable center of authority'; see Lon Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) 1975 BYU Law Review 89, 93. However, just to clarify, we should mention here that we have disagreement with Fuller on the point of customary law.

[88] Tyler, Jr., 'Validity, Legal', *Internet Encyclopedia of Philosophy* <https://iep.utm.edu/legal-va/> accessed 10 April 2023. (soft copy page number). Tyler's statement is sufficient to support our conviction about the Austinian and Benthamite version of the lawjon approach's tyrannical nature. He states – '[Bentham's statement] The sovereign's will provides its own validity standard … Bentham's Anarchical Fallacies …Positive law is the only real law…. In sum, the will of the sovereign provides its own standard of legal validity, unrestrained by morality, custom, or the autonomy of law … Like Bentham's "imperative" theory, Austin's "command" theory of law … wields no autonomy over the political ruler's will, including the will of judges. … Society cannot function unless judges are free to make new law to correct the negligence and incapacity of legislatures'. Neoh's depiction of the lawjon approach seemingly fit into the Benthamite or Austinian versions of the lawjon approach.

legal authority by making some futile attempts to show that the source of the authority of law is in the people. We submit that this is just an illusory hope. Admittedly, narratives of their theories substantially vary from that of the theories that explicitly patronise centralised sources of authority, still, the locus of power or authority is concentrated in somewhere other than with the people. The narrative complexity and the countless loopholes that Dworkin's theory is left with make his Hercules judge, Dworkin's most dependable political official, the central source of authority and thus leave enough scope for the judge's tyranny.[89] However, a bit of a general reading of his narrative shifts the authority to political officials, including the judge. From both perspectives, general or focused, law's authority is already shifted out of the people and by virtue of the blessing of a 'transcendental and mysterious entity' the authority is concentrated in the hands of the political officials who are sufficiently equipped to unleash tyranny. Hart's narrative, although in a bit different way, also leads us to the same point ie tyranny of the judges who have the authority even to make law.[90]

Thus, the deal is sealed by both Hart and Dworkin almost in the same manner - power or authority of law is in the hands of the people - is a futile promise.[91] The traditional 'validity requirement of consent by the governed'[92] is not an essential requirement either for Hart or for Dworkin. Once Hart is satisfied that the secondary rules are complied with, no such consent is essential.[93] In a similar vein, Dworkin's political philosophy is not, necessarily, considerate of people's opinions or consent; Dworkin's Hercules has an obligation to take note of the opinions but is not obliged to respect those and he or she

[89] Condorcet states – 'The despotism of courts is one of the most odious of all because, in order to maintain and exercise it, courts use the law, the most respected weapon of all; see Marquis de Condorcet, *Condorcet: Political Writings* (Steven Lukes and Nadia Urbinati eds, Cambridge University Press 2012) 168. Dworkin does present us with many defensive elements ie political morality, the integrity of the law, equal concerns, etc to defend against the tyranny of the judges. As the discussion proceeds, we will see all these defence mechanisms are futile. Further, careful study of the rules of adjudication by Hercules should convince us that at the end of the day judges are the ultimate authority to recognise the 'primary rules' that are binding. We admit there are clear and precise cases where judges do not have any option to apply his or her personal interpretation, for example in the easy cases of criminal convictions against murder, rape, theft or civil liability for breach of contract, etc. These cases are not decided by the legal sense of the lawjon approach; instead, these cases are by default, although unconsciously, decided following the genuine sense of law associated with the Freejon approach.

[90] Hart, 'Are There Any Natural Rights?' (n 13); Hart, 'Bentham and the Demystification of the Law1' (n 19); Hart and others (n 20). Hart's secondary rules ie rules of change, rules of adjudication, and specially the rules of recognition provides the judges sufficient authority to make themselves a tyrant. Tyler states that the rules of recognition 'provides "a rule for conclusive identification of the primary rules of obligation". He also states 'Hart's political rulers wield autonomy over law by controlling the standard of legal validity. Hart also grants judges autonomy over law by rejecting Blackstone's declaratory theory that judges find but do not make law.'; see Tyler, Jr. (n 88) 20–21.

[91] At the end of the day, there remains no distinction between Harts' claim that judges create law through their discretion and Dworkin's opposite claim that judges never create law.

[92] Tyler, Jr. (n 88) 21; William Blackstone, 'Commentaries on the Laws of England: A Facsimile of the First Edition of 1765--1769', *The Founders' Constitution* (University of Chicago Press 1979) 1765–1769; Fuller, *The Morality of Law* (n 20).

[93] Tyler, Jr. (n 88) 21.

may have his own opinion. Thus, all versions of legal positivism ensure the tyranny of positive law.[94] Neoh's narrative suggests how awfully inconsiderate the stricter and hard positivism dominated lawjon approach could be about the existence of the humans themselves and their authority in the question of their life. We just do not understand how would Dworkin or Hart's lawjon approach bring a significantly different result so as to claim that the term tyranny should not be associated with the lawjon approach.

The force of the lawjon approach is so compelling that even if we replace the lawjon's own brand of positivism with natural law or even if someone comes up with a hybrid legal regime incorporating some natural law elements into the positivism, the lawjon cannot compensate for the damages it causes. Commonly addressed as a natural law philosopher, for instance, Fuller's concept of law fails to generate a positive result when the lawjon approach is followed; ultimately power and authority rest on the political officials and the people are not the source of the authority. Fuller's eight desiderata does give some sense about the sense of law and it does accept the idea of human existence.[95] However, in his narrative human existence is depicted as just an idea; he fails to establish human's authority in their life and in the justification of law.[96] Since people are not the authors of law and his narrative misses a comprehensive sense of law, judges have a vast chance to interpret each of the eight desiderata from the judges' point of view and this is enough to make them tyrants.[97]

1.3.3 Possessed, Superficial, Deceiving, Betraying and Sham

The point whence it all started off, still it is revolving around that point. It started with the assumption that humans are evil, tyrannical, and not trustworthy, and hence, the law, which is required to chain them and regulate them, must have a 'ghostly' transcendental source beyond the human themselves.[98]

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[94] Wolfgang Friedmann, 'Gustav Radbruch' (1960) 14 Vanderbilt Law Review 191; Pock (n 51); Tyler, Jr. (n 88). 21. Referring to Radbruch, Tyler states – 'Radbruch, once Germany's leading positivist, argues that the positivist separation of law and morality facilitated Hitler's atrocities through legal means'. ' Hart's political rulers wield autonomy over law by controlling the standard of legal validity. Hart also grants judges autonomy over law by rejecting Blackstone's declaratory theory that judges find but do not make law'; see Tyler, Jr. (n 88).

[95] Fuller, *The Morality of Law* (n 20).

[96] His narrative is limited to demonstrating that law must in order to be considered justified must accept the idea that humans exist; accepting human existence is sufficient. His narrative fails to establish humans as the authors of law and hence the law is something that is imposed on humans from an external source and hence the humans are subject to law; to be more precise, all aspects of human life are subject to the law and hence, lawjon approach rules his theory.

[97] On a relevant point Tyler state – 'As judges increasingly make new law, courts become unpredictable, ex post facto rulings increase, and laws are unevenly applied. Unelected federal judges set aside democratic resolutions of political questions and decide policy issues without public input. Justices devise or limit Constitutional rights according to personal preference to achieve their desired case outcome'; see Tyler, Jr. (n 88) 24.

[98] Chen, 'Positive Law and Natural Law: Han Feizi, Hobbes, and Habermas' (n 49); Wurzburger (n 54) 43. Chen states – 'The authority was supposed to have with the 'God, nature, divine, rulers, or universal ethics'. Wurzburger states – 'The traditionalists …perceived it [law] as the explicit command of the Divine Sovereign. Hence, the overriding authority of the law was deemed to be a function not of its content but of its transcendent source'. Duguit explains this point pretty well: 'it has been said that a rule of conduct could be obligatory for man only if it were part of a principle superior to him, of a transcendental principle …Truly, a rule which had this power could only be founded upon a superior principle, a metaphysical conception'; Duguit (n 46) 825–826. No

Accordingly, the locus of laws' justification and authority must lie somewhere beyond the humans; unknown, superficial entities, or transcendental sources were considered the best option as humans had respect or fear of such sources or entities and hence their subordination to such sources was spontaneous.[99] Thus, the lawjon approach was possessed by the unknown or transcendental ghost or, as Quinney on a similar point terms it, 'dead hand of the legalistic mentality'.[100] Later, on several occasions, humans have been promised that they have been at the centre of sources of authority and justifications. We submit that this promise is fake, superficial, and deceptive. The legal arena with their lawjon approach is still possessed by the same ghost.[101] Take the instance of one of the latest and most dynamic concepts of law as it is narrated by Dworkin; his theory is also possessed by the unknown and transcendental ghost by virtue of which the locus of the authority and justification is shifted to the political officials and the institutions.[102] He distrusts humans, but he trusts those officials and

doubt that the assumption that humans are evil is one of the fundamental reasons why people look for such transcendental sources. In addition, as Duguit states, our very nature is also responsible for such behaviour. He states – 'Man has always felt the need of explaining the visible by the invisible … in the field of the knowledge of nature, he has succeeded in freeing himself from this obsession. In the field of social and moral sciences, he has not yet reached this point. Behind the totality of natural phenomena, a creating and directing entity has been placed; behind a given physical phenomenon, the existence of a kind of spirit has been imagined'; see page 821. Borrello also senses a prevalent transcendental presupposition behind law's authority; see Borrello (n 11) 94. She states – 'In that way, the question turn to: Is the law something totally arbitrary? Or something that can express its legitimacy finding its roots in a transcendental concept of justice?' Borrello is quite correct as she claims, be it Hartian or Kelsenian theory of law, positivists theory of law necessarily presupposes a transcendental source of law. See Borrello (n 11) 96.

[99] Wurzburger (n 54) 42–43; Fred Edwords, 'The Human Basis Of Laws And Ethics' <https://americanhumanist.org/what-is-humanism/human-basis-laws-ethics/> accessed 20 April 2023; Daniel C Dennett, *Freedom Evolves* (Penguin Book Ltd 2003). Wurzburger, for instance, posits – 'In the long run, without recourse to some transcendent authority, no legal system can command respect. Law and order cannot be maintained simply through reliance on the power of sanctions… Morality ultimately derives its normative significance from the transcendent authority of the law … The traditionalists assigned the law such a dominant position because they perceived it as the explicit command of the Divine Sovereign. Hence, the overriding authority of the law was deemed to be a function not of its content but of its transcendent source'. Why do people and the scholars always try to search for such authority? Edwords gives an explanation why we are possessed by such 'ghosts' or 'transcendental entities'. He explains – 'In our culture, people are so accustomed to the idea of every law having a lawmaker, every rule having an enforcer, every institution having someone in authority, and so forth, that the thought of something being otherwise has the ring of chaos to it. As a result, when one lives one's life without reference to some ultimate authority in regard to morals, one's values and aspirations are thought to be arbitrary. Furthermore, it is often argued that, if everyone tried to live in such a fashion, no agreement on morals would be possible and there would be no way to adjudicate disputes between people, no defense of a particular moral stand being possible in the absence of some absolute point of reference. … But all of this is based on certain unchallenged assumptions of the theistic moralist — assumptions that are frequently the product of faulty analogies … A related, unchallenged assumption is that moral values, in order to be binding, must come from a source outside of human beings .. The second assumption is based upon the superficial awareness that laws seem to be imposed upon us from without. And from this it follows that there needs to be an external imposer of morality '.

[100] Quinney (n 54) 1.

[101] Neoh's narrative is an example.

[102] This point is elaborated in Chapter 7.

institutions for no sound and demonstrable reasons.[103] Dworkin thinks that the locus of authority lies in a special type of communal will as distinguished from 'ghostly metaphysical' will of Hegel, and the will is extractable by those officials or institutions. In the course of our discussion, we will show that even Dworkin's communal will is possessed by the same 'ghost' as that of Hegel or Locke.[104] Others do the same, although in different manners.[105] However, one thing is quite common in them; their shifting of locus of authority and justification to the possessed entities or institutions are triggered by their extreme distrust of human nature or humanity.[106] Modern followers of the lawjon approach, specially those who subscribe to any version of positivism, promise that law is man-made.[107] Interestingly they do exactly the opposite; the very first thing they do is disbelieve the humans.[108] How could one give credit to humans for the so-called 'man-made' law, while he or she does not believe that humans have the ability to make such laws? Isn't it a sheer betrayal with the humans when the laws are made, and justified, instead, by the 'superhumans' or institutions who are supposed to be possessed?[109] Isn't it an outrageous deception? We think no one will respond negatively.

In fact, the very nature of the lawjon approach is deceptive and betraying, and there is no scope of escaping from it. The promises or assurances it has made are just not compatible with its own existence. To have a look into the promises in relation to Freedom, for instance; it promises that it not only ensures meaningful Freedom but also increases Freedom. How could such a promise even be consistent with its own narrative? Maintaining narrative coherence in such a case is simply impossible.[110] When a Freedom

[103] This point has been discussed in detail in the second part of the thesis.

[104] Coker with reference to Duguit gives us an idea about what may this ghostly metaphysical means: 'The author [Duguit] defines as metaphysical those conceptions which regard the state as possessed of a personality distinct from the personalities of the individuals who form the social group, and as having a will by its nature superior to individual wills; see Coker (n 46) 537. From this perspective, it may seem that Dworkin's communal will is not (ghostly) metaphysical because he clarifies expressly that his communal will is not such a superficial will as that of the super-personality such as the state. We will show in the second part that even this explanation cannot defend his metaphysical communal will; the will does reflect the ghostly nature.

[105] Hart and others (n 20); Kelsen (n 18); Martin (n 66); Gardner, 'Legal Positivism' (n 19); Joseph Raz, 'Authority, Law and Morality' (1985) 68 The Monist 295, 302; Valentini (n 13). Both Hart and Raz have the opinion that '[m]ost rules of law …are valid because some competent institution enacted them'; cited by Dworkin, *Taking Rights Seriously* (n 1) 59. See also Gardner, 'The Legality of Law' (n 19) 170–174. He shows how Kelsen and Hart rely on the officials and the official process in making the sense of the authority of law.

[106] Gardner, 'Legal Positivism' (n 19); Hart, 'Are There Any Natural Rights?' (n 13); Hart and others (n 20); Valentini (n 13).

[107] Gardner, 'The Legality of Law' (n 19) 176.

[108] Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (n 87) 94. Fuller states – 'The notion that human subjects of law can, through their interactions, generate rules of law is something that legal theory has never felt comfortable with'.

[109] Quinney (n 54) 3–4. He states – 'Seldom is law the product of the whole society. Rather than representing the interests of all members of society, law consists of the interests of only specific segments of the population. Law is made by men, particular men representing special interests, who have the power to translate their interests into public policy'.

[110] This point is discussed in detail in the next few chapters.

reflective act is treated as Freedom only because of the permission or licence of the positive law, the very nature of the Freedom is lost; this becomes just a licence or permission which is substantially different from Freedom.[111] Even the scholars, who support the claim that law is the precondition for Freedom, are forced to explain that 'the jural subjects within any legal system are comprehensively unfree. Because the 'continued existence of each subject's opportunities is dependent partly on the continued disinclination of legal–governmental officials to squelch those opportunities'.[112] Further, their very assumption about the concept of Freedom itself is substantially deluded and the delusion is the source of most of the loopholes the lawjon consisted of.[113] Above all, it is not an unknown fact that the positive law itself is one of the major causes of restricting Freedom-reflecting expressions.[114] If medicine is the very reason for creating diseases, how can we deny the betrayal of medicine?[115]

[111] This point is discussed in detail in the next few chapters. Meanwhile, Simmonds's statement may give us an idea of how law can never be the source of human Freedom, instead, it is always identical to the antithesis of Freedom when law is considered a source of Freedom. He states – 'we think of slavery as the very embodiment of unfreedom. Even when the slave has an extensive range of options available to him, we think of him as unfree. This is presumably because of the conditions under which he enjoys that extensive range of options, for they are fully dependent upon the will of the master'; See Simmonds (n 62) 87.

[112] Matthew H Kramer, 'Freedom and the Rule of Law' (2010) 61 Alabama Law Review 827, 845.

[113] This point is further discussed in the next chapter.

[114] George P Fletcher, 'Law and Morality: A Kantian Perspective' (1987) 87 Columbia Law Review 533, 535; Quinney (n 54) 13; Hamowy (n 59) 376. Fletcher states – 'assertions of freedom that can conflict with the choices of others. … The negative implication of this definition of law is that private purposes are irrelevant in legal transactions'. We will show Freedom is inherently a private phenomenon and if this is irrelevant to law, then how can law help protect or increase it? On a similar point Quinney states – 'in thinking we have individual freedom, we overlook the fact that individual freedom is an ideal that is administered according to specific rules by those who have authority in the society. When liberties are not in the hands of the people, but in the hands of the ruling elite, then we do not actually have our rights in practice'. Further, homosexuality, for instance, was not a crime in the Indian Subcontinent before the act was criminalised by the Victorian British legislature; see '377: The British Colonial Law That Left an Anti-LGBTQ Legacy in Asia' *BBC News* (28 June 2021) <https://www.bbc.com/news/world-asia-57606847> accessed 19 April 2023. There were no crimes as crimes of public nudity, obscenity, etc before these were criminalised by the positive laws. Finally, Neoh himself acknowledges the fact that law does, in fact, contribute to demolishing a particular type of Freedom; Neoh (n 32) 223–224. He states - 'Chattel slaves are enslaved persons: they are moral persons who have been legally enslaved. …law … can strip them of legal personhood by legally designating them as property'. We believe that once he is aware of the conception of Freedom, he will accept law never increases Freedom.

[115] Does legal Freedom satisfy? To find out answer to this question, the authors of the empirical research claim that 'using panel data for up to 133 countries during the period 2008–2018, we identify only two out of seven indicators of legal freedom as positively related to satisfaction with freedom of choice in our baseline analysis'; see Niclas Berggren and Christian Bjørnskov, 'Does Legal Freedom Satisfy?' (2023) 55 European Journal of Law and Economics 1, 17. We understand that the issue concerned cannot be conclusively decided based on empirical evidence. Consequently, although the findings of the research favour our position, our arguments are of substantial nature. The lawjon approach is so designed that first, it creates the diseases and then gives some limited remedy to those diseases. Since these actions of remedying the diseases are visible and comprehensible, the proponents claim credit for the approach. Unfortunately, the statistical damage it commits by creating diseases is kept behind the visions. Slavery, homosexuality, sodomy, offence against the state and state security, and many more crimes or diseases are created by the positive law itself and now the legal arena is roaming around the dark alleys to find a way out to cure the diseases. We will show that in most cases the followers of the lawjon approach make such hyperbolic claims that the law protects Freedom or increases Freedom, without

Even if we take note of Duguit's milder version of the lawjon approach, we will see how it betrays Freedom. His lawjon approach is associated with the law that is sourced from the social norms and he believes that the rules that will be sourced from such norms will spontaneously reflect the will of all people of that society and hence such will not be a reason for conflict with anyone's character as the rule 'imposes itself upon them in fact'.[116] This is nothing but a sheer betrayal of the lawjon with Freedom.[117] In addition, the lawjon constantly ditches the scholars to pursue a path that they always want to avoid. For instance, Berlin, Dworkin, Mill, and others, who want to fight for the cause of Freedom, are deceived by the gravity of the lawjon approach and, at times, take positions contrary to their very objectives.[118] Almost 250 years ago Lord Mansfield explicitly pointed out the dark side of the positive law and this eventually implies the deceptive force of the lawjon approach:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and the time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[119]

Similarly, all other promises of the lawjon approach are in fact instances of betrayal in the disguise of promises. The promises of the certainty and predictability of the law, the promise that humans' opinions are reflected and represented by political officials or institutions, and the promise that humans are in charge of their legal obligations, everything is lie of the lawjon approach.[120] Lawjon's suggested

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understanding what this Freedom means. We will show, theoretically, practically, and philosophically, that their claim is completely incorrect.

[116] Duguit (n 46) 826–827. He states – 'when I speak of a norm which is imposed upon men, a norm founded on the social fact, I have in mind a rule which imposes itself upon them in fact, which modifies in no way the character of their being, the substance of their will, which does not establish a hierarchy of'.

[117] Berlin, *Freedom and Its Betrayal* (n 52). With reference to Rousseau's metaphysical universal will of human beings, Berlin discusses in detail how such will constitute the antithesis of Freedom. We will see further discussion on this issue in the next chapters. Duguit, however, tries to show that the will he is talking about is not that ghostly version of the metaphysical will, instead, his will has its source in the social fact that is claimed to be homogeneous. He states – 'The cells which compose an organism are subjected to the law of that organism'. Duguit (n 46) 827. We find subjecting Freedom to social fact is a betrayal of Freedom on many counts. His claim of the homogeneous nature of social fact is superficial. Further, and more importantly, the moment freedom is made limited to the obstructions of social fact, we destroy the very nature of Freedom; the point will be further clarified when we will discuss Freedom.

[118] Quinney (n 54) 24; Berlin, *Liberty* (n 49). Scholars like Rousseau also shows a similar trend. For instance, see Berlin's discussion on Rousseau; see Berlin, *Freedom and Its Betrayal* (n 52) (Chapter on Rousseau) .

[119] *Somerset v Stewart* [1772] King's Bench 98 ER 499, 98 ER 499 499.

[120] As we will proceed further, we will see the mechanism of the lawjon approach is, instead, works against the certainty and predictability of law. Hamoway states –'such predictability neither exists nor can exist in some vital areas of our legal system, that the very nature of the system … In most cases…no clear pattern as to when a certain law will be disregarded and when it will not …How can one be sure at what point waiting for someone

defence mechanisms ie voting rights, publications of the enactments, prior consent of the people, and so on have never proved to be significant enough in defending against the betrayal of the lawjon approach.[121]

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on a street corner becomes the crime of loitering? At what point does general liveliness at a party become a disturbance of the peace? At what point does acting an unusual way or taking unpopular views become an offense against public morals? In many such instances the difference between having committed a crime and having stayed within the law rest … The law of obscenity is just one of the many areas presently undergoing reinterpretation by the courts and where predictability of the outcome of any case is limited'; Hamowy (n 59) 366–372. Thus, the point is clear that certainty and predictability are not the lawjon's cup of tea. However, we should clarify that we see many laws that reflect people's interests, opinions and so on. This is not due to the virtue of the lawjon approach. These are, instead, unconscious and spontaneous applications of the Freejon approach and its associated sense of law ie sense of law, in fact.

[121] Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (n 43) 261–267. Waldron criticises the positions of both Radin and Fuller. Former posits that 'If a rule is to be followed, it must, in the first instance, be clear, learnable, and effectively promulgated, so that people know it as the standard to which they are to conform their behavior'. Fuller states 'Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination'. Waldron, a strong follower of the lawjon approach, acknowledges that these statements of the two scholars are not correct. Rejecting their positions, Waldron states – 'It is clear, however, for a number of reasons, that this formulation is hyperbole'. Even Dworkin clarifies how futile and erroneous the voting system is in keeping the trace of the legislative process and checking the inaccuracy attached with the legislation. Dworkin goes on to clarify that even if the voters' consent is taken on a regular basis the system is not sufficient enough to check the tyranny of the legislatures. See Dworkin, *Sovereign Virtue* (n 1) 194. He states - 'even if we did schedule elections frequently enough and provide recall mechanisms sufficiently terrifying to make officials generally obedient, we could not make them always so'.

The publication mechanism is more or less a comedic mechanism. Do people follow those? How many people follow those? How many people understand those publications? There is a saying that law is such a complex matter that even the most experts, in times, fail to understand what this publication exactly means. Then how can we believe that common people will understand anything about it? This is nothing but a fantasy that common people will understand these. Bruegger, who thinks that that publication is an effective defence, comes up with a weird explanation of the question. He states – 'Publication of the law does not mean that every person will be able to access it. This access problem is mitigated somewhat by the existence of legal experts … In order for the people to plan their lives to maximise their higher order desires and achieve their goals, it is imperative that the people understand the laws … the understandability criteria can (and must) be met by the reasonable availability of legal experts in society who can understand the law and inform the average person when needed '; see Bruegger (n 58) 97–103. We just do not see how Bruegger's statement makes any sense at all. What does he want to mean? All people start learning law, which is impossible? Should all people start going to the lawyers before doing every bit of things in their life? If lawyers or legal experts are the final end point of explaining the law then how are people authors of the law? Even if we accept, arguendo, that the majority of the people follow those and understand the law, is this enough just informing the people? Not enough because informing is not identical to consent. If this is considered so, it is just making a mockery of humankind. Above all, we will see that the nature of law is such that it is not subject to any of these mechanisms; law is not something decidable by voting percentage; conviction instead of the consent is the right terms to be used when we talk about law; and the sense of law is so profound that outmatch the publication mechanism. Further, as Leoni states – 'notwithstanding many similarities that may exist between voters on the one hand and market operators on the other, the actions of the two are far from actually being similar. No procedural rule seems able to allow voters to act in the same flexible, independent, consistent, and efficient way as operators employing individual choice in the market. …voting is a kind of individual action that almost inevitably undergoes a kind of distortion in its use'; see Bruno Leoni, *Freedom and the Law (LF Ed.)* (Liberty Fund).

Instead, these mechanisms themselves, in time, proved to be the fresh source of tyranny or accomplices in unleashing the tyranny or betrayal by the lawjon approach.[122]

Of all the betrayals of the lawjon approach, the gravest betrayal is that it completely detached the human being from the law; the law lives for its own sake and humans matter to it only when they are identified by it and assigned with a legal identity by it. Apart from that, humans are simply non-existent to it. Narrative of the lawjon approach and its own brand of laws is 'a sinister mythology which authorises the indefinite sacrifice of individuals to such abstractions'[123] possessed by the lawjon approach. We have already seen how Neoh's version of the lawjon approach vanishes a slave from his or her humanhood. A few hundred years ago when the question about the Freedom of the slaves was put before the lawjon's law, the reasoning goes as 'if Lord Mansfield declared Somerset to be free there would be vast economic consequences. The Chief Justice estimated there were about 15,000 slaves in England at the time, each worth at least £50. Thus, "a loss follows to the proprietors of above £700,000 sterling'[124]. On another occasion, a scholar of the 21st century depicts what a slave means to a lawjon approach by asking – 'What, exactly, was being abolished? Property in man? The racial inequality inseparable from slavery? The structure of political power based on slavery? What would be the status of the former slaves and who would determine it?'[125]. This is the real nature of the lawjon approach that attracts reasoning of this nature where humans are missing, and the irony is that the approach stays for itself. Therefore, it would not be out of context to ask – why do we need this repressive, deceptive, tyrannical, and betraying approach at all?

[122] Leoni (n 121). Leoni states – 'voting itself seems to increase the difficulties relating both to the meaning of "representation" and to the "freedom" of the individuals in making their choice. … Election is the result of a group decision where all the electors are to be considered as the members of a group, for instance, of their constituencies or of the electorate as a whole. We have seen that group decisions imply procedures like majority rule which are not compatible with individual freedom of choice of the type that any individual buyer or seller in the market enjoys as well as in any other choice he makes in his private life'. In addition, we should not forget that many dictators justify their tyranny and mass atrocities through their legitimate authority that is granted through the majoritarian votes'.

[123] Berlin, *Freedom and Its Betrayal* (n 52) 102. Berlin states about Hegelian unknown and transcendental entity: a sinister mythology which authorises the indefinite sacrifice of individuals to such abstractions – for all that he calls them 'concrete' – as States, traditions, or the will or destiny of the nation or the race. The world is, after all, composed of things and persons and of nothing else… Hegel does speak as if patterns, like States or Churches, are more real than people or things'. By now it has been clarified that the Hegelian unknown and transcendental entity is still dominating the legal landscape, however just in another form.

[124] Finkelman (n 76) 325–326. Citing *Somerset v Stewart* (n 119).

[125] Eric Foner, 'Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom' (2017) 15 Geo. J.L. & Pub. Pol'y 59, 68.

Chapter 2: Freejon approach - Outline, its Foundation – Freedom, Conception Problem – What it is Not.

The last chapter depicts the lawjon approach, its foundation and nature. This chapter introduces the freejon approach. Upon outlining the approach, the chapter extensively focuses on the concept of Freedom which is the foundation of the freejon approach. The chapter presents that the concept of Freedom is the key challenge that keeps the legal arena always, unnecessarily threaten and sceptic to any idea or system founded on the concept of Freedom. It is not the conception of Freedom, but instead the misconceptions about Freedom that dominate the legal arena and keep the legal arena outside of the benefits that a Freedom based system could afford. Eventually, the chapter presents the misconceptions about Freedom and thus lays the background to present the concept of Freedom in the next chapter.

2.1 Outline of the Freejon approach

The central claim of the freejon approach is quite the opposite of that of the lawjon approach; this approach sees law through the prism of humans instead of seeing humans through the prism of positive law. The approach holds that we are not free because the law gives us Freedom; instead, we are free because we are born free, and Freedom is one of the 'sovereign' virtues without which law loses its legality. Consequently, the law has an obligation to uphold Freedom. We are not created for the law, but the law (to be specific 'the sense of law') is 'evolved'[126] for us. We need law when our Freedom is threatened as we need medicines when we fall sick. We cannot (and should not) say that we live in and by medicines as this will indicate that we are always sick. We must admit and clarify that law does owe responsibility and obligation to play its role in diverse issues connected to every sphere of life but all the issues of every sphere of our life are not subject to legal reasoning or legal justifications. Eventually, although the law may play its facilitating legal roles in connection to every sphere of our life, the freejon approach does not find any justification for permitting legal intervention in every sphere of our life. Such unnecessary intervention is more harmful than the potential benefit that the intervention is supposed to have. The ubiquitous application of law not only invites misery in human life by unnecessarily complicating personal life but also impairs its own integrity by disdaining the significance of Freedom in human life. The approach further holds that the law is not here to rule us but to facilitate our Freedom, and our inter-personal lives. Freedom is not subject to the restrictions of the law, while, still, the law has an obligation to protect Freedom when it is threatened.

In any circumstance, the sovereign virtue, Freedom, must be left unhindered by any provision of law, while, however, the law has an obligation to protect it. To put it simply – the law can never limit or disrupt human Freedom. In fact, the premise of law starts where the premise of Freedom, the foundation

[126] We prefer to say that law or the sense of law is evolved. We are sceptical about the term like enactment of law or the creation of law.

(or foundational environment) of law, ends. The premise of Freedom is the exclusive and inalienable personal zone of the individuals. As human enters interpersonal, social, political, and national life, he or she needs to take resort to the sense of law when there is an issue involving the question of 'legal value' or 'morality of law' and the law is not the law as it is shaped by the legal positivism or natural law theory or other theories that inevitably follow the lawjon approach; the freejon approach rejects the concept of law proposed by the positivists. This law is nothing but an abstract sense that gives rise to a general and shared commitment among humans. Statutes, precedents, legal texts, or other 'positive laws' are just, as Professor Nerhot posits, 'results'[127] or effects of the sense of law. People, instead of participating through their representatives, directly participate in generating the sense of law. Consequently, the Freejon approach holds that the provisions of law can be, but the law, as Fuller[128] claims, cannot be incomprehensible to the people; a law that is not understandable to the people is not a law at all. Further, the approach submits that the law does not impose coercion on people, instead people by their words or actions choose to bear legal obligation. While the Lawjon approach is based on the assumption that all people are evil or some are evil and others are good, freejon neither claims that all people are good nor does it classify people as good or evil. Instead, the approach is based on the fact that the same human being has the likelihood to play both roles - good or evil, rational or irrational, neutral or biased, altruistic or narcissistic, and so on. The approach prescribes not only the threshold of the application of the law but also the endpoint the law is ceased to be applied. Application of law starts where the sphere of Freedom ends and it ends where the sphere of politics, democracy etc starts.

While the approach is more practical and more specific and it will be with the least 'side-effects', we will need to respond to the probable challenges that the approach may face. The greatest challenge of all is in relation to the foundation of the approach – Freedom. Despite the wide disagreements among different versions of legal positivism[129] on different points, one point where all theories of legal positivism converge is – Freedom does not exist outside of the premise of law.[130] Natural law theories, on the other hand, do accept natural freedom outside of the positive law. Nevertheless, Freedom under the natural law theories turns out to be the antithesis of Freedom as their version of freedom is subject

[127] Nerhot, 'Interpretation in Legal Science' (n 22) 196.

[128] Fuller, *The Morality of Law* (n 20). For a similar position see Radin (n 59).

[129] For clarification, it should be mentioned that in this thesis we try our best not to refer to the authors of different theories, but rather to the theories themselves. One justification for such an approach is that it is often found that an author although commonly known as positivist, his or her theory reflects many foundational features of natural law theory. For example, Dworkin although at times seems to take a position against the positivists, his theory does involve many elements that are enough to identify him as more positivist than the commonly known hard positivists. However, a more twisting point is the fact that although he seems critical of legal positivism, we cannot logically place him in the block of the natural law theorists.

[130] Heidegger (n 23); Hobbes (n 66); Valentini (n 13); Samuel Rickless, 'Locke On Freedom' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/spr2020/entries/locke-freedom/> accessed 8 January 2022; Dworkin, *Taking Rights Seriously* (n 1); Dworkin, *Sovereign Virtue* (n 1); Berlin, *Liberty* (n 49).

to, so-called, natural laws or deterministic natural rules. Even the theories that value Freedom most, are, seriously, constrained in claiming Freedom as an independent and sovereign virtue that is inalienable in all situations.[131] Thus, in the conventional legal landscape, it is quite fashionable to consider Freedom, – the foundation of the Freejon approach – as a very weak starting point for any legal discourse whereas Freedom is central to the freejon approach. Consequently, defending the foundation of the freejon approach ie Freedom is one of the prime preconditions to give a solid basis for the freejon approach. Once Freedom is explained, understood, and defended, the emergence of the application of the freejon approach will be realised.

2.2 Defending Freedom – The Three Problems

The immense prospects of Freedom as the supreme virtue of law have been, almost invariably, denied by subjecting or aligning Freedom to some misleading concepts, illusory challenges, and baseless requirements of law. The significance of Freedom has been always undermined with reference to questions and contentions like: humans are necessarily evil, therefore accepting unregulated freedom is to license humans to destroy the world. Freedom has no limits of its own – everyone's freedom is bound to overlap. Therefore, how is it possible to live in a society or state without restricting freedom? Will not the concept of inviolable freedom create anarchy in society as people will be able to do whatever they want? Will not such a concept of freedom impede or limit the scope of state actions? Will not it be a threat to the institutional mechanism? Will we be able to establish any unity in regulating the people? Absolute Freedom comes with the absolute denial of duties - can there be any right without corresponding duty? Why should the law protect freedom if freedom is not a part of jural fact? What is the basis of freedom if it is not the positive law? Why should the law take positive action to facilitate Freedom?

This thesis responds to and refutes all these contentions and questions with reference to three problems primarily responsible for making the concept of Freedom contentious and fearful. The three problems are: the problem of conception - misconception about Freedom; the problem of comparison - obliviousness towards the foundational significance of the relevant issues in comparison; and the problem of confirmation - illusory conception about the justifications of the legal claims. It should further be mentioned that the first problem is the most serious problem, and it contributes to aggravating the other two problems. Consequently, an effective solution to the first problem will pave the way to the solution of the other two problems. A detailed discussion of these three problems and their contributing reasons will be sufficient to demonstrate the absurdity and ingenuousness of these allegations and questions. The first problem is connected to what Freedom is not whereas the solution

[131] Dworkin, *Sovereign Virtue* (n 1); Berlin, *Liberty* (n 49); Mill (n 53). Everyone's theory, although highly appreciative of Freedom, often retreat from their original high respect for Freedom and, generally, acknowledges that Freedom is alienable in certain circumstances.

is what Freedom is coupled with the answers to the questions inherent to what Freedom is. The discussion in connection to the first problem stretches from this chapter to the next two chapters ie chapters 3 and 4. The second problem is connected to the lack of awareness about the foundational validity of any system and its importance when the objective is to evaluate the system with reference to an alternative system. The problem of confirmation points to the erroneous measures, strategies, and logic that the positive law regime follows in confirming and rejecting the legality of any claim, in this case, the claim of Freedom.

2.3 The Conception Problem - What Freedom Is Not

There are few words as ambiguous and misleading as Freedom; the discussion with reference to Freedom, its meaning, nature, and significance are 'insanely'[132] diverse, extensively metaphorical, confusing, and, above all, misleading.[133] Eventually and inconveniently, we are swamped with the answers when our question is – what is Freedom. However, we must know the correct answer as the prospects of the freejon approach is dependent on the correct answer. How do we determine the correct answer out of the numerous answers out there? What is more problematic is, as Professor Nerhot states, that in legal science 'when it comes to interpretation, there is no single right answer'.[134] Fortunately, it is a matter of great relief for us that there are very few right answers. While we do not have problems accepting the right answers, if there are really any, we can logically reject the wrong answers which are dominating the legal and political landscape. It is worthwhile to mention that these wrong answers are primarily responsible for the concerns, rumors, and antagonism that has been out there with reference to Freedom. Therefore, before focusing on the right answer in the next chapter, this chapter presents the wrong answers that are dominating the legal landscape.

Of all the wrong answers, although the most prevalent, the most contentious, and the most infamous is the Hobbesian conception of Freedom. Hobbes and his countless followers take Freedom cheaply in some 'vulgar'[135] and 'naive'[136] senses as – 'the ability to do whatever one wants to do'[137], 'I can do, whatever I want', 'I am free only if I do things which nobody can stop me from doing'[138] – thus Freedom

[132] Berlin states that the concept 'is so porous that there is little interpretation that it seems able to resist'. He further reminds us that more than two hundred senses of the term have been recorded by historians; see Berlin, *Liberty* (n 49) 168. To Rawls, the concept of Freedom or liberty is 'unhappily abstract'; see John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 179. However, quite interestingly, Rawls finds that the definition of the term has no importance at all; see Rawls 176. Knight tells us that the 'concept of freedom is used with reference to various levels of meaning, of thought, and of reality … in the realm of physics, even of mathematics, as well as in biology'; see Frank H Knight, 'The Meaning of Freedom' (1941) 52 Ethics 86, 90.

[133] Rawls (n 6) 54; he states - 'It is difficult, and perhaps impossible, to give a complete specification of these liberties'.

[134] Nerhot, *Law, Interpretation and Reality* (n 26) 6.

[135] Mill (n 53) 133 (footnote).

[136] Knight (n 132) 91.

[137] Knight (n 132) 91.

[138] Berlin, *Freedom and Its Betrayal* (n 52) 71.

is meant to indicate doing anything according to one's will.[139] The lawjon approach often entices scholars and philosophers to accept some exclusive legal and political claims such as the right to vote[140], the right to hold public office, the right to influence the administration of the government,[141] or the right to property[142] as Freedom (to some, as 'basic liberties' or basic Freedom).[143] Hilariously and illogically a wide range of acts are considered as Freedom: government officers' entitlement to identify rebels and execute them[144], floggings of men, women, and children by such officers[145], etc. Astonishingly, some scholars move too far to consider that the extent of freedom extends even to committing murder![146] Thus, Freedom has been associated with the most fearful sense and unregulated freedom is, necessarily, related to a state 'in which all men could boundlessly interfere with all other men; and this kind of 'natural' freedom would lead to social chaos in which men's minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong'[147].

2.3.1 The Grand Proposition 'About'[148] Freedom.

Admittedly, there are concepts and scholarly discourses that, prima facie, convey relative merits as they come up with some components of great interest evaluation of which will equip us to have a 'pre-sense'[149] as to the meaning, nature, conditions, and the prospects of Freedom. These concepts and discourses of diverse prospects give rise to a wide variety of propositions about Freedom. We can combine all these propositions and present them as a grand proposition in the following bubble chart:

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[139] Charles Taylor (ed), 'What's Wrong with Negative Liberty', *Philosophical Papers: Volume 2: Philosophy and the Human Sciences*, vol 2 (Cambridge University Press 1985) 213; Isaiah Berlin, *Liberty* (Edited by Henry Hardy ed, 2nd edn, Oxford University Press 2002); Hobbes (n 66); Valentini (n 13); Rickless (n 130).

[140] Right to vote is an entitlement not connected to Freedom as such. It is, as long as not connected to Freedom resources (to be explained in section 2.2.1.1) is, primarily a political entitlement.

[141] Benjamin Constant, *Constant: Political Writings* (Biancamaria Fontana ed, Cambridge University Press 1988) 311.

[142] Right to property as distinguished from the entitlement to resources is purely a legal invention hence subject to positive law. Constant and Fontana (n 15) 311 - to dispose of property and even to dispose it.

[143] AK Upadhyay, 'Rawlsian Concept of Two Principles of Justice' (1993) 54 The Indian Journal of Political Science 388, 388.

[144] David Bromwich, 'A Note on the Life and Thought of John Stuart Mill', *Liberty* (New Edition, Yale University Press 2003) 17.

[145] Bromwich (n 144) 17.

[146] John Bruegger, 'Freedom, Legality, and the Rule of Law' (2016) 9 Washington University Jurisprudence Review 081, 96; Bruegger states ' Prohibiting murder promotes safety. The unfreedom to commit murder is offset by the creation of new specific freedoms'.

[147] Berlin, *Liberty* (n 49) 170.

[148] We consciously use the preposition 'about' instead of 'of'. The preposition 'of' indicates that the proposition is necessarily connected to Freedom. However, we will see, on many occasions, the proposition has no connection with the concept of Freedom, although it is mistakenly thought that the proposition is the proposition of freedom. The proposition is targeted to speak about Freedom, it does speak about Freedom not speaking anything of Freedom.

[149] We call it pre-sense as the discussion of this part will not reveal the exact sense about the meaning, nature, conditions, and the prospects of Freedom. Instead, by revealing what Freedom is not, this part of the discussion will help us prepare to get the sense in the next section.

The Grand Proposition about Freedom

It will not be an exaggeration to claim that the component of the proposition, 'list of activities without interference, plays the most dominant role in a story of Freedom. Whatever story of Freedom we take into consideration, the authors, directly or indirectly, consciously or unconsciously, take us to some form of list or catalogue of activities that we are allowed to do without interference. Thus, in the bold letter, the essence of all the stories is the claim that Freedom is a list of activities we can do without interference.[150] How do we make the list? Based on our choice. Freedom gives us the opportunity to choose the activities or doors from the list of the options available or the doors open. As a result, to some scholars, Freedom is synonymous with choice or opportunity.[151] However, among scholars, the word 'power' seems more attractive to use as a substitution for Freedom or to connect it to Freedom, when they want to say anything in connection to Freedom.[152]

The proponents of the propositions about Freedom think that if there is no choice or alternative option to conduct the action of prioritization, there is no Freedom.[153] What is more, as different scholars claim, the presence of alternative choices is not sufficient, the choices must be conflicting and conscious.[154] How is the choice to be made? What should be the objectives of the choice? The choice to be made to get the best out of life to fulfil our desire, or to get the maximum pleasure in life; the utmost utility must

[150] Rawls (n 132) 4; Frye (n 13) 310; Berlin, *Liberty* (n 49) 31, 214; Philip Pettit, 'Freedom as Antipower' (1996) 106 Ethics 576, 69. I am free to the degree that no human being has the power to interfere with me: to the extent that no one else is my master. Knight (n 132) 92.Quoting Perry - One does not speak of liberty at all unless there is a disposition to perform an act.

[151] Constant (n 141) 311. Knight (n 132) 92. Pettit (n 150) 579. Berlin, *Liberty* (n 49) 44. To Fichte it is a choice by something supernatural, see Berlin, *Freedom and Its Betrayal* (n 52) 76. Mill (n 53) 164.

[152] Condorcet (n 89) xxxii (a two-way power); Berlin, *Liberty* (n 49) 180. Berlin states 'Montesquieu, forgetting his liberal moment, speaks of political liberty as being not permission to do what we want, or even what the law allows, but only 'the power of doing what we' (Page 193) Knight (n 132) 92, 96. Knight states 'In contrast with the relation of freedom to wish, its relation to power is very generally recognized in one way or another and is treated by a large number of contributors to the volume … What is ostensibly a demand for freedom is in fact largely a demand for power over others'. Karsten Schubert, 'Freedom as Critique. Foucault Beyond Anarchism' [2020] Philosophy and Social Criticism 10. He states – 'There is no realm outside of power as in liberal political philosophy, instead power is omnipresent, and freedom cannot be located beyond power'. Berlin, *Freedom and Its Betrayal* (n 52) 112. Berlin states 'The essence of liberty has always lain in the ability to choose as you wish to choose, because you wish so to choose, uncoerced, unbullied, not swallowed up in some vast system; and in the right to resist, to be unpopular, to stand up for your convictions merely because they are your convictions. That is true freedom, and without it there is neither freedom of any kind, nor even the illusion of it'.

[153] Paul A Bové, 'Power and Freedom: Opposition and the Humanities' (1990) 53 The MIT Press 78.

[154] Condorcet (n 26) xxxii, 181; Condorcet states - 'when there is just one desire to which the will succumbs automatically' Freedom in this sense exists even when we face insurmountable external obstacles, unless, facing these, our wills are paralysed, disabling us from acting otherwise. On Condorcet's account, natural freedom manifests itself in experience, in the moment an individual faces 'two contradictory sentiments' (deux sentiments contraires) relating to the same action and has to decide between them' … Every being is free who is able to have two contradictory sentiments relating to the same action, and who can decide either to wish, or not wish, to take that action in complete awareness that his will is conforming to one of the two sentiments. He is free when experiencing the two sentiments and is conscious of doing so. The more the two sentiments are in play when he acts, and the more sharply aware of them he is, the more his freedom is complete. Freedom ceases when there is just one'.

be the prime objective of the choice that we make to claim that we have Freedom.[155] The utility, as the propositions go, may be material immaterial, temporal, spiritual, or ecclesiastical.[156] While some propositions require the fulfilment of personal interests, others require taking care of the interest of the universe[157] or of humanity.[158]

The toughest question that every proponent faces is – can everyone make this choice or, put it another way, is everyone entitled to Freedom? This is an occasion when all the proponents converge without exception, and their unanimous answer is negative.[159] Children, lunatics, uncivilized people, and people of the backward class must not have such pleasure, opportunity, choice, or autonomy that are, inevitably, deemed to be associated with Freedom.[160] Are all mature civilized people free? Again, the answer is unanimous – no. They must have the capacity or ability to be Free or to feel free or to have Freedom.[161] How do they prove their capacity? Demonstrating their free will[162], capability of reasoning, rationality, and relevant expertise required to claim Freedom in relation to the activity in question.[163]

[155] Rawls (n 132) 179; Mill (n 53) 164,; Constant (n 141) 327; Rawls (n 132) 184. As understood by Mill, the principle of utility often supports freedom. Condorcet (n 89) 181. Condorcet states - 'Freedom for an individual is to have the will to act in accordance with what his intelligence leads him to recognise as being most useful to him'. Constant (n 141) 324. Constant considers increasing the enjoyment as an essential component of Freedom.

[156] Mill (n 53) 82–83. He states – 'I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people … The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it'.

[157] Tomasz Bekrycht, 'Positive Law and the Idea of Freedom' in Bartosz Wojciechowski, Tomasz Bekrycht and Karolina M Cern, *Jurysprudencja* (Wydawnictwo UŁ 2017) 76. Quoting Kant 'if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right'. Berlin, *Liberty* (n 49) 193.

[158] Berlin, *Liberty* (n 49) 180. Berlin quoting TH Green '[T]he ideal of true freedom is the maximum of power for all members of human society alike to make the best of themselves'.

[159] Rawls (n 132) 179. Rawls states - 'But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims'. Knight (n 132) 93.

[160] Mill (n 53) 81; Berlin, *Freedom and Its Betrayal* (n 52) 14. 'The essence of liberty has always lain in the ability to choose as you wish to choose'.

[161] Condorcet (n 89) xxxii - 'the ability 'to make a different judgement, to take a different decision'. Rawls (n 132) 179. He states – 'the worth of liberty to persons and groups depends upon their capacity to advance their ends within the framework the system defines'. Berlin, *Liberty* (n 49) 45. Berlin states - 'If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him'.

[162] Hannah Arendt, 'Freedom and Politics: A Lecture' (1960) 14 Chicago Review 28, 37. Free will and freedom became synonymous notions.

[163] Condorcet (n 89) xxxii, xxxiii. A free person is considered someone who has 'attained the age of reason'. Berlin, *Liberty* (n 49) 187. The only true method of attaining freedom, we are told, is using critical reason, the understanding of what is necessary and what is contingent. Berlin quoting Locke – ' 'Where there is no law there is no freedom', because rational law is a direction to a man's 'proper interests' or 'general good'; see Berlin, *Liberty* (n 49) 193.

They can also prove their Freedom by demonstrating that their decision is the reflection of their free will, and their decision is devoid of any sort of passion, emotion, motivation, and necessity.

Teaching people who do not have those capacities is the precondition of Freedom or being free.[164] Thus Freedom can also be increased or decreased subject to the resources one has and the regulation in place.[165] Is this Freedom can be absolute if all these capacities are fulfilled? Again, all the proponents agree – they not only answer negatively but also claim that it is impossible and insist that this must not be the case. Freedom cannot be absolute as one's Freedom is necessarily proportionate to the other's unfreedom.[166] Further, there is the problem of balancing one Freedom with another Freedom.[167] In addition, there is a list of infinite causes like state security, social security, public interest, etc in relation to which Freedom can be stripped away.[168] There are countless values and goals[169] Freedom is subject to and, in some cases, Freedom must 'disappear'[170].[171] Eventually, Freedom can be half, 'semi-free'[172], specific, social, political.[173] Again, based on the nature of the duties of the state in ensuring Freedom to

[164] Bromwich (n 144) 16. Stating - 'the extension of individual liberty would require growing numbers of people to be taught, by their experience of voting and other new rights, to consider themselves as individuals'. Rawls (n 132) 182. Mill (n 9) 111 – 'until people are again systematically trained to it, there will be few great thinkers, and a low general average of intellect, in any but the mathematical and physical departments of speculation'. Mill (n 9) 167 – 'Is it not almost a self-evident axiom, that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen? … Hardly any one indeed will deny that it is one of the most sacred duties of the parents (or, as law and usage now stand, the father), after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself'. Berlin, *Liberty* (n 4) 45 – 'To take a concrete example: it is, I believe, desirable to introduce a uniform system of general primary and secondary education in every country, if only in order to do away with distinctions of social status that are at present created or promoted by the existence of a social hierarchy of schools in some'.

[165] Condorcet (n 89) xxxii. Stating – ''to animals as well as ourselves' and is strengthened 'with the growth of reason, of enlightenment, of fineness of moral sentiment'. Berlin, *Liberty* (n 49) 31; Pettit (n 150) 578. Dennett (n 99) 275. Dennett claims the increase of Freedom by Artificial way.

[166] Rawls (n 132) 54. Since they may be limited when they clash with one another, none of these liberties is absolute. Pettit (n 150) 577.

[167] Rawls (n 132) 178. they will have to balance one basic liberty against another; for example, freedom of speech against the right to a fair trial. Kant and Habermas held Freedom and curtailment of Freedom are necessarily linked; see Bekrycht, 'Positive Law and the Idea of Freedom' (n 157) 77.

[168] Berlin, *Liberty* (n 4) 44, 45; Rawls (n 6) 186 - Liberty of conscience is limited, everyone agrees, by the common interest in public order and security. Alfred Denning, *Freedom Under the Law* (Stevens & Sons Limited 1949) 5.

[169] Security, status, prosperity, power, virtue, rewards in the next world; or justice, equality, fraternity; see Berlin, *Liberty* (n 49) 207.

[170] Knight (n 6) 109 – 'other values conflict with freedom and must be given preference over freedom, within limits which can only be estimated or, perhaps to some small extent, determined by experiment. In terms of action, the material and organizational foundation of civilized life must be preserved or all values, including freedom, must disappear'.

[171] Denning (n 168) 35–36. Denning states – 'This country, just as every country, preserves to itself the right to prevent the expression of views which are subversive of the existing Constitution or a danger to the fabric of society'. Condorcet (n 89) xxxiv. Condorcet's republicanism ascribes a central role to equality, without which liberty cannot be enjoyed securely ('equal liberty' is the expression he uses). Ronald Dworkin also emphasis (in fact put more emphasis than that of Condorcet); see generally Dworkin, *Sovereign Virtue* (n 1).

[172] Emma Rothschild, 'Condorcet and the Conflict of Values' (1996) 39 The Historical Journal 677, xxxiii.

[173] Condorcet (n 89); Arendt (n 162); Dworkin, *Taking Rights Seriously* (n 1); Dworkin, *Sovereign Virtue* (n 1).

its citizens, Freedom is famously classified into two classes – negative Freedom and positive Freedom.[174] There is also a gradation of Freedom; one Freedom is more important than the other.[175] Above all, specially as the positivists claim, Freedom is worthless until it is not recognised.[176]

Although the stories the grand story or the grand proposition constituted of are diverse, one common and certain message that all these stories deliver us is that we are yet to get a convincing conception of Freedom. Undoubtedly, many observations and claims presented in the stories or propositions go close to that end, but to fail in maintaining their consistency and coherence. Each of these propositions refers to something which is other than Freedom, itself, for sure. Presumably, we are aware of the parable of the blind men and an elephant in which several blind men try to explain the elephant by touching different parts of the elephant and each man touches only one part of the Elephant.[177] As long as the parts of the elephant are concerned, all the blind men are correct; they explain correctly their respective parts of the elephant. It demonstrates that Nerhot is correct – one question may have more than a single right answer based on the perspectives. However, to identify the mistakes each of these Freedom stories contains, we have to extend the parable a bit. Now suppose that they are clarified that they are touching different body parts of the same elephant and, further, they are given a chance to share each of their feeling about the respective body parts they are experiencing. Eventually, they will come to the conclusion that the elephant is the accumulation of all of these experiences each of the men gets. Now, they are put in the same experiment again, but this time elephant will be taken away, and, in its place, another animal like a cow, horse, or donkey will be placed. It is likely that no matter which animal they are experiencing, every time their answer will be the elephant. Exactly this is what happens in each of the Freedom stories or propositions. As an elephant is an accumulated list concept to the blind men, Freedom is so to the proponents of the propositions about Freedom. Now, let's try to see how futile these propositions are.

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[174] Knight (n 132) 92. Berlin, *Freedom and Its Betrayal* (n 52); Berlin, *Liberty* (n 49).

[175] Alfred Denning, *Freedom Under the Law* (STEVENS & SONS LIMITED 1949); Denning ranks 'personal liberty' or Freedom over all other liberties. Rawls (n 132). 'most extensive basic liberty'. Berlin, *Liberty* (n 49) 41. 'all doors are not of equal importance'. Constant (n 141) 321. 'Individual independence is the first need of the moderns'. Rawls (n 132) 178. 'Liberty is unequal as when one class of persons has a greater liberty than another, or liberty is less extensive than it should be'. Knight (n 132) 92. Knight quotes Haldane – 'clearly a paralytic has less freedom than a man with full power over his muscles'.

[176] Pettit (n 150) 594–595. 'being able to look the other in the eye, confident in the shared knowledge that it is not by their leave that you pursue your innocent, noninterfering choices; you pursue those choices by publicly recognized right. You do not have to live either in fear of that other, then, or in deference to the other. The noninterference you enjoy at the hands of others is not enjoyed by their grace, and you do not live at their mercy. You are a somebody in relation to them, not a nobody. You are a person in your own legal and social right'. Pock (n 51) 75. The first freedom is regarded as arbitrary will, namely unlawful wild freedom. The second, on the other hand, is referred to as legal freedom.

[177] 'Blind Men and an Elephant', , *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=Blind_men_and_an_elephant&oldid=1083138792> accessed 26 April 2022.

2.3.2 Freedom as a List of Actions

Berlin states that 'Jefferson, Burke, Paine, Mill compiled different catalogues of individual liberties'[178]. Berlin himself gives us a list or catalogue of Freedom, and so do other proponents.[179] In fact, everyone, who wants to tell us about Freedom, takes Freedom as a list concept. To them Freedom is identical to the list of options, opportunities, actions, choices, etc one can do or perform without interference. Nevertheless, we submit that Freedom does not manifest in the list of actions. These acts, or options that are listed in the name of Freedom are just 'tentative' symptoms of the existence of Freedom and it must be noticed that these symptoms are in no way preconditions of the existence of Freedom.[180] These symptoms as noticed by the external audiences may give us a wrong sense of Freedom for Freedom is more internal than external. We, for example, can get a presumption as to Freedom by looking at one's dress, he or she wears. Wearing a short skirt may commonly indicate that the girls have Freedom in the question of what they should and shouldn't wear, while wearing hijab may be the opposite indication. But the actions may give us a wrong message for example the girl who wears a short skirt may not have any interest or is not comfortable in wearing it. However, she has to do it as a dress code in her office. This may be relatable to her unfreedom, the opposite of Freedom unless it is the case that wearing a short skirt is essential for the nature of the business, she is in.[181] Again, it may also be a case that she is interested and comfortable in such dress but for any reason or for no reason known to her, she is not comfortable in wearing such dress in her workplace. This is also more relatable to her unfreedom. On the other hand, the girl who wears hijab may be touched by her Freedom in wearing hijab. Thus, it is evident, although in many cases it is the case, symptoms expressed through the acts are not identical to Freedom. Therefore, neither the acts nor the list or catalogue that contains the acts tell us what Freedom is.

What is to be included in the list and what is not? What is the basis for including any action in the basket of Freedom? Based on some illusory conceptions as the blind men have, in the parable, about the concept of the elephant? We are conscious when we submit that this is an illusory method of listing the acts of Freedom because Freedom is something[182] that is not listable. It is neither phenomenon nor noumenon[183] or both. Thus, it is obvious because of its nature Freedom can never be a list concept. More odds to add on, the list concept of Freedom shows the audacity to count whose list of freedom

[178] Berlin, *Liberty* (n 49) 173.
[179] For example, Rosseau, Bruegger and many other scholars do the same.
[180] Freedom can be asymptomatic.
[181] For example, it is fashion house of short skirt. Or suppose in the case of advertisement of wearing apparels and she is model of the wearing apparels.
[182] Or nothingness, the term Sartre uses. Jean-Paul Sartre, *Being and Nothingness* (Hazel E Barnes tr, Reprint edition, Washington Square Press 1993).
[183] Term used by Kant and to him Freedom is largely noumenon instead of the phenomenon by what he meant external freedom necessarily entices us to take it as a phenomenon; see Fletcher (n 114) 537.

bucket is complete or yet to complete. Based on this, the proponents classify Freedom in some strange terms as 'full freedom', 'semi-freedom', 'fundamental freedom' 'specific freedom' 'political freedom' 'social freedom' etc. As we will move forward, we will see how absurd these terms are.

Probably, Arendt has the strongest position in considering freedom as an activity concept. She posits '[m]en are free - as distinguished from their possessing the gift for freedom as long as they act, neither before nor after; for to be free and to act are the same'.[184] To Arendt, Freedom can be 'best translated by "virtuosity" that is, an excellence we attribute to the performing art …where the accomplishment lies in the performance itself'[185]. Thus, Freedom is being taken far away from the general sphere. Freedom is no more everyone's cup of tea; Freedom is limited to only those rare kinds of people having excellence.

The fact is, Freedom is neither an activity nor an action concept nor a list of activities. Freedom is expressed through some actions and inactions, that's all; at best what we can find, is a remote connection of Freedom with the proportion concept[186], if we, in any way, consider its mode of expression as the denominator or measurement of Freedom. Thus, the list concept of Freedom not only reduces the glory of Freedom to its least level but also gives rise to many other misleading theories of Freedom. Berlin, although unconsciously subscribes to the list concept of Freedom and thereby the action concept of Freedom, tries to come up with a revised version of his original position. His revised position suggests that Freedom is not, directly, an action concept but a concept of 'opportunity for action'[187].

Instead of solving the problem, Berlin's revised position complicates the problem. We have to accept the lie that Freedom is a kind of opportunity. List concept and opportunity concepts together require the absence of interference and the presence of awareness about the opportunity. When Freedom is taken in connection to the activity, as the list concept always does, the non-interference is always external interference that inevitably requires an inter-personal element. Thus, as Arendt posits, Freedom without reference to someone else is no Freedom at all as there is no awareness of it. She posits that the problems associated with Freedom start to surface from the moment when Freedom is 'no longer experienced in acting and association with others.[188]

We reject all these three pre-conditions of Freedom. We may, at times, experience these as symptoms, but neither non-interference nor opportunity or awareness is the denominator of Freedom. Freedom, for its manifestation, does not need an interpersonal element ie reference to interference. Freedom is a

[184] Arendt (n 162) 33.
[185] Arendt (n 162) 33.
[186] To be explained in chapter 4.
[187] Berlin, *Liberty* (n 49) 35.
[188] Arendt (n 162) 40.

natural and regular condition as our health is. If one wants to experience the healthy body with reference to the diseases and starts looking for the diseases in the healthy body, either he or she will not experience health as there is no disease or he or she will experience illusory diseases he or she imagined in the body. She or he will never experience health. Bruegger rightly posits that Freedom does not necessarily mean the absence of restriction. [189] Condorcet also holds the same position, and he submits that Freedom can exist 'even when we face insurmountable external obstacles'[190].

On the other hand, Freedom that is discussed with reference to internal interference is also flawed. For example, Kant's Freedom without internal interference requires the absence of sensual interference.[191] If this is what that Kant really wants to deliver then it is simply something that is simply impossibility. How can one reach such a state when his or her sensual drive will cease to exist?[192] It is like denying the humanhood; nirvana is the ideal representation of such a state.[193] Berlin rejects such unworldly Freedom, and so do we.[194] This nihilistic version of Freedom, which might be absolute Freedom, is of a different paradigm where nothing is absolute, nothing is anything and anything is nothing. This dimension is too remotely connected to worldly matters. The Freedom we are talking about is worldly Freedom, simply 'Freedom' that matters in the worldly life where the sensual drive, at best, with its effect may remain dormant, but never remains absent.[195]

The grounds that show non-interference is not an essential condition for Freedom also demonstrate that awareness is not an essential condition. One does not necessarily need to feel it or be aware of it to claim the entitlement to it. It is just a state as that of the state of good health of which we, often, remain unconscious. We have sentiments both active and passive; we may be aware of the sentiment or not. What is more twisted is the fact, at times, we may be deceived by such sentiment at our conscious level that is different from the actual sentiment we hold at the core level.[196] Although, we are not aware of the core sentiment or motivation, we may unconsciously drive ourselves to that direction and thus we can relate our actions or inaction with our Freedom. To take a concrete example, often we are

[189] Bruegger (n 58) 93. He says - In order to be free, man must perform his actions, which, statistically speaking, are highly improbable. However, we do not agree what he says that the act has to be improbable.
[190] Condorcet (n 89) xxxii (Editorial Introduction).
[191] Fletcher (n 114) 537.
[192] His proposition is relatable to Rawls' 'original position' about which we will discuss in the 6th chapter.
[193] To understand the concept of Nirvana see Steven Collins, *Nirvana and Other Buddhist Felicities* (Cambridge University Press 1998); Brian Peter Harvey, *The Selfless Mind: Personality, Consciousness and Nirvāṇa in Early Buddhism* (Psychology Press 1995). We submit that the concept of Nirvana is paradigmatically incompatible with the worldly concept of Freedom we are talking about.
[194] Berlin, *Liberty* (n 49) 182.
[195] We do not believe, and nor do we subscribe to any such illusory concept of humans that are devoid of human drives. Such concept of human existence is illusory.
[196] For instance, at a conscious level one may think he or she is not a religious person, but at his or her core he or she might be serious religious person.

preoccupied with false interest – an interest that we think of as our own but not exactly so. Often, we confuse our interest with imitation, ambition to be in line with society, trends, material goals, personal insecurity etc. X may think that he or she is interested to become a rich man but probably from his or her core he or she never wants to be so. Probably he or she, in fact, what is the usual case[197], so delves into imitating and following the trends around him or her that he or she develops a false interest to become rich. However, his or her core interest may lie in doing something that will never make him or her rich. Consequently, his or her action or inaction may demonstrate a different motive than that of the conscious motive.[198] Therefore, in such complex equation of human nature, putting human Freedom in the box of human consciousness or awareness is nothing but trying to build a castle in the air and it demonstrates how unaware we are about what is Freedom. To be aware of the existence of oxygen it is not necessary to go to the state of breathlessness. If there is not anything to reflect on, we do not see light. Absence of the things that reflects light does not mean that there is no light. Light is out there, and so does the Freedom, even in the absence of awareness.

On the point of opportunity theory, we want to draw a quite unusual metaphor: I have hand - I cannot say I have the opportunity to have my hand. The word opportunity is comparable to Bengali 'Shuyog' that constitutes of two elements ie 'Shu' (good or well) + 'Yog' (time including the sense of fate, occasion, or connection).[199] Thus, it is evident from the construction of the word 'Shuyog' or opportunity itself is not free; it is subjected to time, fate or occasion or connection. Therefore, opportunity comes into being when luck or fate allows it; when all the factors that determine the fate of things are connected to favourable manner opportunity comes into being. By its nature opportunity itself is subservient, irregular, conditioned and an 'in addition sense' whereas the Freedom is inevitable and regular sense. Opportunity is not a general state of things or part of it. On the other hand, as hand, in general a part of the body, freedom is also a general state of the human. It simply does not matter if one has the luck or not or one has all his connections working in favour of him or not, Freedom is the status quo. When Freedom is presented as opportunity it loses its generality and becomes entitlements for only those who has all of their connections in favour of them. This, eventually generates two vices – a. it is an exclusive entitlement of few and, hence, the mass is discriminated; and b. for the few who has the opportune to have it, is the opportunity to do anything as they wish for all connections work for them.

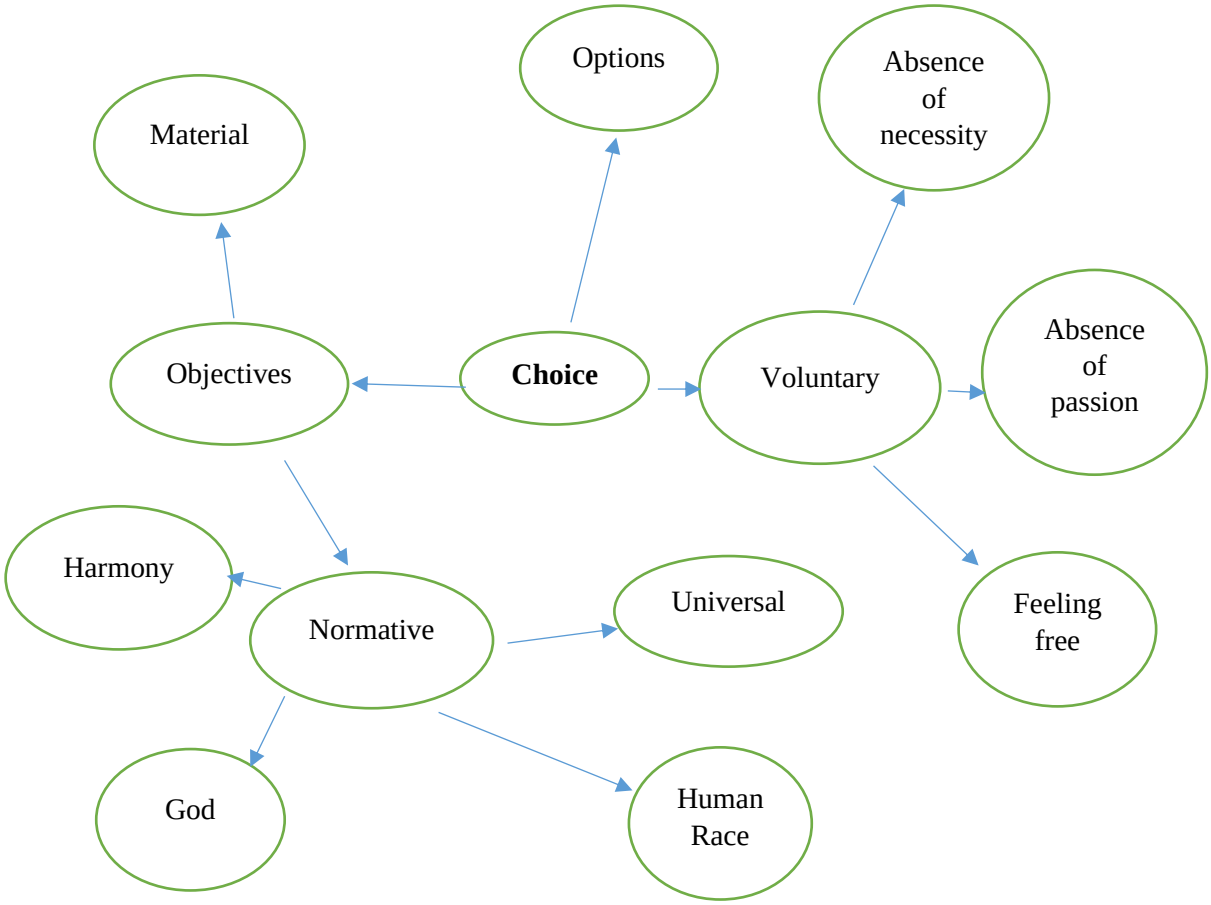
[197] Bengali Poet Michael Madhusudan Dutt in his 'Kapatakkha River' excellently depicts this nature of human; see 'Michael Madhusudan Dutt', , *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=Michael_Madhusudan_Dutt&oldid=1081818197> accessed 28 April 2022. Sartre's nothingness is all about exactly this nature of humans; see generally Sartre (n 182).

[198] There are instances where X likes to engage with Y, with the initial thought that Y is the most desired person for him or her only to understand later that Y was not the person of his or her interest. Many think they want to be an engineer but to understand later their interest lie in the arts.

[199] Jamil Choudhury, *Bangla Academy Adhunik Bangla Abhidhan* (Bangla Academy 2016); Ahmed Sharif, *Bangla Academy Sonkhipto Bangla Ovidhan* (Bangla Academy 2017).

Thus, the opportunistic concept of Freedom gives it the notorious face people are afraid of. Further, opportunity is a mere positive concept but Freedom may be manifested in the negatives too, in the acceptance of the insignificance or of the nothingness.[200]

2.3.3 Freedom as Choice



Going back to the same list concept that gives rise to the action concept, Berlin posits '[a]ction is choosing, choosing implies selection between alternative goals. Someone who cannot choose between alternative goals because he is compelled is to that extent not human'[201]. Thus, the choice becomes a dominant precondition for Freedom and hence, the equation is like no choice, no Freedom. As Berlin and other claims choice brings the necessity of options. Choice in order to be choice needs to be voluntary which requires the importance of feeling free and the absence of passion and necessity.[202]

[200] András Bálint Kovács, 'Sartre, the Philosophy of Nothingness, and the Modern Melodrama' (2006) 64 The Journal of Aesthetics and Art Criticism 135, 137.
[201] Berlin, *Freedom and Its Betrayal* (n 52) 35.
[202] Zeynep Barlas and Sukhvinder Obhi, 'Freedom, Choice, and the Sense of Agency' (2013) 7 Frontiers in Human Neuroscience; Paul Russell, 'Hume on Free Will' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy*

Can one choose if there is only one option to choose from? Suppose, X is a homosexual person, and he has been given the option to choose from A (homosexual) and B (heterosexual). Although externally it may seem X has two option to choose from[203], he or she has only one option to choose from. As per his or her psychophysical needs, he or she is driven to select A and only A. Let's take another example, Y is in a passionate relationship with C. Now Y has been asked to choose either C or D as a life partner. Since Y is passionately involved with C, he or she has no other option but to choose C. According to the dominant theories all three preconditions ie availability of more than one option, absence of needs and absence of passion are unfulfilled here. Can we say that Freedom is not relatable with the decisions made by X & Y? In the absence of any survey, we can presume and submit no one will answer positively; we should not have any doubt that their decisions are well relatable to Freedom despite they do not have options and their decisions are driven by their needs and passion.

The Freedom storytellers are confused because the list concept, activity concept, requirements of awareness and non-interference, lawjon approach, etc keep pushing them to consider Freedom as an external phenomenon. They see Freedom through the eyes of the audience, not through the eyes of the person whose Freedom is in question. X has the option to choose either A, B or C as his wife. For the external audiences the matter is like choosing or just picking up, an act of choosing. But for X, this might not be the case; for him, it is a task of determination, a matter of hard decision. Thus apparently, if freedom is relatable to the exclusionary or evaluative procedure, it is more relatable to determination than to the choice. Probably this is why Condorcet defines Freedom as the power to 'determine my course of action'.[204] Berlin also supports us acknowledging that '[c]ompulsion frustrates my wishes but when I fulfil them, I am surely free, even though my wishes themselves are causally determined'[205]. Thus, it is evident and Sartre quite rightly claims – 'it [Freedom] can not be limited to voluntary acts'[206]. In addition, in some cases, the choice itself can be a barrier towards Freedom.[207] Sartre offers us a

(Fall 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/fall2021/entries/hume-freewill/> accessed 25 April 2023; Barry Schwartz and Nathan N Cheek, 'Choice, Freedom, and Well-Being: Considerations for Public Policy' (2017) 1 Behavioural Public Policy 106. It is stated that 'It is commonly assumed in affluent, Western, democratic societies that by enhancing opportunities for choice, we enhance freedom…'.

[203] As it is opined by Justice Scalia that a homosexual person has such an option; see *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44).

[204] Condorcet (n 89) 183.

[205] Berlin, *Liberty* (n 49) 28–29. According to Ranke, with whom Gadamer agrees, [b]sides freedom stands necessity'; see Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G Marshall trs, Revised edition, Bloomsbury USA Academic 2004) 203.

[206] Sartre (n 182) 444.

[207] Numerous sources support our position that Freedom is neither, necessarily, connected nor, inevitably, proportionate to the availability of choices. As Schwartz submits 'choice no longer liberates. It might even be said to tyrannize'; Barry Schwartz, *The Paradox of Choice: Why More Is Less, Revised Edition* (Harper Collins 2009). See also Ian Carter, 'Choice, Freedom, and Freedom of Choice' (2004) 22 Social Choice and Welfare 61; Sarah Conly, 'When Freedom of Choice Doesn't Matter' (2016) 37 The Tocqueville Review/La revue Tocqueville 39.

possible explanation for why scholars confuse choice with Freedom. Sartre himself relates Freedom with 'choice' however with an explanatory note 'the formula "to be free" does not mean "to obtain what one has wished" but rather "by oneself to determine oneself to wish" (in the broad sense of choosing)[208].

To further complicate the things, some scholars suggest that the presence of more than one option is not enough. There must be at least two contradictory sentiments at play; Freedom ceases to exist where there is only one sentiment.[209] We disagree, in many cases, if not in general. Freedom is, instead, relatable to the end of contradiction. One's freedom starts to be relatable from the moment his or her contradiction ends. In addition, the existence of two contradictory desires or wills that give rise to contradictory sentiments is not essential at all. I have the freedom to have food with my left hand. I have this freedom both in the presence of a contradictory sentiment and in the absence of such sentiment. For example, in the countries like India and Bangladesh, people because of social pressure develop a sentiment or a pull not to use the left hand while having food. Now suppose 'X', one Bangladeshi left-handed boy, defying the social pressure continues to have food with the left hand. On the other hand, there is no such contrary pressure and hence a contradictory sentiment to use the right hand in the European Countries. We cannot say that X has more Freedom than a European left-handed boy.

There are a few scholars who claim that the conflicting sentiments must be of the same or similar intensity. To make the situation even further complicated, Freedom scholars, almost invariably, hold that whatever choice we opt for must be attached to objective(s); they consider utility as a pre-condition of Freedom. Condorcet posits:

> If an insurmountable obstacle stops me from taking the action which my will has determined to be the most advantageous to me, then I cannot determine to take that action. Strictly speaking, you can then say that I am free because I am deciding not to want to take an action, since it is in my interest not to try to do what I sense to be futile.[210]

Let's break down what Condorcet says:

1. Doing an action 'A' is the most advantageous for me.
2. But an insurmountable obstacle stops me to do 'A'.
3. Thus, technically, as Condorcet says, I am free because as I calculate I find:

[208] Sartre (n 182) 483.
[209] Condorcet (n 89) 181.
[210] Condorcet (n 89) 183. - Every being is free who is able to have two contradictory sentiments relating to the same action, and who can decide either to wish, or not wish, to take that action in complete awareness that his will is conforming to one of the two sentiments. He is free when experiencing the two sentiments and is conscious of doing so. The more the two sentiments are in play when he acts, and the more sharply aware of them he is, the more his freedom is complete. Freedom ceases when there is just one.

a. The credit for doing A is X
b. The attempt I need to put to do the A will be equivalent to debit X.
c. Thus, my motivation or will or desire to do the act is X – X = 0

4. In this stage whatever decision, I take, it will be a "free decision"[211] if I take the decision in my own best interest.
5. I sense that trying to do it is futile (ie Waste of resources or time). Therefore, quitting to do A is my Freedom.

We disagree and submit that taking either action can be compatible with our Freedom. What is more interesting, taking the most advantageous decision might not be relatable to our Freedom. The person for being the person I am, I may like to take challenges or risks. Suppose, Z is an outstanding student. He has two options to choose from. Either to choose PhD studentship or to join a corporation. A corporate job is most rewarding in terms of the financial benefit while the studentship is not and it is more time-consuming, and at the end of the studentship he has the slightest possibility (10%) to secure a teaching position he is passionate about and he always wants to pursue. Consciously and unconsciously, he has always dreamed to become a university teacher. It is, simply, does not matter whether he will finally secure the position or not; opting for the studentship is relatable to his Freedom.[212] On the other hand, opting for the corporate job may or may not be relatable to his Freedom despite its greater reward.

Thus, it is obvious that material utility cannot be a pre-condition for Freedom. What other utilities can be there? What type of utilities does Condorcet want to make Freedom conditioned to? The answer lies in the account of Condorcet himself. He means utility in its abstract sense or in its normative sense.[213] This is one of the most dangerous paths one may choose while setting a requirement for Freedom, because the abstract utilities may take a wide variety of shapes and for such utilities, Freedom can be undermined whenever the utilities are to be taken care of.[214] The abstract utilities may include serving

[211] We will come back to the phrase again. The phrase, in the context of the discussion of Freedom may refer to or connected to two concepts ie free will and feeling free. We will discuss about feeling free in the later part of the section while free will be discussed in 2.2.1.3.

[212] Sartre rightly posits that success is not important to freedom; see Sartre (n 182) 483. Mill insists that Freedom requires that people must take their responsibilities of their own 'even though, as it may appear to them, some should be for the worse'; see Mill (n 53) 137. Knight states - human beings typically wish to be free, even in situations where they recognize that freedom may involve a lower degree of effectiveness in realizing the actual end than would result from direction of their activity by another party; see Knight (n 132) 100.

[213] Condorcet (n 89) 183 (read generally).

[214] Fichte, Hegel, Kant, Locke, Rawls, Rousseau, Spinoza, and many other scholars and philosophers make Freedom subject to such abstract utilities. See Berlin, *Freedom and Its Betrayal* (n 52) (Specially see Chapters presenting Hegel and Rousseau); Erich Fromm, *Escape from Freedom* (Avon Books 1969) 251; Wilhelm von Humboldt, *The Limits of State Action* (JW Burrow ed, CUP 1969) 16.

the god, 'inner vision'[215] universe, human race, eternal harmony, eternal laws, or 'eternal and immutable dictates of reason'.[216] Further, for reasons to be explained in the next sections, the utilities are simply the antithesis of Freedom, the destroyer of Freedom.

In addition to the substantial dangers, every utilitarian theory comes up with some unnecessary problems that could be avoided with relative easiness. For example, Mill's utilitarian theory of Freedom suffers a lot in finding ways out to the problems not necessarily connected to the scope of Freedom. He is entangled with the questions relating to rules and principles of taxation, trade and commerce and distribution of goods and services in the social and market space.[217] Freedom is absolutely connected to the person himself or herself, not directly connected to the goods or services. When the question is about goods or services one is entitled to, it is rather a question that is not exclusively limited to the person himself or herself; this is not something in his or her control. Mill himself understands that trade is a social act and not directly connected to the question of Freedom.[218] Knight wants to give a disassociated definition of Freedom. Unfortunately, he is, as is the case of others, caught up in the utility problem - necessarily connecting Freedom with the economic aspect.[219]

Another relevant misconception about Freedom is, in the broad line, it is considered identical to feeling free. Freedom and feeling free are neither the same nor similar. Freedom is a more sophisticated sense than just being free. While Freedom, generally, gives the sense of being free, it gives the opposite sense too. Take an example[220], X needs an accommodation and has been looking for it for months. As he is not being able to manage it, he or she feels unfreedom (the antithesis of feeling free); X delivers the duty to someone else. Now he or she feels free. Here, he or she surrenders his or her responsibility to someone, but still his or her Freedom is intact. Now suppose X has not handed over the duty to find the accommodation to anyone and he or she has to leave the current house in a month, while he or she does not know where he or she will end up in the next month. However, he or she diverts his or her mind to

[215] Fichte finds the abstract utility is best served in serving the inner vision; see Berlin, *Freedom and Its Betrayal* (n 52) 69.
[216] Humboldt (n 214) 16; Fromm (n 214) 251.
[217] Bromwich (n 144) 162; Mill (n 53) 156. He states - 'Whoever succeeds in an overcrowded profession, or in a competitive examination; whoever is preferred to another in any contest for an object which both desire, reaps benefit from the loss of others'.
[218] Mill (n 53) 157. 'Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus, his conduct, in principle, comes within the jurisdiction of society'.
[219] Knight (n 132) 100. He states – 'the particular meaning which I wish to emphasize here-that all human relations ought to be voluntary; that the human individual, to the degree in which he is such, must be free to decline any associative relations with others which may be offered on terms which are not satisfactory to himself. This fact raises the central problem of freedom in the practical sense, specifically of economic freedom in the realm of economic activity, freedom has meant primarily freedom of exchange, organized in market'.
[220] Although the example is not purely connected to Freedom, we present it as it is relevant to the concept of Freedom available out there.

something else he or she likes thus he or she finds herself free of the tension or burden of finding a house. Here, his or her behaviour is irresponsible ie he or she gets the feeling of 'freeness' at the expense of ignoring a responsibility whereas the concept of Freedom has a strong connection with taking responsibility.[221] Freedom is about taking responsibility (including taking the responsibility of waiving the responsibility or surrendering the responsibility). Further, as has been already stated, we do not support the nihilistic version of Freedom, the incident of feeling free is more relatable to the nihilist version of Freedom.[222] Constant, warns us of the danger of considering feeling free as Freedom.[223]

2.3.4 Freedom as Capacity

Freedom proponents claim that to have Freedom, one must have something extra apart from what he or she has in his or her state of nature.[224] What are these extra capacities or abilities that people must have? What qualifications do we need to have to enjoy the blessing of Freedom? Despite there being no concrete list of such capacities or abilities or qualities, traditionally scholars prescribe some common qualities without which one does not qualify to have Freedom. The qualities are among others education, training, reasoning skill, rationality, the ability to know the human end or universal end, etc.[225] Some scholars add material resources[226] and economic resources to the list of basic capacities that people need to have in order to have Freedom.[227] To them, one can enjoy the Freedom of doing mathematics or playing music only by becoming an expert in those.[228]

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[221] However, it should be clarified that the responsibility that is attached to Freedom is not the conventional type of formatted responsibilities the Freedom proponents mistakenly consider as preconditions for Freedom. The responsibility includes the responsibility of saving oneself while also the responsibility of destroying oneself. The point will be further clarified in the next sections.

[222] To understand such a version of Freedom, see Berlin, *Liberty* (n 49) 182.

[223] Constant (n 141) 326. He says – 'The danger of modem liberty is that, absorbed in the enjoyment of our private independence, and in the pursuit of our particular interests, we should surrender our right to share in political power too easily. The holders of authority are only too anxious to encourage us to do so. They are so ready to spare us all sort of troubles, except those of obeying and paying! They will say to us: what, in the end, is the aim of your efforts, the motive of your labours, the object of all your hopes? Is it not happiness? Well, leave this happiness to us and we shall give it to you'.

[224] Marquis de Condorcet, *Condorcet: Political Writings* (Steven Lukes and Nadia Urbinati eds, Cambridge University Press 2012) 183; - 'We see that natural freedom is not an absolute faculty but a relative one …that it strengthens with the growth of reason, of enlightenment, of fineness of moral sentiment. Maxwell defines Freedom as "the capacity to achieve what is of value in a range of circumstances"; see Dennett (n 99) 302.

[225] Mill (n 53); Rickless (n 130); Michelle E Brady, 'Locke's "Thoughts" on Reputation' (2013) 75 The Review of Politics 335; Kant (n 28).

[226] Berlin, *Liberty* (n 49) 45.

[227] Berlin, *Liberty* (n 49).

[228] Berlin, *Liberty* (n 49) 187–188. He claims – 'If I am a schoolboy, all but the simplest truths of mathematics obtrude themselves as obstacles to the free functioning of my mind, as theorems whose necessity I do not understand …But when I understand the functions of the symbols, the axioms, the formation and transformation rules… then mathematical truths no longer obtrude themselves as external entities forced upon me… I now freely will in the course of the natural functioning of my own rational activity. For the mathematician, the proof of these theorems is part of the free exercise of his natural reasoning capacity. For the musician, after he has assimilated the pattern of the composer's score, and has made the composer's ends his own, the playing of the music is not obedience to external laws, a compulsion and a barrier to liberty, but a free, unimpeded exercise'.

Considering these qualities as pre-conditions for the existence of Freedom is the worst outcome of the list concept. Based on the number and the extent of the qualities one holds, his or her Freedom lists are made. The more qualities one holds the more Freedom he or she has and the longer the list of activities he or she can do without interference.[229] One who lacks qualities, lacks Freedom.[230] Thus, Freedom is only for qualified persons.[231] Children, people of backward class, and 'uncivilised' people have no Freedom as they lack the qualities. None but John Stuart Mill, who is considered 'the most eloquent and the most sincere'[232] enthusiast of Freedom, holds this notorious view.[233] He further goes on to state '[d]espotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end'.[234]

We reject such exclusionary, discriminatory, and short-sighted theories that require qualities or capacities as pre-condition for Freedom. Our rejection is not merely normative; it is equally supported by facticity. Admittedly, children, and mentally challenged people need help in many matters; so are the requirements for many other people who are, otherwise, seem capable of doing regular activities. However, this does not necessarily demonstrate the absence of Freedom. If this becomes the case, literally, anyone's Freedom can be stripped away showing one or another capacity missing from the list listing actions of Freedom and their required capacities.[235] Who will make this list? What is the standard for making this list? Who gives one group of people the authority to declare another group of people as 'uncivilised'? This is sheer absurdity and this demonstrates that the true value of Freedom has not been understood. In addition, for reasons Freedom is for its significance and the significance it carries, Freedom is for all with their state of nature without requiring any extra quality of any sort.[236]

The capacity or ability is not directly connected to the meaning, interpretation and the existence of Freedom. All it has to do with the capacity or ability of the intensity of the symptom of Freedom or expression of the Freedom that leads to awareness. Awareness, as we have seen in the discussion of the previous section, is not a reliable and certain denominator of Freedom. Hence, the importance of the

[229] Condorcet (n 89) 187.
[230] Hannah Arendt, 'Freedom and Politics: A Lecture' (1960) 14 Chicago Review 28, 38; - 'For Montesquieu as for the ancients it was obvious that an agent could no longer be called free when he lacked the capacity to do'.
[231] Condorcet (n 89) 185. Condorcet claims one gets Freedom once he or she gets to the age of reason.
[232] Berlin, *Freedom and Its Betrayal* (n 52) 55.
[233] Mill (n 53) 81. No doubt Mill has good intentions and to save the children, underaged people, and people of the so-called backward stage, he supports keeping these people under paternal supervision and hence denies their Freedom.
[234] Mill (n 53) 81.
[235] Berlin states – 'There are all sorts of things I may be unable to do, but this does not make me a slave. I cannot fly to the sky with wings; I cannot count beyond five million; I cannot understand the works of Hegel; see Berlin, *Freedom and Its Betrayal* (n 52) 56. Thus a Hegelian government can take away one's Freedom on the argument that he has not qualified to have Freedom yet. A Trumpian, Putinian or Marxian government may do the same.
[236] This point will be decisively and extensively clarified once we understand the phenomenon of merging and splitting of the boundary of Freedom to be discussed in Chapter 3.

quality or capacity of the person is as futile as the awareness is for the Freedom of the person. An educated and aware person may find a longer list of actions relatable to his or her Freedom, while an uneducated person may relate his or her Freedom to a shorter list of actions. This does not necessarily hold that the educated person has more Freedom than the uneducated person. Lack of ability to express Freedom does not necessarily annihilate Freedom.[237]

Berlin, one of the most important figures among the Freedom proponents, also follows the same wrong path. Let's consider Berlin's door metaphor which further develops by Petit – suppose out of three closed doors, X is capable of opening one door. How logical would it be to claim that X has 1/3 Freedom? The capacity concept gives rise to as weird claim as to inventing a method 'for measuring and comparing the overall freedom of individuals'[238]. Bruegger criticises such a method of measuring and comparing Freedom and states '[a] person cannot be a little free to φ, or mostly free to φ—either that particular freedom exists or it does not … it is an all or nothing event'[239]. Until this point, except one mistake[240], his position seems worth noting and so is the position of Sartre who states with the same mistake as that of Bruegger that '[m]an cannot be sometimes slave and sometimes free; he is wholly and forever free or he is not free at all'[241]. However, Brugger's latter line reveals that he, like others, is in the darkness. He posits '[a] person may have greater overall freedom than someone else, because he or she has more specific freedoms'[242]. This is the repetition of the same mistake ie considering Freedom as a listable concept and thus measurable and comparable. The gradation of the specificity of Freedom is another ill effect of the list concept of Freedom.

Nietzsche's conception of Freedom could have been relatively acceptable had not he, like others, been trapped in the capacity conception. He considers Freedom as a 'state of being an achievement, rather than the exercise of an inherent capacity'[243]. He further takes it to the extreme level by adding some extreme qualities as requirements like 'an unusual intentional self-relation'[244]. He further states that 'the relation involves both a kind of whole-hearted identification and affirmation, as well as the potential for great self-dissatisfaction'[245]. Thus, his conception of Freedom is reserved only for those few extraordinary people who achieved extraordinary qualities and, seemingly, their achieved qualities or

[237] Berlin, *Liberty* (n 49) 45. He states – 'If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated'.
[238] Bruegger (n 58) 90.
[239] Bruegger (n 58).
[240] To be precise, it is an all-event and never a nothing event.
[241] Sartre (n 182) 441.
[242] Bruegger (n 58) 91.
[243] Robert Pippin, 'How to Overcome Oneself: Nietzsche on Freedom', *Nietzsche on Freedom and Autonomy* (Oxford University Press 2009) 85.
[244] Pippin (n 243) 85.
[245] Pippin (n 243) 85.

capacities are perceived in their actions. We agree with the point that Freedom is a state or condition, but not with the point of achievement nor with the existence of capacities or the exercise of it. As we have already mentioned, Freedom, not necessarily but does, shows symptoms and the symptoms or expressions may vary from person to person. For example, for a baby, we see fewer symptoms or expressions of Freedom, while an adult, generally, shows more symptoms or expressions; an educated or highly skilled person, arguably or apparently, shows the greatest number of symptoms or expressions. X, a homesick person is touched by the whole of Freedom as he stays at home & catches fish in the nearby river. Y, on the other hand, like a free bird likes to travel around the world and involve himself in a lot of activities that require an extraordinary type of capacities. It may create a general misconception in many of us that Y has more Freedom than X, as the former shows evidence of having more capacities. This is not the truth.

Everyone has it. Few are aware of it in the sense that they can distinguish this phenomenon or noumenon from other immediate phenomena or noumenon, drives, will and so on; very few can express it, if anyone at all. Few people, who are touched by it consciously and unconsciously and aware of the light of it, express the immense significance and importance of it unanimously. Scholars and philosophers, who highly value Freedom, never deny the inevitability of Freedom because they are touched by it.[246] Those who show the audacity to deny the importance of it are the people who either have not seen the light of it or fail to see the source of the light.[247]

In relation to the instances of solving mathematical problems and mastering music, we do not see how the fluency of a student in solving mathematical problems or the mastery of a musician is relatable to their Freedom. We must make a difference. We are talking about Freedom that a person has for being a human. On the other hand, these two incidents are kinds of social, political, institutional, and formal competence people achieve by successfully passing different kinds of tests ie social, political, professional, etc. The freedom is to sing anyway – even if this sounds like a barking dog; playing the piano anyway we like or dislike. But playing it socially recognisable way is subject to social and

[246] Berlin, Mill, Constant, Condorcet, Humboldt, Sartre, Tocqueville, and others are touched by the light of Freedom and hence we see their highest appraisal of it.

[247] Scholars like Bentham, Austin, or Hobbes were not touched by it. Their methods may make some sense in the study of natural sciences, but when it is the field of social sciences, their methods are extremely flawed. For example, Bentham had declared that 'all poetry was misrepresentation'; see Bromwich (n 144) 5. This demonstrates that he was not touched by the blessing of imagination and abstraction. His method was exclusively connected to concrete or reductionism, a method increasingly proved to be incomplete even in the field of material sciences. Hardcore scientists like Heisenberg, Oppenheimer, Nicola Tesla, EO Wilson, Schrödinger, and many others already accepted the limitations of reductionism and the promises of imagination and abstraction in the study of natural sciences. See Schrodinger, *Mind and Matter* (1st Edition, Cambridge University Press 1958); Edward Osborne Wilson, *Consilience: The Unity of Knowledge* (Reprint edition, Vintage 1999). For any field of social sciences, just depending on reductionism is nothing but absurdity. We cannot get an idea about the nature of life if we do not care about the soft components of life identified in poetry, arts, philosophy, etc.

political recognition. We must not mingle Freedom with the points like recognition, comfort, pleasure or fluency. These may seem like Freedom to some, but these are not. Instead, these are like anti-thesis of Freedom. Although this may not be the self-abnegation, which Berlin reject to consider as Freedom, in its strict sense, it is a kind of self-alignment[248] that may not be considered as slavery by some but, definitely, it is not Freedom. Or if we, at all want to say Freedom, it is an acquired Freedom that is subject to society, law, institution, formal body, etc.

Unfortunately, the majority of the scholars, who talk about Freedom, focus more to increase the acquired or artificial or idealistic Freedom even at the expense of the original Freedom.[249] Their exponential interest in educating people or instilling rationality or reasoning in them and considering these requirements as a precondition for Freedom might have increased the artificial Freedom a bit but at the expense of the imminent threat to the Freedom itself. Humboldt understands the danger it may involve in imposing education as a condition for Freedom and, hence, he strictly prohibits the state to make any attempt, 'directly or indirectly' to prescribe morality and character of its citizen.[250] However, unfortunately, he fails to stay on his track as he takes a strategy that can be, roughly, called 'Freedom engineering'; he proposes that the state, instead of educating, should enable its citizen "to educate himself".[251] The ultimate goal of his education is to create a nation of moral men and good citizens who will be serving the ultimate goal of the state.[252] 'Good citizen', 'moral men', 'ultimate goal of the state' – how can Freedom be Freedom amidst such jargon? 'One of the most influential Enlightenment thinkers and commonly known as the "Father of Liberalism"'[253] tries his best to be the saviour of Freedom by educating people about the law of nature, the divine law and the law opinion or reputation.[254] His model of education emphasises the teaching of the law of opinion or reputation that reflects society's customs.[255] Isn't this a path towards unfreedom, instead? Be it Humboldt, Locke or Mill – their projects of educating people were different, but one thing is very common in them. To all

[248] Aligning our expertise, choice, with the trend. For example, what a singer tries to do, in general, tries to follow a standard state by the music industry, society, and the common people. However, please not I am not claiming that one following the trend is not free; instead, our submission is the pursuit may turn to be compatible with unfreedom in many cases.

[249] Such scholars include all the scholars who follow any version of legal positivism. Many natural law theorists also have a similar focus.

[250] David Sorkin, 'Wilhelm Von Humboldt: The Theory and Practice of Self-Formation (Bildung), 1791-1810' (1983) 44 Journal of the History of Ideas 55, 60. He states - the State must wholly refrain from every attempt to operate directly or indirectly on the morals and character of the nation. Everything calculated to promote such a design, and particularly all special supervision of education, religion, sumptuary laws, etc., lies wholly outside the limits of legitimate activity.

[251] Sorkin (n 250) 62.

[252] Sorkin (n 250) 64–65.

[253] 'John Locke', , *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=John_Locke&oldid=1084606829> accessed 1 May 2022.

[254] Brady (n 225) 345.

[255] Brady (n 225) 345.

of them, Freedom does not mean Freedom; it is their insecurity. To them, to have Freedom, one is to be a person like one of them. Their Freedoms are limited by the end they want to achieve through their own models of education.

Is not the imposition of education on the people, itself, a threat to Freedom? History tells us that the content and the curriculum of education have the risks to be so designed to make people follow the dominant trend be it social political, or social.[256] Subjecting Freedom to education is not only a defective strategy[257] but also a dangerous strategy[258]. Mill himself understands this and accordingly states:

> A general State education is a mere contrivance for moulding people to be exactly like one another; and as the mould in which it casts them is that which pleases the predominant power in the government … it establishes a despotism over the mind, leading by natural tendency to one over the body.[259]

Mills' contradiction continues when he prescribes to hold the father legally responsible and subject to fines on the occasion of his failure to provide education to the child.[260] This is, apparently, a good suggestion but with a potentially darker side. This will damage the general, natural, and cooperative texture of the father's relationship with his children. Further, what is more alarming, is that the line of thought he follows leads to follow the path of supporting or motivating despotism.[261] He goes further

[256] Theodore Hsi-En Chen, 'Education and Propaganda in Communist China' (1951) 277 The Annals of the American Academy of Political and Social Science 135; Helen I Davis, 'Propaganda Enters the English Classroom' (1939) 28 The English Journal 26; Brittany Hunter, 'Education Is the State's Greatest Tool for Propaganda | Brittany Hunter' <https://fee.org/articles/education-is-the-states-greatest-tool-for-propaganda/> accessed 26 April 2023; HH Remmers, 'Propaganda in the Schools - Do the Effects Last?' (1938) 2 The Public Opinion Quarterly 197; Carroll H Wooddy, 'Education and Propaganda' (1935) 179 The Annals of the American Academy of Political and Social Science 227.

[257] Mill (n 8) 105; he states – 'Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. Their conclusion may be true, but it might be false for anything they know: they have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say; and consequently, they do not, in any proper sense of the word, know the doctrine which they themselves profess'.

[258] Mill (n 8) 137–138; 'education brings people under common influences, and gives them access to the general stock of facts and sentiments. The combination of all these causes forms so great a mass of influences hostile to Individuality, that it is not easy to see how it can stand its ground'. Emma Rothschild, 'Condorcet and the Conflict of Values' (1996) 39 The Historical Journal 677, 684; - 'The person who brings with him into society the opinions which his education has given to him 'is no longer a free man'. He is 'the slave of his masters'; his chains are the more difficult to break ' because he does not feel them himself, and he believes that he is'.

[259] Mill (n 53).

[260] Mill (n 53) 167.

[261] Mill (n 8) 168–169; - 'To undertake this responsibility—to bestow a life which may be either a curse or a blessing—unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being. And in a country either over-peopled, or threatened with being so, to produce children, beyond a very small number, with the effect of reducing the reward of labour by their competition, is a serious offence against all who live by the remuneration of their labour. The laws which, in

and insists that society must take the responsibility to educate children, teaching rational conduct and, as he holds, the power that society holds over the children is absolute.[262] This is eventually a proposal of making society more stringent in performing its supervisory (or policing role) role and, hence, becoming less adaptable to personal Freedom. Condorcet rightly points out '[i]t would be only illusory, however, if 'society were to take hold of new generations, to dictate to them what they should believe'.[263] Criticising Rosseau and his followers, Constant states 'by a necessary consequence of the education they had received, steeped in ancient views which are no longer valid, which the philosophers whom I mentioned above had made fashionable'[264]. In this regard, we do not see any reason to be hopeful about education even in this 21st century. Although education is democratised and, hence, more people are getting the chance to take higher education, the situation is rather seemingly worse in comparison with the scenario of education when Constant or Condorcet lived.[265] Unfortunately, more concerning is the fact that Constant himself falls into the same trap of educating people as a prerequisite for Freedom.[266] Dennett asks:

> How are we to distinguish between good education, dubious propaganda, and bad brainwashing? … self-control of our mental lives is limited and problematic in any case, so it is no surprise that we will have a problem distinguishing engineering that bypasses our capacities from engineering that exploits them in tolerable or desirable ways.[267]

As the requirement of education is not only incompatible with Freedom but also dangerous for Freedom, so is the case when reason and rationality is considered as preconditions of Freedom.[268] Like the choice conception of Freedom, reasoning and rationalism are necessarily tagged with the results or utilities

many countries on the Continent, forbid marriage unless the parties can show that they have the means of supporting a family, do not exceed the legitimate powers of the state'.

[262] Mill (n 53) 145.

[263] Rothschild (n 172) 684.

[264] Constant (n 141) 319.

[265] Now we are exponentially moving towards so-called 'outcome-based education' where the outcome of the education must be traceable, concrete, saleable, and valuable in the market. With this spirit, we will be able to produce a lot of saleable products in the market but not educated people or rational people, the two terms we are concerned about. With this spirit, one Oxford Professor of Jurisprudence takes pride in announcing the fact that law has no philosophy nor does need it. See Gardner, 'Legal Positivism' (n 19). The majority of the University seats are now reserved for students who will be learning how to create or generate more demands within people instead of finding a way out of fulfilling the already existing demands.

[266] He insists that the authorities, instead of playing the conventional role, should play a modified role in educating people. Authorities should take the role of travel guide. He states 'needing the authorities only to give us the general means of instruction which they can supply, as travellers accept from them the main roads without being told by them which route to take'; Constant (n 141) 323.

[267] Dennett (n 99) 281.

[268] Interestingly, all the great pro-Freedom philosophers like Spinoza, Hegel, Nietzsche, Rousseau, Kant, Locke and their countless followers take Freedom as subject to universal and eternal principles of reasoning and rationality.

(primarily normative utilities).[269] TH Green's rational formula of Freedom seeks to attain true Freedom for all members of society in exchange for the immediate pleasure of the individuals.[270] Mill's rationalism also aimed at a similar utility ie 'human permanent interest'[271]. To Rousseau, the utmost utility of men and women lies in following the eternal, absolute, and universal law of nature 'which speaks to the heart of man and to his reason' to establish universal harmony.[272] Thus, their versions of Freedom are limited by their respective ends.

Despite their immense support for Freedom, their rudimentary and dogmatic stance in favour of their ends and, hence, shaping their concepts of reasoning and rationality accordingly, eventually proves to be more effective in deprecating Freedom instead of appreciating it. In times, if not on countless occasions, this paves the way to unleash the reign of terror and unfreedom by demanding the lack of reason and rationale in people.[273] This inspires destructive philosophies as that of Fichte who claims '[t]o compel men to adopt the right form of government, to impose Right on them by force, is not only the right, but the sacred duty of every man who has both the insight and the power to do so'[274]. On this point, Condorcet's question is worth asking ''Who gave them the right to judge where it is to be found?' This is not enlightenment, but fanaticism: 'dazzling men instead of enlightening them, seducing them for the truth, presenting it to them like a prejudice'.[275] Definitely, this is not what Kant or Spinoza wants to promote but they provide enough space to misinterpret them, intentionally or unintentionally, as they necessarily link Freedom with such principles that are prone to be misinterpreted.[276] This opens the door of 'the most dismal tyranny'[277].

When our Freedom is necessarily subject to the Freedom for all members of the society, or universal harmony, how can we be Free? In such a case, achieving the illusory and flamboyant objectives

[269] Dennett (n 99) 281. - To take oneself as a rational agent is to assume that one's reason has a practical application or, equivalently, that one has a will.
[270] Berlin, *Liberty* (n 49) 180.
[271] Mill (n 53) 82.
[272] Berlin, *Freedom and Its Betrayal* (n 52) (See chapter dealing with Rousseau).
[273] Henry E Allison, *Essays on Kant* (Oxford University Press 2012) 90. Berlin, *Liberty* (n 49) 51. Berlin states - Rousseau, who claims to have been the most ardent and passionate lover of human liberty who ever lived, … was one of the most sinister and most formidable enemies of liberty in the whole history of modern thought.
[274] Berlin, *Liberty* (n 49) 197.
[275] Rothschild (n 172) 686.
[276] This makes Freedom a matter of interpretation by the experts. Berlin states - With this the door was opened wide to the rule of experts - Berlin, *Liberty* (n 49) 198. Both Kant and Fichte hold that morality is not found but invented through the will. If this is the case, Fichte finds support for his theory to manufacture rationality and based on this rationality impose power on others who do not subscribe to this rationality.
[277] Rothschild (n 172) 685–686. Rothschild, referring to the claims of Condorcet, states - To impose universal and eternal principles, finally, is for Condorcet the most dismal tyranny. The legislators of antiquity, he wrote, sought to establish eternal constitutions. But to teach the constitution 'as a doctrine in conformity with the principles of universal reason' is a despotism of public power. It is to 'violate liberty in its most sacred rights, under the pretext of teaching people how to cherish it'.

becomes the priority. When the end becomes the priority, Freedom and the well-being of humans, in general, become the means to achieve it. This is exactly the anti-thesis of Freedom; Kant strongly opposes this.[278] Although there may or may not have such rules that unite human consciousness and, hence, may establish universal harmony, we reject the contents of these so-called sacred rules. What is more important we reject the attempt to consider these rules as a precondition for Freedom, because such attempts are dangerous. As Berlin puts it:

> The Jacobins, Robespierre, Hitler, Mussolini, the Communists all use this very same method of argument, of saying men do not know what they truly want – and therefore by wanting it for them, by wanting it on their behalf.[279]

What is 'human permanent interest'? What are the criteria for identifying such interest? Who is setting up these criteria? Is this possible to set up such criteria, at all? Can we (or should we) rely on the society, the state or the political community in this regard? Constant points out a very significant fact that 'conditions of society, morality are formed by subtle, fluctuating, elusive nuances, which would be distorted in a thousand ways if one attempted to define them more precisely'.[280] This lead to further complexities ie the possibility of having more than one conflicting ends. In fact, Berlin is quite sure that 'the ends of men are many' and these conflicting ends, as Berlin claims, will lead to a tragedy that 'can never be wholly eliminated'. [281] Let alone the normative ends, even if these questions are asked with reference to material ends, we do not have any answers except some audacious, superstitious, hyperbolic, idealistic, and illusory assumptions. These questions are not answerable as the human end is not knowable, let alone be confused with the varieties of ends.[282]

Fortunately, the method we are following does not require us to know the end or ends of the human. Therefore, the claimed conflict of ends or goals is not a relevant discussion when we are talking about Freedom. In fact, the questions of the humans' end(s) is literally worthless until we secure the inalienable position of Freedom in the first place; the questions in connection to the setting up of the human goals come up in the latter stages. Freedom is the ground floor whereas the question of goals is

[278] Berlin, *Liberty* (n 49) 186.
[279] Berlin, *Liberty* (n 49) 50.
[280] Constant (n 141) 322.
[281] Berlin, *Liberty* (n 49) 214.
[282] Sartre (n 182) 443. Rawls states – 'Even if the general capacities of mankind were known (as they are not), each person has still to find himself, and for this freedom is a prerequisite… It does not presuppose that all truths can be established by ways of thought recognized by common sense; nor does it hold that everything is, in some definable sense, a logical construction out of what can be observed or evidenced by rational scientific inquiry'; see Rawls (n 132) 184, 188.

the later floors; if there is no Freedom there is no question of setting up of goals but not vice versa.[283] The antithesis of Freedom is determinism and in determinism, the question of setting up the goals is immaterial; these are already set and no one's reasons or rationality has anything to do with it. In such a state, to talk about the end of humanity is to talk about the end of the stone. However, as Freedom entails, we can always look for the reasons and rationale, but these must not be taken as a condition for Freedom as Freedom itself contributes to shaping the general reasoning and rationality. What is more interesting, even Kant and Rousseau's original positions decisively support that the ability of rational self-direction belongs to all people and morality is not a matter of specialised knowledge.[284] Berlin submits that there is a minimum space for all humans, where the choices need not be, necessarily, rational or virtuous.[285] To Rousseau, Freedom is the 'absolute value' that can never be compromised.[286] When this is the case, how can we emphasise on one's capacities or qualities as an inevitable requirement and test for it?

Seemingly, they do not have answers to this question. Their confusions can be explained in the light of Nerhot's insight – [k]nowing means knowing how to distrust what misleads the senses; it is always a question of knowing how to see what has to be seen and not seeing what has not to be seen'[287]. What misleads the senses of the Enlightenment thinkers? While we do not know exactly what misleads them, we have some clues thereto. Dennett presents one such clue. He states – [a] deep and persistent misunderstanding of Darwinian thinking is the idea that … we must be denying that people think'![288] Even Darwin himself would not accept that people don't think. The Enlightenment thinkers hold that the thought of the majority of the people is not rational and not supported by reason.[289] While the percentage of people who can think reasonably and rationally is not a decisive factor to decide whether one has Freedom or not, we reject their conviction that people don't think logically. Presumably, this misleading conviction is responsible for the Enlightenment thinkers' confusion and insecurity that pull them into the fortress of capacity arguments.

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[283] Sartre (n 182) 444–445. He posits – 'since freedom is identical with my existence, it is the foundation, of ends which I shall attempt to attain either by the will or by passionate efforts…Freedom cannot determine its existence by the end which it posits'.

[284] Berlin, *Liberty* (n 49) 191, 198. Kant insisted, following Rousseau, that a capacity for rational self-direction belonged to all men; that there could be no experts in moral matters since morality was a matter not of specialised knowledge.

[285] Berlin, *Liberty* (n 49) 44.

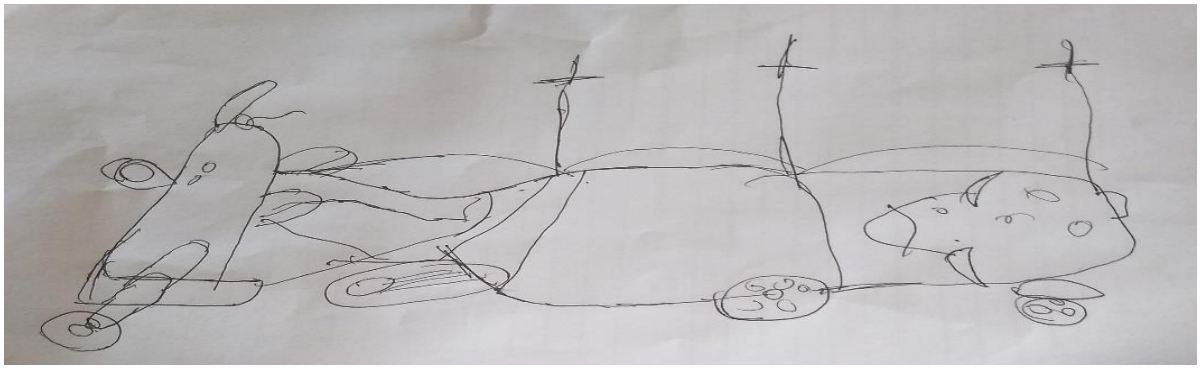
[286] Berlin, *Liberty* (n 49) 55.

[287] Patrick Nerhot, 'Cause and Effect in Rational Reasoning' in Patrick Nerhot (ed), *Truth and Judgement* (Franco Angeli 2008) 248.

[288] Dennett (n 99) 186.

[289] To Mill 99% of educated people show irrationality in their reasoning; see Mill (n 53) 105. To Locke and Nietzsche, reasoning and rationality among people is rare. See Ken Gemes and Christopher Janaway, 'Nietzsche on Free Will, Autonomy and the Sovereign Individual' (2006) 80 Proceedings of the Aristotelian Society, Supplementary Volumes 321, 46.

Wittgenstein states ‘we do not know how to think anything illogical because otherwise we would have to think illogically’[290]. Our submission in this regard is more fundamental and extensive. We submit that their conviction as to the capacity of people is too generalised, prejudiced and biased. We do not see any reason or rationality to be afraid and upset about the capacities of the children, the uneducated people or the ‘uncivilised’ people only because they, apparently, do not think or do in the way the Enlightened thinkers think or do. Instead, we have enough reasons to be hopeful and, hereby, accept the fact that everyone has Freedom. A boy had drawn a picture of a ‘safe’ motorcycle to be used by him and his parents when he was just 3-year-old. After one year, when his sister joined his family, he extended the motorcycle to give enough space for his sister too, while ensuring that it is safe. The extended motorcycle looks like as follows:



One day the four-year-old boy asks his father ‘Baba, humans came from the monkeys, then how come the monkeys are still monkeys’? We submit that these stories are not the stories of some extraordinary children. These are general stories and common in every household where there are children. Generally, all children show intelligence, reasoning skill and rationality in their own way. Similarly, there are countless uneducated people and ‘uncivilised’ people living in the farthest corners of the civilised world. They may lack ‘civic’ sense, but they have wisdom, the big brother of reasoning and rationality, no less than the educated and civilised people. However, mature, rational, and educated people find it difficult to accept this for some peculiar reasons. Locke, himself points out one reason that we have an ‘inclination to overestimate our own capacity for reason, and to underestimate that of others’[291]. Mature people overestimate their capacities, whereas they underestimate or overlook the capacities of children. Similarly, educated and rational people do the same when they compare themselves with reference to the uneducated and the ‘uncivilised’ people.[292]

[290] Cited in -Patrick Nerhot, ‘Text and Meaning’ in Patrick Nerhot (ed), *Truth and Judgement* (Franco Angeli 2008) 250.
[291] Brady (n 225) 353.
[292] Professor Pierre Bourdieu, *Sociology in Question* (Sage Publications (CA) 1993) (see Chapter 21 titled ’Racism of Intelligence’); Toon Kuppens and others, ‘Educationism and the Irony of Meritocracy: Negative Attitudes of Higher Educated People towards the Less Educated’ (2018) 76 Journal of Experimental Social Psychology 429; Melissa Hogenboom, ‘Educationism: The Hidden Bias We Often Ignore’ (20 December 2017)

Our continuous search for self-worth is another reason.[293] People keep searching for it in a whole lot of peculiar ways; when they don't find any, they assume it. They assume it just because they are mature, educated, or rational. It is like the lawyers claiming themselves learned; they, to boost their worth, claim that they are the only learned species on the planet. They, being mature, educated or rational, seek to attain a superior status in terms of self-worth for the sake of their maturity, education and rationality. Another reason and more connected reason is, as we term it, 'compensatory extremism' a concept we use to refer to a peculiar but certain inclination of people. People generally show an 'extreme reaction'[294] to a trend when they become dissatisfied with it and choose to embrace the opposite trend, at least, momentarily. In doing so, they tend to reject even the essential elements of the previous trend just to make sure that they are opposing the previous trend to the maximum level to compensate for their distaste. Evidently, the Enlightened thinkers are caught up by the compensatory extremism; they are so annoyed by the irrationality and unscientific actions of their previous eras that they categorically reject all the human processes that take place beyond the scientific, logical, systematic and conscious level. In doing so, they overlook and undermine the wonderful human processes that take place beyond that level they set as standard. Had they taken care of the sophistication and the significance of human language or learning process of walking, they would not have felt the insecurity about the capacities of the children, or the 'uncivilised' people.

We are not claiming that the children or the 'uncivilised' people do not do irrational acts or acts not supported by the reasons. One day, the 1-year-old sister of the 4-year-old boy threw the remote control of the television out of the window. The boy claimed 'now I have got the point why the landlord keeps the window, so that my sister can throw the remote control out'. Now suppose about a hundred people have died in any of the EU countries because of landslides. We submit that we will find millions of educated and mature people who would reason that the incident has taken place because these people are infidels; this is god's punishment for their infidelity. There are billions of mature, rational, and educated people out there who blame women's dress for sexual offences against women.[295] Are the standards of the logic of the mature and rational people of these cases significantly improved than that of the logic of the 4-year-old boy?

<https://www.bbc.com/future/article/20171219-the-hidden-judgements-holding-people-back> accessed 26 May 2023.

[293] It does not matter what kind of people we are, we all search for it. See Jennifer Crocker and Noah Nuer, 'The Insatiable Quest for Self-Worth' (2003) 14 Psychological Inquiry 31; Jennifer Crocker and others, 'The Pursuit of Self-Esteem: Contingencies of Self-Worth and Self-Regulation' (2006) 74 Journal of Personality 1749.

[294] A reaction far higher than usually deserves in a particular situation.

[295] 'Majority of Men Believe Women More Likely to Be Sexually Assaulted If Wearing Revealing Clothes, Study Suggests' (*The Independent*, 23 February 2019) <https://www.independent.co.uk/news/uk/home-news/men-sexual-assault-clothes-women-victim-blaming-rape-a8792591.html> accessed 10 May 2022.

Maistre states, '[o]nly two things which are ever good in the world – one is antiquity, and the other is irrationality'.[296] We must clarify our point that we are not promoting or supporting irrationality. What we are trying to say is that when we are talking about Freedom, we must not necessarily look for these capacities, because this causes more harm than the harm that can take place, if at all, in accepting the Freedom of everyone, irrespective of their capacities. Berlin correctly posits:

> 'I have never, I must own, understood what 'reason' means'[297] … '[T]he positive doctrine of liberation by reason' is the ultimate and the most effective justification that all the dictatorship, totalitarian and authoritarian regimes use to do all the mishaps and tyranny they do around the world.[298]

Millions of homosexual people have suffered decades after decades and still suffering their loss of Freedom because their practice does not qualify for the test of reasoning or rationality. In 1986, *Bowers*[299] delivered a verdict against homosexual people with a 5-4 majority. The verdicts did not find any justifiable reason or rationality for such practice. After 17 years, *Lawrence*[300] reversed the decision with the same 5-4 majority. The interesting fact is, in 1986, Justice O'Connor did not find any rationality in the practice and, hence she decided against the practice. After 17 years when she delivered her verdict in *Lawrence*, she did not find any rationality in such practice, but this time she was confused and decided in favour of the homosexual practice. Alas, had she been confused in the *Bowers* in 1986, millions of homosexual people would not have been identified as criminals for 17 years!! What an immense price the people had to pay only because of the search for reasoning and rationality. Condorcet states:

> Wisdom and reason are not the privilege of a few people, who deceive everyone else and ' take hold of their imagination', ' charged with thinking for them, and directing their eternal childhood'. 'How can they be so sure that what they believe is or always will be the truth,'[301]

[296] Berlin, *Freedom and Its Betrayal* (n 52) 159.
[297] Berlin, *Liberty* (n 49) 200 (footnote) .
[298] Berlin, *Liberty* (n 49) 190–191. 'I assimilate it into my substance as I do the laws of logic, of mathematics, of physics, the rules of art, the principles that govern everything of which I understand, and therefore will, the rational purpose, by which I can never be thwarted, since I cannot want it to be other than it is. This is the positive doctrine of liberation by reason'.
[299] *Bowers v Hardwick* [1986] Supreme Court of the United States 478 U.S. 186.
[300] *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44).
[301] Rothschild (n 172) 686.

2.3.5 Freedom as Power

Capacity causes power. Except for a few, all the scholars, irrespective of liberals or conservatives, consider Freedom a sort of power or, to the least, see Freedom through the prism of power.[302] The platonic capacity-based Freedom insists that one having the capacity to control himself or herself has the right to rule others while freeing himself or herself 'from the obligation of obedience'[303] The platonic version of Freedom by default comes with the entitlement of ruling others and what is shocking is the fact that these rulers are free from any obligation. Eventually, these Freedom holders are subject to no restrictions except their will or desire. They are free to do anything as their will dictates. Their unaccountable power gives them the right to inflict tyranny on others whenever they wish. Thus, both will and power becomes synonyms of Freedom of notorious type and this is the dominant conception of power.[304] There are other conceptions of power – we find, at least, more three types of power.[305] The second is the Foucauldian concept of power which is the milder version of the dominant version of power. While the dominant version permits physical violence, this version of power permits to 'influence the field of action of another actors'.[306] The third version of power can be called a natural or philosophical version of power which simply means one's internal energy for regulating one's thoughts.[307] Ranke also talks about another type of power called 'germinal power'[308] – the power of starting something new.[309] Apparently, the germinal power can be related to the third category of power ie energy. The fourth type of power is anti-power which is a sort of power, although not power.[310]

Considering Freedom as power is primarily responsible for the notoriety and fear about Freedom that exists in the hearts of every human in every corner of the world. This Hobbesian conception of Freedom keeps people always in the horror of the reign of arbitrary will and, hence, the ubiquitous disapproval of Freedom. This power conception of Freedom has been effectively used by every dictator[311], and

[302] Stephanie Batters, 'Care of the Self and the Will to Freedom: Michel Foucault, Critique and Ethics' [2011] Senior Honors Projects 5. However, there are a few exceptions that rightly point out thae Freedom is necessarily the antithesis of power. See Johan Zaaiman, 'Power and Freedom: Reflecting on the Relationship' (2021) 86 Koers 1.

[303] Arendt (n 162) 38.

[304] Almost all the major discourses take Freedom as indicative of this version of the power of doing anything against another.

[305] For other versions of Freedom, for instance, see Mark Haugaard, 'Two types of freedom and four dimensions of power' (2016) 275 Revue internationale de philosophie 37; Robert A Dahl, 'The Concept of Power' (2007) 2 Behavioral Science 201.

[306] Schubert (n 152) 6.

[307] Gadamer (n 205). This version may also be relatable to McCall's version. See Storrs McCall, 'Freedom Defined as the Power to Decide' (1984) 21 American Philosophical Quarterly 329.

[308] Gadamer (n 205) 202.

[309] Gadamer (n 205) 202. Gadamer presents it as - At every moment something new can begin, something whose sole origin is the primary and common source of all human activity.

[310] Pettit (n 150) 589. Pettit explains antipower as a social resource and still, in a broader sense, a form of power.

[311] Including both de facto dictator and de jure dictator.

every oligarch around the world to keep their 'arbitrary power'[312] intact to achieve their own exclusive and unlimited interests. Using the made-up terror of Freedom, they, with the camouflage of saviour and common paternal figures, control and decides the faith of the people as per their will.[313] Conceptions of Freedom may significantly vary among the proponents of Freedom, but their common and invariable tendency of subscribing to the 'powerful conception of Freedom' ultimately takes them to the same position as that of Fichte in tyrannizing and justifying the tyranny in the name of Freedom.[314]

Freedom is no way, relatable to either the dominant version of Freedom or the Foucauldian version of Freedom. As Knight correctly states '[l]iberty is one thing, and power another'[315]. Both require two persons – one person exercises the power and another is the subject or victim of this power or domination; for the Foucauldian version of power, the two persons are the influencer and the influenced.[316] On the other hand, Freedom is completely an internal and personal issue and does not, necessarily, requires a second person.[317] Taking Freedom from the perspective of power gives rise to another problem – it requires expression and awareness of the activities assumed to be identical to Freedom. As Gadamer posits '[a]ll power exists only in its expression. Expression is not only the manifestation of power but its reality'[318]. Further, it should be noticed that Freedom precedes power. As Foucault acknowledges that power exists when the parties involved in the relationship have certain degrees of Freedom.[319] Thus, as time separates Freedom from power, it is evident that these are not the same. In addition, as Arendt claims that the power by its nature cannot be legitimately owned by the individual, it, 'belongs to the group and it exists so long as the group holds together'[320]. Batters referring to the position of Foucault, states that the '[f]reedom is anti-thesis of power'[321]. Locke is also aware of

[312] Power, in its prevalent sense, is always arbitrary. However, the redundancy is to put enough emphasis of the danger involved in taking Freedom from the perspective of power.
[313] Pock (n 51) 69. He states – 'power is in itself evil no matter who wields it'.
[314] For instance, although the conception of Freedom as propounded by Mill, Kant, Rousseau, Locke and others are fundamentally different, they all take Freedom as a reflection of power or as a synonym for power.
[315] Knight (n 132) 93.
[316] Dahl (n 305) 202–203.
[317] This point is explained in Chapter 3.
[318] Gadamer (n 205) 202. Gadamer referring to the dialectic account of Hagel claims: power is more than its expression. It possesses potentiality also—… It has the mode of "suspension" …It follows that power cannot be known or measured in terms of its expressions, but only experienced as an indwelling. The observation of an effect always shows only the cause, and not the power … But even then, it is through an awareness that power is experienced. Interiority is the mode of experiencing power because power, of its nature, is related to itself alone.
[319] Batters (n 302) 6.
[320] Tomasz Bekrycht, 'Positive Law and the Idea of Freedom' (Łódź University Press 2017) 71.
[321] Batters (n 302) 31. He states the position of Foucault - The risk of dominating others and exercising a tyrannical power over them arises precisely only when one has not taken care of the self and has become the slave of one's desires. But if you take proper care of yourself, that is, if you know ontologically what you are, if you know what you are capable of, if you know what it means for you to be a citizen of a city… if you know what things you should and should not fear, if you know what you can reasonably hope for and, on the other hand,

the virtue of Freedom and, hence, he posits that when one is the master of his or her own, he or she quits 'the dangerous love of dominion'[322].

On the other hand, the energy version of power, philosophers including Gadamer, Ranke, and even Locke talk about, may or may not be relatable to the concept of Freedom; we are yet to know if Freedom is a sort of energy or not. Nevertheless, the energy version of power is not incompatible with Freedom as the energy version of power, like Freedom, is an internal phenomenon or noumenon. Gadamer states ' [o]ntologically, power is inwardness … It is not a contradiction for freedom to be limited'.[323] To Locke, will is the power to prefer one over another though.[324] Locke's power is, more or less, similar to the 'germinal' power of Ranke and this power is not applied to another person; but to prefer one action over another.[325]

The fourth type of power ie anti-power Pettit talks about is not exactly the power but through the metaphor he wants to explain ani-power as a sort of power although its nature is fundamentally different from that of the nature of power. When A is fundamentally different from B by its nature, it is logically desirable not to consider them as the same matter only because of the similarity of their form; a tiger is not a lion.

2.3.6 Freedom as a Subject Matter of Balancing

The Freedom proponents claim that Freedom is absolute, inalienable, and an existential component without which humans are not humans. Interestingly, the same scholars tell us that Freedom is subject to numerous considerations and, hence, requires balancing. They, literally propose everything ie state interest, public interest, countless values, and different kinds of freedoms against which Freedom is to be balanced. Isn't it like saying that all people have the inalienable right to marry provided that he or she is financially solvent enough to purchase a yacht!! It demonstrates that the true nature of Freedom is yet to be understood as Freedom is something that can never be compromised. Constant states:

> All exile pronounced by an assembly for alleged reasons of public safety is a crime which that assembly itself commits against public safety, which resides only in respect for the laws, in the observance of forms, and in the maintenance of safeguards.[326]

what things should not matter to you, if you know, finally, that you should not be afraid of death – if you know all this, you cannot abuse your power over others'.

[322] Brady (n 225) 339.
[323] Gadamer (n 205) 203.
[324] Rickless (n 130).
[325] Rickless (n 130).
[326] Constant (n 141) 322.

Unfortunately, we have not had the luck to find a scholar or philosopher who holds that Freedom is not subject to the mediaeval legal concepts such as public interest, state security etc.[327] Freedom has been always, invariably, subject to these anti-theses of Freedom. We hold the belief that, probably, nothing is more dangerous to Freedom than these terms; human Freedom has been always denied in the name of these legal terms although these terms have nothing to do with one's Freedom given the inherently personal nature of Freedom. It is never Freedom that is responsible for the threat to the public interest or state interest; instead, it is the violation of Freedom that is responsible.[328]

Even if we consider that these terms have anything to do with Freedom, how do we balance Freedom against these concepts? What is the standard or scale? Who is doing it? The mighty governments, however democratic are these, 'can criminalise almost anything that can arbitrarily be defined as a harm to others'[329] Therefore, Mill's harm principle is not sufficient to protect the Freedom of people as it is, practically, impossible to draw a dividing line between which action is harmful and which is not, and thereby, the government has always the option to interfere in the life of its citizens just by manipulating the dividing line.[330] British Judge Denning, quite appropriately states that 'the line where criticism ends and sedition begins is capable of infinite variations'[331]. However, quite interestingly, the British judge does not forget to take the credit for having such a rare ability that is, in fact, not affordable. He expresses satisfaction and claims that the Common Law is very effective in drawing a line between the two as the task of drawing the line between criticism and sedition is entrusted with the jury 'who are independent of the party in power in the State'.[332]

This is a sort of false satisfaction based on no essence of its own. Cannot we see that the people in the jurists are also part of the society that may inflict allegations on the person who is charged and being judged? Even if they are not part of the society (supposedly and authentically chosen people who themselves are sort of detached from the society), they, being separate persons themselves, have their own personal views about life. Thus, the personal issue is taken in the interpersonal realm and, hence, Freedom is endangered. A person being just a person is very weak compared to the mighty state

[327] However, *prima facie*, Humboldt may seem an exception. Humboldt, suggest that the state must as much as possible stay away from interfering in its citizen's life, except in the case of state security and he further clarifies that state security does not refer to the security of the state itself, instead it is in the interest of the people. See Humboldt (n 214) 86–92. However, as we have demonstrated in Chapter 4, even such kind of indirect impediment against Freedom could be very dangerous.
[328] This point is further discussed in Chapter 4.
[329] Quinney (n 54).
[330] To understand, for instance, how messy the explanation of harm may be, see Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90 Journal of Criminal Law and Criminology 109; Marianne Giles, 'R v Brown: Consensual Harm and the Public Interest' (1994) 57 The Modern Law Review 101.
[331] Denning (n 168) 36.
[332] Denning (n 168) 36.

power.[333] Let people demolish the government time and again and thus let them be aware of their conduct and let them observe the effect of their acts and, thereby, feel it and understand it. Let them feel their importance and only this way people become responsible.[334]

Waldron finds Freedom as a contested concept as for him liberty of one is the oppression of others.[335] Liberal scholars, including Berlin, consider Freedom as a value like other values ie equality, security, justice, happiness, public order, etc and, to them, these are conflicting with each other and therefore need to be balanced against each other.[336] Berlin claims that the immense value attached to Freedom by the scholars is due to their illusion that humans may reach such a 'perfect state' where no value of humans will be in conflict.[337] Berlin thinks it is impossible.[338] We do also agree with Berlin that the methods the Enlightenment thinkers suggest will never lead people to achieve the 'perfect state' in the real world.[339] However, we submit that with our freejon approach, there can exist more than one sovereign value. There are values that stay parallel to each other and, hence, no possibility of conflict.[340] In addition, we must remember all values are not equally connected to all issues; therefore, it is always possible to prioritise value in bearing in mind the proximity of connection. For example, social value has its place in society whereas, in the personal matter, it has the least importance in comparison to Freedom.

Already confusing weather becomes even more confusing with the introduction of some misleading and ambiguous terms such as social freedom, religious freedom and most prominent of all political freedom. Further, even there are terms such as philosophical freedom, freedom of will, etc. Their general claim is that these freedoms are intimately connected with Freedom and that Freedom cannot be completely achieved without the guarantee of these freedoms.[341] However, unfortunately, these freedoms are, on many occasions, in conflict with Freedom.

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[333] Humboldt (n 214) 68.
[334] This point is further clarified in Chapter 4.
[335] Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (n 43) 268.
[336] Berlin, *Liberty* (n 49) 215. Knight (n 132) 89. Rawls presents Freedom as a social value and expects to balance it against other values to ensure justice and, to him, justice is the supreme value and other values are subject to it. See Rawls (n 132) 54.
[337] Berlin, *Liberty* (n 49) 214.
[338] Berlin, *Liberty* (n 49) 214.
[339] They for instance think that when people are driven by absolute reasons there will remain no conflict of interest among the human. See, for instance, the methods that are suggested by Hegel, Locke, Kant, and others.
[340] Chapter 8, for instance, demonstrates how Freedom and equality can stay together being both sovereign virtues.
[341] Dario Maimone, Pietro Navarra and Sebastiano Bavetta (eds), 'EconomicFreedom, Political Freedom, and IndividualWell-Being', *Freedom and the Pursuit of Happiness: An Economic and Political Perspective* (Cambridge University Press 2014) <https://www.cambridge.org/core/books/freedom-and-the-pursuit-of-happiness/economicfreedom-political-freedom-and-individualwellbeing/3D2C512A3141AB55C45899599ECF4121> accessed 26 May 2023; William T Blackstone, 'The Concept of Political Freedom' (1973) 2 Social Theory and Practice 421; Wenbo Wu and Otto A Davis,

There are some scholars who goes on as far as to claim individual freedom has no value without making proper arrangements or compromise with these freedoms; these freedoms are the precondition of Freedom and, hence, they advise us to make a compromise between or combine, as the case may be, Freedom with these freedoms.[342] To Arendt, Freedom that remains within the personal sphere has no value of its own apart from its philosophical value and such Freedom has nothing to do with politics.[343] Politics, as she claims, with which we have an agreement, is incompatible with Freedom in the sense that the former is all about action, while for the latter, action is not an essential condition. She states, '[t]he raison d'etre of politics is freedom, and its field of experience is action'[344], whereas our concept of Freedom rejects the action theory of Freedom.

On the other hand, Constant, although advises us to combine political liberty and individual liberty, insists on not sacrificing Freedom for political freedom.[345] Condorcet, although he considers political freedom as a branch of Freedom, realizes that political freedom has to be considered separately from Freedom.[346] He posits 'you will find almost everywhere a clear difference between legal freedom, that is to say, freedom arising from the law, and real freedom[347]. Thus, he along with many others holds that Freedom can exist without the assistance of other types of freedom.[348] On a similar note, Dennett clarifies that '[t]he real threats to freedom are not metaphysical but political and social'[349].

While we agree with Dennett and hold the belief that it will be the wisest decision to take Freedom out of the political and social metaphors and gives its place in the person, our submission is more fundamental. We are in the trap of the jungle of jargon and words of different natures that convey subjective senses. Freedom despite philosophical also practical. Freedom is not relatable to the freedom

'Economic Freedom and Political Freedom' in Charles K Rowley and Friedrich Schneider (eds), *The Encyclopedia of Public Choice* (Springer US 2004) <https://doi.org/10.1007/978-0-306-47828-4_79> accessed 26 May 2023.

[342] Constant (n 141) 237. He states - political liberty is the most powerful, the most effective means of self-development that heaven has given us.

[343] Arendt (n 162) 37.

[344] Arendt (n 162) 28.

[345] Constant (n 141) 321. Individual independence is the first need of the modems: consequently, one must never require from them any sacrifices to establish political liberty.

[346] Condorcet (n 89) 185. He states – This (political freedom) is not an add-on to the freedom of the individual, but rather a branch of that freedom which has to be considered separately.

[347] Condorcet (n 89) 189.

[348] Condorcet (n 89) xxxiii. Lukes and Urbinati point out, in the editorial note on Condorcet's writing, that the Freedom 'concerns areas of freedom that are considered separate from political liberty' and it can exist in absence of the so-called political freedom. Condorcet rightly recognises that Rousseau's conception of political liberty is a liberty that does not belong to the mass; general people cannot feel it or hold touch with it. Condorcet further specifically clarifies that this liberty is subject to laws and the laws, Condorcet states 'emanate from the will of the general citizen'. We reemphasise that Freedom is not subject to the law, but the law does subject to Freedom. Thus, the so-called political liberty fails to fulfil the standard requires to be considered as Freedom. See Emma Rothschild, *Economic Sentiments* (Harvard University Press 2013) 201.

[349] Dennett (n 99) 287.

of will as popularised by Hobbes and his followers. However, it does not mean that the Freedom is devoid of will, desire, passion, etc. We reject all these terms like political liberty, social liberty etc. as such to relate to Freedom. What is religious freedom or liberty? I can perform my own religion on my own terms. How is it not individual freedom or simply Freedom? How can there be an absurd concept as religious freedom in the sense of Freedom?

What is listed under the heading of political liberty or political freedom? The right to vote, the right to participate in a political assembly, etc. When we talk about the right to vote or the right to participate in a political assembly, there is a twist. These two claims are not equivalent to claims that we have the freedom to vote or we have the freedom to participate in the assembly. Furthermore, the pair of claims is not similar to the claims that we have the freedom to decide whether we will vote or not, or we have the freedom to decide whether we will participate in such an assembly or not. It is very important to understand the differences between these three pairs of claims; most of the time the differences are overlooked and hence messing up the meaning of Freedom. The meanings of the third pair of claims are significantly different from the meanings of the previous two pairs of claims. The third pair of claims are the claims of Freedom. On the other hand, first two pairs of claims have some connections with Freedom but not exclusively with Freedom; these claims include the claims of Freedom plus the claims of something more ie recognition, law, politics, etc. When our discourse is about Freedom, the first two pairs of claims are not logically correct although both pairs are aimed at conveying senses similar to the third pair of claims. Only the third pair of claims are decisively relatable to Freedom.

What are listed under the heading of so-called social liberty or freedom? We have the right to associate with people; or we have the right to talk to our fellow members of society. We have the freedom to associate with people; or we have the freedom to talk to people. We have the Freedom to decide whether we will be associating with people or not; we have the Freedom to decide whether we will talk to people or not. Like the previous 3 pairs of claims, only the last pair of claims are exclusively relatable to our Freedom. In fact, this is the individual Freedom that is at the centre of discussion and objective too.

Hart, challenging the exclusive significance of individual freedom, posits:

> [L]line which Mill attempts to draw between actions with which the law may interfere and those which it may not is illusory. "No man is an island"; and in an organised society it is impossible to identify classes of actions which harm no one or no one but the individual who does them.[350]

[350] HLA Hart and Herbert Lionel Adolphus Hart, *Law, Liberty, and Morality* (Stanford University Press 1963) 5.

Everything is connected to everything but in an order and minding the order is the key in every case. Definitely, social life, personal life, political life, religious life, cultural life, and legal life belong to the same paradigm ie the worldly paradigm but there exists a dynamic of order between them and the order determines the connections among them. There is no doubt, as it is confirmed by Condorcet too, that the political, or the social opinions are relatable to Freedom.[351] Nevertheless, it will be a grave mistake if one, although many scholars do so, claim these opinions are subject to social, religious, or political authority. X, for example, is an individual person (suppose a male) who lives in a society and in a political and religious atmosphere. There is no doubt that he also lives with other people ie A, B, C, D, and so on. X has the Freedom to take the decision of associating with A, B, C, and others. It is his individual Freedom or just Freedom. How come it becomes social freedom? They claim that this individual freedom does not have any value as long as it is not manifested in action (action concept) or does not have the capacity to make it happen (capacity concept). To their opinion, until he or she has the power to commit A, B, C or others in the association (power concept), X's Freedom is of no value. Now they ask - what can make it happen? What can give him or her the capacity or power to associate with A, B, C…? It is commonly claimed that it is society or politics or religious group that authorises such association. Therefore, as they obsessively and illogically claim, these are political freedom or social freedom and so on. Such an absurd claim is in no way good for Freedom but rather repugnant to Freedom in countless ways. A, B, C …associate with X by virtue of their own individual freedom or simply Freedom. The same is true for X. How on earth does society or politics take the credit for it?

However, arguendo, if this absurdity is counted as facticity at all, it is just opening another frontier to unfreedom. Society or politics is compelling or forcing A, B, C, … to associate with X by authorising X to do so. How can there exist individual freedom of A, B, C, ...? In the same vein, when X has to wait for the authorisation of society or political association or institution, how come it is his or her Freedom? Instead, why should not we call it terms like authorisation, permission, opportunity and so on? They just twisted things. If we see the list of Mill's 'Social Liberty'[352], we will find that the list mostly includes individual Freedom or Freedom with some acts that are in no way relatable to Freedom. Hanna Arendt states:

> Freedom as related to politics is not a phenomenon of the will . . . Rather it is . . . the freedom to call something into being which did not exist before, which was not given, not even as an object of cognition or imagination, … politics is the forum in which men act and freedom appears.[353]

[351] Condorcet (n 89) 185.
[352] Mill (n 53) 103.
[353] Bruegger (n 58) 93.

A person being a political agent can, subject to the rules of politics and the political association or community he or she belongs to, come up with new concepts. He or she can come up with a new concept because he or she is so permitted or we can say that he or she belongs to such a political association that gives its members the flexibility to go beyond its usual rules and, hereby, comes up with new rules that was never exist before. This is not a political liberty in the sense of Freedom. Instead, it is a sort of political permission, authority, discretion, or political flexibility that is granted in favour of the person. For example, whether X will vote or not or will he or she subscribe to the religious group or not - these are questions of Freedom. These are condition precedents to enter the political or religious spheres. Once in politics or religion, he or she is subject to politics or religion. Now politics or religion may grant him permission or flexibility to come up with something new in the political or religious practices. This is just permission or authorisation and what he or she exercises is discretion, not Freedom, despite he or she might need to exercise his or her individual faculties or inner views of personal nature in such a case. In contrast, an act, the symptom of Freedom, does not, necessarily, become subject to political or public authorisation only because the act is executed in public or with reference to politics. Bromwich states:

> Public activity and discussion is for Mill, a form of life, a culture, put into regular performance by political arrangements, but owing its existence to and deriving continuous energy from a state of manners more deepseated than politics.[354]

This is the Freedom from which the activity owes its existence or derives its energy, although it takes place in the public or social or political sphere. Therefore, there is no chance to name these activities as social or political liberty. As Arendt states politics is just the stage where the Freedom is expressed or performed (if it is expressible). X can perform classical dance on any stage. How absurd it would be if people start to change the name of classical dance based on the names of the stages where it is performed!!! If someone is allowed to invent a new trend in social action or political action, we may say that society or politics grants opportunity or flexibility for social or political innovation or discretion. Still, if they persist to keep using ambiguous terms ie political liberty or social liberty, they can use them in a metaphoric sense. In such a case these are relatable to Freedom only in the metaphoric sense as the moon is relatable to face or as the human brain is relatable to computer processors.

Finally, Berlin who understands freedom probably more than anyone else makes the irreversible mistake of proposing to balance between 'Freedom to' and 'Freedom from' commonly known as positive freedom and negative freedom respectively.[355] The list concept of Freedom that gives rise to these two famous versions of Freedom is the reason for Berlin's confusion. The 'Freedom from' has

[354] Bromwich (n 144) 26.
[355] Berlin, *Liberty* (n 49).

been here for a long time as we necessarily see Freedom from the external perspective.[356] On the other hand, 'Freedom to' has emerged as a direct consequence of the weird attitude of grading Freedom. In addition, the false amici problem that relate one apparently relevant concept with an irrelevant concept is responsible for generating the misleading sense that the complete manifestation of Freedom is subject to the positive duty of the state. Condorcet's 'other liberty'[357] as distinguished from the political liberty is the liberty for all and, by substance, is closely relatable to the Freedom we are talking about. Unfortunately, the lawjon approach, Condorcet is trapped in[358], lands him to confuse Freedom with apparently similar concepts like independence or autonomy.[359] Consequently, he defines Freedom as 'the liberty of disposing freely of one's own person, of not being dependent, for one's food, for one's sentiments, for one's tastes, on the whims of a man'.[360] Berlin, Mill, Rawls and many others do the same mistake.[361]

Berlin invests a considerable amount of his valuable time describing the imminent danger of following either of these versions of Freedom.[362] Berlin, along with others, warns that these two versions of Freedom are a big threat to the very existence of Freedom. Berlin claims that '[t]hese are not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life'[363]. Berlin thinks that true Freedom lies in the balance between these 'two profoundly divergent and irreconcilable attitudes'.[364] Berlin's wish to make a balance between these two extreme attitudes is likely to turn out to be a boomerang; this will keep taking us to the place we want to run away from. This will take Freedom to the custody of the law, the legal experts, and other experts and this is exactly what Berlin always criticizes because he does not want Freedom should be the cup of a few peoples' tea. We submit that there is no such distinction, and this distinction arises because they

[356] Maria Dimova-Cookson, 'The Two Modern Liberties of Constant and Berlin' (2022) 48 History of European Ideas 229.
[357] Rothschild (n 348) 202.
[358] His statement demonstrates how extensively he is engrossed by the lawjon approach. He states – 'It is everybody's right to be able to enjoy natural freedom in accordance with the law'; see Condorcet (n 89) 185.
[359] Rothschild (n 348) 202. Constant also does the same. He states - Individual independence is the first need of the modems. Here, he uses the word independence to refer to Freedom; see Constant (n 141) 321.
[360] Rothschild (n 172) 684.
[361] Rawls (n 132) 54, 55; Mill (n 53) 161.
[362] Berlin states – 'belief in negative freedom is compatible with, and (so far as ideas influence conduct) has played its part in generating, great and lasting social evils course, used to support politically and socially destructive policies which armed the strong, the brutal and the unscrupulous against the humane and the weak, the able and ruthless against the less gifted and the less fortunate. Freedom for the wolves has often meant death to the sheep'. Berlin, *Liberty* (n 49) 37–38. He further, states – 'Legal liberties are compatible with extremes of exploitation, brutality and injustice. The case for intervention, by the State or other effective agencies, to secure conditions for both positive, and at least a minimum degree of negative, liberty for individuals, is overwhelmingly strong'. Liberals like Tocqueville and J. S. Mill, and even Benjamin Constant (who prized negative liberty beyond any modern writer), were not unaware of this; see Berlin, *Liberty* (n 49) 38.
[363] Berlin, *Liberty* (n 49) 212.
[364] Berlin, *Liberty* (n 49) 212.

consider Freedom from the lawjon perspective. They consider law as the precondition of Freedom and, hence, see Freedom in relation to the nature of legal actions necessarily sought. They take the list of the activities the Freedom catalogue includes and then align the activities with reference to the legal nature of actions required to take care of the Freedoms. Can we, just for a moment, think that there is no law?[365] Where is the classification? Nowhere. And we can and should think of Freedom before the introduction of law; because the law is introduced only after the issue of Freedom is settled, neither before nor simultaneously.[366] How can we expect the refrainment of something that is yet to come into being? How can we expect that the thing, which is yet to come into being, provides us something?

We understand that we are likely to face a typical question that the lawjon approach always raises: how can Freedom exist without a guarantee? What exists, does exist; requires no guarantee. The fear of violation of Freedom cannot deny the existence of Freedom. As we have claimed earlier, the fear of being sick cannot deny the prevalence of health; even the absolute certainty of death cannot claim that I do not have a life. Berlin, Condorcet and many others wonder how one can enjoy Freedom without the guarantee of basic necessities like food, clothes, etc![367] They are worried that a human alone is not sufficient; he or she needs space, food, and shelter and until he or she is not part of the interpersonal social and legal relationship, he or she does not have either of these. He or she does not have rights, as he or she is not part of the right system.[368] He or she is literally dead. What is the point of having such freedom? Does not he or she need help from the society or state for these basic necessities? Are not these basic necessities precondition to the exercise of his or her Freedom?

Before responding to the questions, we want to add another question. We admit that food, shelter, spaces, etc are inevitable for life. Sunlight, air for breathing, and water for drinking are also inevitable. How can one survive if the law does not provide air for breathing, water for drinking and sunlight? Our question, although logically relevant to their questions, may seem absurd to them. We submit that their question is as absurd as that of ours. They argue that the limitational aspect of the resources renders their questions logical and our question absurd. According to them and as the prevalent conceptions go on - land, food, etc are limited and therefore require regulation whereas the sunlight or air for breathing is unlimited, hence not worthy of regulation. Nevertheless, the truth is that their such a claim is a historical fallacy; this is not the limitation but the exploitability of the resources that prompts the necessity of regulation and, largely, these are the exploiters who influence, if not lead, the enactment of

[365] In fact, there is no law as long as the question of Freedom is not settled.
[366] Chapter 8 further clarifies this point.
[367] Rothschild (n 172) 684; Berlin, *Liberty* (n 49) 35.
[368] Neoh (n 32); Dworkin, *Taking Rights Seriously* (n 1). This point is essentially connected to concepts like plots, theoretical frameworks, etc. Latter Chapters have detailed discussions on these points.

legislations regulating these resources inevitable for human.[369] However, given the scope of the thesis, we resist the temptation to discuss further in this issue; neither do we need to justify whether the limitation or exploitability of resources gives rise to the regulation of the resources. For the purpose of this thesis, it is sufficient to understand a concept that we call Freedom resources (FR) and the concept will be discussed in length in the next chapter. The concept will demonstrate that no one is subject to anyone for these resources, one needs to exist as a human. We are not taking the perspective of the natural law. The absurdity of the claim is demonstratable with reference to the brute facts that are not questionable. We have questions regarding the limit of these resources one needs; we do not have any questions relating to the necessity of these resources. Who on earth can claim that human worldly existence can be conceived without a minimum space guaranteed for him or her? Such a claim is no less absurd than claiming that people don't have the right to breathe.

[369] History reveals that the laws regulating the uses of material resources have been prompted by the exploitability of the resources, not the limitation of the resources. From this experience, it is likely that the exploiters of the natural resources will make the sunlight or air subject to legal regulations as soon as they get a way out to exploit and control the availability of these natural resources.

Chapter 3: Freedom, Conception Problem – Solved

The prime objective of this chapter is to resolve the confusion associated with the concept of Freedom and thereby, lay the theoretical and philosophical foundation of the lawjon approach. The chapter ends with clarifying two points associated with the conception of Freedom.

3.1 Freedom - What It Is.

The wrong answers and the weird conceptions of Freedom are due to various factors. The peculiar nature of legal terminology is one of the main factors.[370] Many of the legal terms, with their special legal meanings, are readily borrowed from the words and terms of daily use without maintaining the distinctive line between the meanings of daily use and that of legal use.[371] This is a grave defect in legal practice.[372] The word Freedom is a word that is often used in the legal arena as a replacement for many legal terms and concepts with their distinct legal meaning and significance attached.[373] The problem is intensified when the word, which has its own diverse meaning in daily life, is used in law to mean different legal concepts. For example, let's take a line from Bromwich:

> The governor's soldiers enjoyed unlimited freedom to identify rebels and put them to death, and floggings of men, women, and children became commonplace.[374]

Here, it is noticeable how loosely Bromwich uses the word Freedom in the sentence. It is apparent that he wants to mean governor's soldiers have immunity or license or authority, or privilege (less likely) to do (or in doing) those acts. The sense he wants to convey through the word freedom is not, in any consideration, the same or similar to the sense the word Freedom stands for in its regular meaning,

[370] Anshen (n 23); Davis and Kelley (n 23); European Convention for the Protection of Human Rights and Fundamental Freedoms; Leoni (n 23); Heidegger (n 23); Foner (n 23).

[371] Hamowy (n 59) 349. Hamowy states how naive the political and legal scholars may become as they often use the word Freedom without defining the word and readily 'relying principally on the common sense meaning'.

[372] This defect is enough to create a substantial vagueness in the legal meaning of words. Although some scholars like Dworkin, Christie, Waldron and many others support such vagueness for, allegedly, positive grounds, the vagueness associated with the meaning of Freedom causes a huge problem as this keeps the legal arena away from the freejon approach. To know the benefit associated with the vagueness see George C Christie, 'Vagueness and Legal Language' 48 Minnesota Law Review; Timothy AO Endicott and Timothy AO Endicott, *Vagueness in Law* (Oxford University Press 2000); Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 California Law Review 509. For a neutral and critical account against the benefit of see Hrafn Asgeirsson, 'On the Instrumental Value of Vagueness in the Law' (2015) 125 Ethics 425. However, our freejon approach finds no such benefit of the vagueness of the legal words and terms. Instead, it finds such vagueness is detrimental to the authority and sense of law.

[373] As we have already seen in the last chapter, how diverse meanings the term Freedom may be associated with.

[374] Bromwich (n 144) 17.

while all these legal terms themselves convey different meanings in the law itself.[375] This is just a typical example of using some words too loosely. This confusing and unscientific practice, as Hohfeld posits, is responsible for 'much of the difficulty' arising in understanding a word or term from a legal perspective.[376] Consequently, we see how easily and frequently, if not inevitably, Freedom is muddled with apparently similar legal concepts like power, privilege, immunity, etc.[377] The imperative, licensed, inconsiderate, and/ or unrestrained senses intrinsically attached to these legal terms present Freedom with its notoriety as claimed by the dominant section of the political and legal arenas. However, as we have seen in the discussion of the previous section and as we will get the right answer in this section, it will be clarified that Freedom does not have any functional connections with these terms. Most significantly, all these legal terms are other-affecting, whereas Freedom is, 'necessarily', self-affecting.

In relation to the nature of legal terminology, it should also be pointed out that the repurposed use of the common words in law, creates the situation more complicated as the words so used in law, generally, are expected to have 'fictional'[378] sense in many cases.[379] Unfortunately, when lawyers or legal scholars deal with these fictional and repurposed words or terms they neither walk along the line of the rules of fiction nor do they maintain the line between the purposed meaning and repurposed meaning.[380] The legal arena fails to come up with either a fictional concept of Freedom or a real concept of Freedom.[381]

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[375] The legal terms immunity, license, authority, or privilege have their respective meanings of their own in the legal practice, although the meanings are not unambiguous enough to be considered as distinguishable meanings. Therefore, the senses the terms are supposed to reflect in legal discourse are themselves ambiguous. In such a circumstance muddling these terms with the very different meanings of freedom only further complicates the already complicated situation.

[376] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24) 24.

[377] We have seen this in detail in the last chapter.

[378] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24).

[379] To see, for instance, the problems associated with the repurposed use of daily life words in fictional meaning of law see 'What We Talk about When We Talk about Persons: The Language of a Legal Fiction' (2001) 114 Harvard Law Review 1745.

[380] In fact, neither are they able to avoid such mistakes because they are not aware of the sense of law and hence, they are not aware of how they, unconsciously and automatically, are drawn by the sense of law in their legal practice. In due course of the thesis, this point will be further clarified.

[381] Our conviction is based on the fact that the conceptions (to be specific 'misconception') about Freedom, which dominate the legal arena, are by and large founded on the philosophies of the philosophers like Hobbes, Hegel, Rousseau, and others, who, generally and strikingly, miss the dividing line between the material world and the absolute world. Hobbesian practical concepts of Freedom are devoid of practicality whereas the fictional concepts of Freedom as proposed by Rousseau, Kant, Hegel and others suffer a lot as they overlook the lines between different paradigms. For instance, Hegel's philosophy is primarily a philosophy that blurs the dividing line between the material world and the absolute world. Hegel's unity of the single process, for instance, is nothing but a core feature of the absolute world that is beyond the material world. His process 'degrades the [worldly] individual to the level of a mere tool in the hands of the idea' of that single process. See Francis L Jackson, 'Hegel's Psychology Of Freedom' (see generally); SW Dyde, 'Hegel's Conception of Freedom' (1894) 3 The Philosophical Review 655, 655. As we will move forward, we will see how is this Hegelian process substantially incompatible with the sense of law that put the individual in its centre. Hobbes' practical concept of Freedom gives emphasis on the practical and external measures that will be taken to protect Freedom. Acton or circumstance where practical and external measures are missing or not possible to take, Freedom cannot

On a deeper level, there are inherent linguistic and phenomenological problems as identified by scholars and philosophers like Wittgenstein, Kant, Gadamer, Nerhot and others.[382] These problems and their impact on the meaning of Freedom contribute to making the situation more complicated. Taking note of *a priori*[383] and 'paradigm of fact'[384], sensing the phenomenon the fact presents[385], its contextualization and expressing it with an appropriate word or phrase takes a very complex process in which the main sense may be lost.[386] The lawjon-centric binary legal context, which holds that things within the premise of the positive law are legal and everything else is illegal (or if not illegal, at least blameworthy), is seriously constrained in processing a factual phenomenon the word Freedom is supposed to represent.[387] Humans are naturally evil – *a priori* assumption of all the scholars following the lawmen approach accelerates the process of giving the infamous and misleading meaning to Freedom. For example, we can take Hobbes' statement - '[e]very man by nature hath right to all things, that is to say, to do whatsoever he listeth to whom he listeth, to possess, use, and enjoy all things he will and can'.[388] The political context of his time and the *a priori* assumption motivates Hobbes to refer to the situation as depicted by the statement, **necessarily**, with reference to the concept of Freedom.[389] Following the same path, other jurists and scholars, necessarily, connect Freedom with the scenario depicted by Hobbes and hence the concept of Freedom seems as chaotic and unsafe as it is claimed, specially in the contexts of pluralism, altruism, justice, etc. The situation as depicted by the statement of Hobbes is **not necessarily** relatable to Freedom.

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meaningfully exist there. Unfortunately, his whole concept of Freedom and law is based on some impractical assumptions, for instance, humans are evil. See generally Hobbes (n 66).

[382] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (DF Pears and BF McGuinness trs, Taylor&Francis e-Library edition, Routledge 2002) (see generally); Colin Johnston, 'Tractarian Objects and Logical Categories' (2009) 167 Synthese 145 (see generally); Nerhot, 'Text and Meaning' (n 290) (see generally); M Potter, 'How Substantial Are Tractarian Objects Really?' (see generally); Nerhot, *Law, Interpretation and Reality* (n 26) (see generally); Gadamer (n 205) (see generally); Kant (n 28) 127–129 (specially see the effects of a priori cognitions).

[383] Kant (n 28) 127–129.

[384] Nerhot, *Law, Interpretation and Reality* (n 26).

[385] see generally, Wittgenstein (n 382).

[386] Sue Chaplin, '"Written in the Black Letter": The Gothic and/in the Rule of Law' (2005) 17 Law and Literature 47, 52. Chaplin, for instance, tells us how sense associated with a particular word is lost in the process of transcription. He states – 'The law's embodiment within the legal text gives it a certain permanence, but at the same time deprives it of its origin in the spoken word; the law is cut off from the paternal principle—the Logos'.

[387] Dworkin discuss the dual nature of legal rules in length. See Dworkin, *Taking Rights Seriously* (n 1) (Chapter II Model of Rules I) .

[388] JH Burns, James Henderson Burns and Mark Goldie, *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press 1994) 537.

[389] The political turmoil and fragile situation during his time apparently play a decisive role in making such sadistic and reactive conviction. Nevertheless, there is disagreement and mixed opinion on this point. See generally, Glenn Burgess, 'Contexts for the Writing and Publication of Hobbes's "Leviathan"' (1990) 11 History of Political Thought 675; Z Lubienski, 'Hobbes' Philosophy and Its Historical Background' (1930) 5 Journal of Philosophical Studies 175. However, we suspect Hobbes himself was such reactive as he is commonly portrayed. Instead, we find substantial evaluative convictions in his work, specially in Leviathan. We think that the scholars who follow him emphasise too much on his reactive conviction while ignoring the associated evaluative convictions about human nature.

Further, even it may be the case that the scholars, who apparently connect the word Freedom to such a negative sense not directly connected to the sense of Freedom, have not actually wanted to connect to the wrong sense or they have not connected in the manner as it appears.[390] The connection might be a product of the misreading of followers of the scholars and the misreading may take place even where the text is demonstrably plain.[391] The overall impact a word or term creates based on its context, position, tone, text design can outweigh the meaning it would have otherwise expressed.[392] This phenomenon of the meaning of an otherwise clear text is explained by Nerhot. Pointing to the game of chase in contrast with soccer, he shows how unpredictable is the result of a game of chess despite all the rules of the game being pre-set.[393] Similarly, the meaning of the plain text can vary because of something internal in it or around it. To further clarify the point we can, for example, consider the text of Constant on Freedom. He goes as '[p]olitical liberty is its guarantee, consequently, political liberty is indispensable … political liberty is the most powerful, the most effective means of self-development that heaven has given us'[394]. Despite the text giving us a strong message as to Constant's support for so-called political liberty, the overall sense the text[395] convey is that he prioritises individual liberty (Freedom) over political liberty. Rawls also gets the same sense.[396]

In addition, there is a problem with the very language we are expressing the word in. For example, let's talk about the English language. Fuller states – '[i]n a very real sense language sets us free by imposing limits on how we express what we intend to say'.[397] Has the English language set a limit on the sense the word Freedom stands for? Does the language have enough alternative words to convey the meanings or senses that are mistakenly expressed through the word Freedom? Do the linguists or the users of the language, take care of the limits? Weinsheimer and Marshal translate Gadamer's text as follows:

> Thus, we say of someone that he plays *with possibilities* or with plans. What we mean is clear. He *still has not committed himself* to the possibilities as to serious aims. *He still has the freedom to decide one way or the other*, for one or the other possibility. On the other hand, this *freedom is not without danger*. Rather, the game

[390] Latter chapters show in detail, how Mill and Rousseau, for instance, might have been presented in such a manner, which may give us a sense, that their narratives are betraying to Freedom.
[391] Wittgenstein, for instance, provide us with the insight that there are situations when neither the question nor the answer can be put into word. See Wittgenstein (n 382) 88–89. He states – 'There are, indeed, things that cannot be put into words. They make themselves manifest.' In relation t such things, we may use some words but for no logical meaning although the texts are clear.
[392] Wittgenstein (n 382) (see generally).
[393] Nerhot, 'Text and Meaning' (n 290) 92–94.
[394] Constant (n 141) 323–327.
[395] Condorcet (n 89) 323–327.
[396] Rawls (n 44) 176–177. Rawls states – 'Thus one might want to maintain, as Constant did, that the so-called liberty of the moderns is of greater value than the liberty of the ancients'.
[397] Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (n 87) 89.

> itself is a risk for the player. One can play only with serious possibilities. Obviously this means that one may become *so engrossed in them that they outplay one, as it were, and prevail over one*. The attraction that the game exercises on the player *lies in this risk. One enjoys a freedom of decision which at the same time is endangered and irrevocably limited*.[398]

In this paragraph, the word freedom has been used twice – in the 4th line and in the 5th line. The word 'freedom' that appears in the 4th line is more relatable to a sense of option or choice and in the positive sense; he or she has the opportunity to select from different options as he or she likes. On the other hand, the 'freedom' that appears in the 5th line, is referring something quite the opposite; no option left. Freedom of the 5th line gives us the sense that Freedom comes when choice ends while the freedom of the 4th line takes choice as the synonym of Freedom.

When we talk about Freedom, we are referring to a phenomenon or noumenon[399] or a deep sense that is universal, intrinsic and conveys a great significance for the human individual and for the determination of the destiny of the human species in general.[400] However, the English language expresses the great phenomenon through a, seemingly, insignificant[401] word 'freedom' that has a lot of irrelevant and misleading meanings in the major dictionaries of the language: 'the condition or right of being able or allowed to do, say, think, etc. whatever you want to, without being controlled or limited'[402], 'the power or right to do or say what you want without anyone stopping you'[403], 'state of being allowed to do what you want to do'[404], 'the power to do what you want to do: the ability to move or act freely'[405]. Black's Law Dictionary, 'the most widely cited law book in the world'[406], gives the most misleading meaning of Freedom – '1. The state of being free or liberated. 2. A political right'[407]. As demonstrated above, neither of the dictionary meanings is in line with the concept of Freedom. However, the linguistic blander is primarily responsible for popularizing the Hobbesian conception of Freedom. Neither the original image theory nor the reformed theory of language-game of Wittgenstein

[398] Gadamer (n 205) 106 (emphasis added).
[399] A Kantian term which is explained in Kant (n 28) 348–352.
[400] However, it should be clarified that destiny is never determined as the very nature of Freedom is such.
[401] Insignificant, in the sense that it so widely and diversly used that it loses its significance with relation to the grand sense of Freedom.
[402] 'Freedom' <https://dictionary.cambridge.org/dictionary/english/freedom> accessed 24 December 2021.
[403] 'Freedom' <https://www.oxfordlearnersdictionaries.com/definition/english/freedom?q=freedom> accessed 24 December 2021.
[404] 'Freedom Definition and Meaning' <https://www.collinsdictionary.com/dictionary/english/freedom> accessed 24 December 2021.
[405] 'Definition of FREEDOM' <https://www.merriam-webster.com/dictionary/freedom> accessed 24 December 2021.
[406] 'Black's Law Dictionary' (*Thomson Reuters Legal*) <https://legal.thomsonreuters.com/en/products/law-books/blacks-law-dictionary> accessed 11 January 2022.
[407] Bryan A Garner, *Black's Law Dictionary* (Thomson Reuters 2009).

support either of the meanings.[408] This kind of absurd, hyperbolic, and inconsiderate interpretation is not relatable with the picture the concept of Freedom is supposed to paint.

Let's go back to Hobbes' statement about Freedom and the context in which the statement was made. There are words in English like solipsism, authoritarianism, despotism, totalitarianism, egocentrism, dictatorship, etc. Aren't these words more relatable to the pictures painted by Hobbes's statement and the context? Aren't these words more relatable to the picture painted by the interpretations of the dictionaries? With the presence of all these words why would one consider, necessarily, referring to Freedom to represent the scenario depicted by the statement of Hobbes? Although there are no statistics, it can be presumed that people, in general, will love to save the word Freedom and only in that case English as a language can avoid the contention of not having a word that can be assigned to represent the fundamental phenomenon that one experiences or deserves to experience for being a human.

If our presumption goes wrong? In that case, we have to acknowledge that it is the flaws of the English language[409] that fails to give a word for the profound and shared sense of Freedom that is the constituting element of humans. At the same time, we must acknowledge that in either case, the legal arena completely fails to take note of this fundamental phenomenon.[410] It is not the word or words law is supposed to be aware of; it is the sense behind the word (or in Wittgenstein's term – picture or word games behind the word) law must have taken care of. Law, for good reasons[411], must distinguish the fundamental sense as represented by Freedom from other chaotic and unsafe senses. If, however, our presumption goes wrong (ie the word freedom does not necessarily represent a realizable and distinguishable picture of the fundamental sense we are referring to), law owes a duty in this regard. To realize is to reflect the expression of a word it is supposed to express. If the word does not generate the reflection the expression conveying word is supposed to come up with, it is certain that the word loses its significance in the context of the fundamental sense we are talking about. In such a case, the

[408] Wittgenstein (n 382); Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe, PMS Hacker and Joachim Schulte trs, John Wiley & Sons 2009) (see generally). The former book takes word with reference to the image or picture, while the latter ie revised book take word as a representation of the language-game.

[409] However, it should be noted that not only English but also other languages contain such flaws. We face further problems because of the differences between the written form of language and the verbal form of language. See Chaplin (n 386) (see generally) . Even further complication arises as people distort the general rules and meaning of the language to give hyperbolic sense, or to fill gaps in the speech and writing. Every language has this kind of words that are used too liberally to give too remote meaning of the word.

[410] All these meritless legal disputes in relation to the concept of Freedom is the conclusive evidence that the legal arena completely fails to comprehend the sense associated with the word Freedom. To see some meritless reasoning against the concept of Freedom (or liberty as it is termed in most of cases) see the dissenting opinions made in *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44); *Obergefell v Hodges* [2015] Supreme Court of the USA 576 U.S. 644 (2015). A large part of Dworkin's narrative also reflects the unawareness of the profound sense the word Freedom is associated with.

[411] To be explained in the later section of this thesis.

law is not supposed to stick to the word. Instead, law, using its fictional mechanism, must introduce a word that can effectively sketch the picture of the phenomenon (or noumenon).

Now it is time to focus on the appropriate interpretation of Freedom. To this end, like Nerhot[412], we find the theory of coherence is more reliable than the theory of correspondence.[413] In search of a coherent interpretation of Freedom, the Bengali language can be a good starting point. In Bengali, the word for the sense of Freedom is 'Swadhinata', which can be split into two elements – 'Swadhin' + 'ata' (state of).[414] Thus, the word 'Swadhinata' refers to the state of being 'Swadhin'. The word 'Swadhin' can further be split into two elements - 'Swa' (self) + 'adhin' (under supervision, control, or scope).[415] Therefore, the word 'Swadhinata' means – the state where one is under the control of the self. Thus, to say I have Freedom is to say, roughly, I am in a state or condition where my self is in charge of me. My self is in charge of my actions, inactions, responses, responsibilities, irresponsibilities, pain, pleasure, etc; it is in charge of my 'everything' including 'nothing'[416]. Freedom is simply a condition or state of self.

The condition seems not far from Condorcet and Fichte's[417] condition of the 'inner self'[418] or, as Brady says, simply a 'state of freedom'[419] ; a state when, as Rousseu[420] says, I am the author of my conducts. A similar Bengali word is 'Swecchadhin' that constitutes of three elements 'Swa' (self) + 'icchar' (of will) + 'adhin' (under supervision, control, or scope).[421] Thus the word indicates that the things are not directly under control or scope of self but under the controll of the will of the self. It also indicates that the self, itself, is under the control of will to a some extent. However, self, still has its voice. There is another Bengali word called 'Swecchachari' that connsits of three elements 'Swa' (self) + 'icchar' (of will) + 'achari' or 'achoronkari'(habituated to behave).[422] In this case, the self is habituated to behave as per the instructions of will or, to tell itanotherr waythe, self becomes the slave of will.

If we cast our eyes to Hindi language, we find similar three words that depict similar pictures. Hindi 'Swadhinata' is also consists of the same three elements as that of Bengali. Bengali 'Swechadhin' is

[412] Nerhot, *Law, Interpretation and Reality* (n 26) 8.
[413] The incoherent meanings of Freedom as given by the English dictionaries and Black's Law dictionary are due to their dependence on the theory of correspondence.
[414] Choudhury (n 199); Sharif (n 199).
[415] Choudhury (n 199); Sharif (n 199).
[416] Nothing in the sense of something as it is explained by Sartre. See generally Sartre (n 182).
[417] Considering Fichte's earlier position. For further information see the Fichte's transformation as explained by Berlin; Berlin, *Freedom and Its Betrayal* (n 52) (see the discussion on Fichte) .
[418] Berlin, *Freedom and Its Betrayal* (n 52) 66; Rothschild (n 172) 684.
[419] Brady (n 225) 338.
[420] Berlin, *Freedom and Its Betrayal* (n 52) 61.
[421] Choudhury (n 199).
[422] Choudhury (n 199).

relatable to Hindi 'Swaichchhik' – meaning – *(1. जो अपनी इच्छा के अनुसार हो; 2. किसी की निजी इच्छा से संबंध रखने वाला)*[423] - *(1. jo apanee ichchha ke anusaar ho; 2. kisee kee nijee ichchha se sambandh rakhane vaala)* - 1. things done according to the will of self; 2. person who sticks to the will of the self. The third relatable Hindi word is 'Manmana' – *'जो अपनी इच्छा तथा बिना किसी को ध्यान में रखकर किया जाए'*[424] - *(jo apanee ichchha tatha bina kisee ko dhyaan mein rakhakar kiya jae)*; things done as per the will of the self without taking care of others. Or *'(बात या विचार) जो किसी तर्क या सिद्धांत पर आश्रित न हो, बल्कि केवल अपनी प्रवृत्ति या रूचि के अनुसार और बिना उपयुक्तता का ध्यान रखे व्यक्त या स्थिर किया गया हो। (आर्बिट्रेरी)'*[425] *((baat ya vichaar) jo kisee tark ya siddhaant par aashrit na ho, balki keval apanee pravrtti ya roochi ke anusaar aur bina upayuktata ka dhyaan rakhe vyakt ya sthir kiya gaya ho*. Word, action or decision taken solely based on one's will, natue or trend withiout taking resort to any judgement, logic, or appropriateness. It is very cruicial to understand the subtle but immensly significnt differences in the picture these three pairs of words depict:

[423] 'Hindi Dictionary - Online Hindi to Hindi Devanagari Words Dictionary' <http://www.hindi2dictionary.com/> accessed 25 December 2021.
[424] 'Hindi Dictionary - Online Hindi to Hindi Devanagari Words Dictionary' (n 423).
[425] 'ShabdKhoj : Hindi to English Words List - Meanings and Translation in Hindi' <https://dict.hinkhoj.com/hindi-to-english/> accessed 25 December 2021.

	Swadhinata x 2 (1st)	Swecchadhin – Swaichchhik (2nd)	Swecchachari – Manmana (3rd)
1	Acting or behaving as per the instructions of self. Here, one's activities are evaluated and constrained by the senses or 'Will'[426] of the self.	Self is controlled by the will, generally in the positive sense. Apparently, self and will, by and large, converge here, and hence, technically, still one may enjoy Freedom.	One, not being evaluated and guided by self, does whatever he or she wants to do. In extreme cases, will is not under the control of or guided by the self at all.
2	Generate a safe and reliable sense as it is guided, and accountable. Comes with self-responsibility.[427]	Carries a sense of a certain level of safety and reliability.	Generate disturbing and frightening senses like arbitrary, inconsiderate, unrestrained, etc.
3	Application and the effect thereof are limited to the scope of self. Does not involve anything beyond the self.	Application is limited to things within the scope of the will of the self.	The effect of my will to act is no more limited to self. Thus, introducing the interpersonal plot of actions.
4	Will brings changes in self but still, the will is under the spell of self	Will brings change and self agrees to that change	Self is not separately identifiable as it merged with the will.
5	It does not give any Hobbesian sense as 'absence of opposition'[428]. It refers to a unique state that unites two absolute opposites – positives and negatives, permission and prohibition, and benefit and responsibility.[429] If we use the legal terms we may, roughly, say that Freedom is a state that gives us a right to undertake a duty to ourselves.	A sense of opposition exists.	It gives the sense as Hobbes claims 'absence of opposition'.

Admittedly, like the English linguists, Bengali and Hindi linguists also, on many occasions, speacillay at the time of searching for synonyms, ignore the significance of the words and make a complete mess-

[426] Will with capital 'W' to be distinguished from general will. This Will is the will of the self as distinguished from the instantaneous will.

[427] Ken Gemes and Simon May (eds), *Nietzsche on Freedom and Autonomy* (1st edition, Oxford University Press 2009) xv.

[428] Hobbes (n 66) 139.

[429] Knight (n 132) 106; Randy E Barnett, *The Structure of Liberty: Justice and the Rule of Law* (2° edizione, OUP Oxford 2014) 2; Denning (n 168) 4.

up. As we will proceed forward into the thesis, it will be demonstrated that the interpretations of Freedom presented above is the most coherent interpretation as long as the discourse is connected to law. The statement of Hobbes and the English dictionary interpretations are, in no way, connected to the interpretation of *Swadhinata* or Freedom. Hobbes' necessary connection claim is completely misleading. Their interpretation is, apparently, not relatable even to the 2nd pair of Bengali and Hindi words. Their interpretation such as - 'I can do, whatever I want' is surely and certainly relatable to the 3rd pair of words ie *Swecchachari – Manmana* that refer to 'I am the slave of my will'. When someone is the slave of his or her will, how can he or she be free?

The correct and coherent interpretation, itself substantiates that the allegations, fear and discomfort with reference to Freedom is completely incorrect and misleading. Further investigation into the phenomenon associated with Freedom necessarily reconfirms the weirdness of the claims raised against Freedom. Here in this thesis, we are not simply referring to the word Freedom; instead, we are refereeing to the whole of it - the sense, phenomenon, and context the word is supposed to reflect with and convey. We are not talking about the sound; we are talking about the sense (or teleological sense that is yet to come into being). The intrinsic Freedom, by virtue of its own nature, does not have any conflict with the interpersonal, social, political and national distribution of the rights.[430] In its core meaning of Freedom, it is confined in self. It has nothing to do with going beyond the self. Consequently, the exercise of Freedom in its core meaning does not constitute any jural fact of its own, because it does not involve any interpersonal relationship of any sort.

As the chart shows, the self plays the supreme role in giving rise to Freedom and its application while the relationship between the self and its will is also an important issue. Therefore, having an idea about the self and its relationship with will is essential. Unfortunately, with the current state of knowledge, the world has about the self, it is impossible to have a conclusive idea about the self. Fortunately, for the purpose of this thesis, surface-level speculation about the self is sufficient. To be specific, instead of knowing what self exactly is, knowing the dominant perceptions about self is sufficient for this thesis.[431] From its surface level to cover the widest perspectives about the self, reference to the Eastern perspective and the Western perspective is significant. Eastern philosophy has vast resources to offer to understand the meaning of 'Swa' or the 'self'. It refers to a vast and deep sense as a 'particular being with the totality' that is also supported by famous Western philosophers like Spinoza[432], Kant, and

[430] This point is further clarified in Chapter 8.

[431] We may with confidence relate this self to Berlin's fundamental moral categories and concepts that are, at any rate over large stretches of time and space, and whatever their ultimate origins, a part of their being and thought and sense of their own identity; part of what makes them human; see Berlin, *Liberty* (n 49) 217.

[432] Soraj Hongladarom, 'Spinoza & Buddhism on the Self' [2015] The Oxford Philosopher <https://theoxfordphilosopher.com/2015/07/29/spinoza-buddhism-on-the-self/> accessed 28 December 2021.

Schopenhauer[433].[434] While Spinoza considers the self as a part of the absolute substance[435], Eastern philosophy, in general, holds that every self is part of the emptiness[436] or illusion[437]. Behind the words, the convergence is, both for Spinoza and Eastern philosophy, every self is interconnected, 'transcendental'[438], part of the unified things (or of nothing[439]) or, an 'interconnected system'[440]. On the other hand, Western philosophy holds that the self is isolated and the product of subjective experiences or a 'bundle or collection of different perceptions'[441] or the locus of experiencing humans' own someones[442].[443] To put it simply, to Western philosophy, the self is an 'autonomous distinctive individual living-in-sociey'[444] and he or she is 'free to choose'[445]. Although, prominent philosophers (specially who are known as materialists) like Nietzsche, Hume, Dennett, and others deny the existence of such an individual as a unitary subject of thought or action, their alternative abstract models are equally competent for us to be counted as self.[446]

A logical link can be established between these, apparently, conflicting perspectives. Thus, without taking the burden of undertaking the massive task of evaluating and deciding which perspective is more viable, the thesis can presume that both perspectives are correct. We submit the fact that human insight is split over two dimensions – inward and outward and this significantly differentiates humans from other animals.[447] These two dimensions led every human to play two roles in his or her life: a. evaluative - as an observer, evaluator or judge; and b. executive - as an actor or participant. As an evaluator, he or

[433] Robert Wicks, 'Arthur Schopenhauer' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/fall2021/entries/schopenhauer/> accessed 25 December 2021.
[434] Heidegger (n 23).
[435] Hongladarom (n 432).
[436] Hongladarom (n 432).
[437] Frederic F Fost, 'Playful Illusion: The Making of Worlds in Advaita Vedānta' (1998) 48 Philosophy East and West 387; HR Aravinda Prabhu and PS Bhat, 'Mind and Consciousness in Yoga – Vedanta: A Comparative Analysis with Western Psychological Concepts' (2013) 55 Indian Journal of Psychiatry S182.
[438] Kant (n 28).
[439] Hongladarom (n 432).
[440] Patricia Kitcher, 'Kant's Paralogisms' (1982) 91 The Philosophical Review 515, 533; Andrew Brook, *Kant and the Mind* (Cambridge University Press 1997) 238.
[441] Colin Marshall, 'Kant's Metaphysics of the Self' (2010) 10 21, 10.
[442] Grace Gredys Harris, 'Concepts of Individual, Self, and Person in Description and Analysis' (1989) 91 American Anthropologist 599, 601.
[443] Petar R Dimkov, 'The Concept of Self in Eastern and Western Philosophy', *5th International e-Conference on Studies in Humanities and Social Sciences: Conference Proceedings* (Center for Open Access in Science, Belgrade 2020) <https://www.centerprode.com/conferences/5IeCSHSS.html#017> accessed 28 December 2021.
[444] DW Murray, 'What Is the Western Concept of the Self? On Forgetting David Hume' (1993) 21 Ethos 3, 5.
[445] Murray, 'What Is the Western Concept of the Self?' (n 444) 5.
[446] As it is the claim of Vedanta that self does not exists as such, they also hold the view that self is just an illusion. Instead, Nietzsche describe self as ' composite of often competing drives'; see Gemes and May (n 427) xviii. Christopher Janaway, 'Autonomy, Affect, and the Self in Nietzsche's Project of Genealogy', *Nietzsche on Freedom and Autonomy* (Oxford University Press 2009) 65. For Hume it is ' character with a stable, unified, and integrated, hierarchy of drives'; see Gemes and May (n 427) 38. To Dennett it is just a false security; see Dennett (n 99) 306.
[447] This point is further discussed in Part II.

she is just a part of the unified whole; he or she does not have a separate existence apart from others.[448] In this state, he or she plays a role that is impartial, outward and devoid of any individualistic interest. In this state, one is guided by the shared and general senses. This is why, we see people who, in their personal life, physically torture their family members but, honestly, holds that no one should be physically tortured in any circumstance!![449] Understanding the executive or action role further clarifies this sort of self-contradictory behaviour. As an actor and participant in his or her life, he or she is driven by inward interests loop that makes him or her a parted individual or a system of accumulated information or accumulation of drives. In this state, he or she plays a partial and individualistic executive role that may limit or diminish his or her general evaluative capacity.[450] This evaluator is the Eastern unified self, while the executor is the Western individualistic self. Thus, it can be said that the self consists of two parts – the unified self as an evaluator and the individualistic self as an executor.

Nor do we need to know the exact definition of will; suffice to know how it is connected to the self. Arguably[451], the relation of self with will can be shown using the metaphor[452] of the structure of Sears Tower, a metaphor used by Barnett to show the relationship of the structure of society with people.[453] Similarly, the self can be considered as a structure that consists of or contains numerous wills. As is the case of the people in the Sears Tower, will, once attached to the structure self, becomes subject to the internal structural rules of the self. All the self are not equally structured as Sears Tower, but we do not have any concrete criteria to distinguish between the wrong and the right structure. Thus, we have to accept that all the structures are correct unless one structure is collapsed upon another structure. Alternatively, we can relate the relationship with the situation-action machines and choice machines of

[448] This point is further discussed in Part II.
[449] This point is further discussed in Part II.
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[451] This metaphor is just giving a primary idea as to the relation of will with the self. We will present a better and more appropriate metaphor in section 2.2.1.3 while we will be discussing about the deterministic conception of free will as proposed by Nietzsche.
[452] Barnett explains the metaphor – 'The structure of Sears Tower surely constrains the behavior or "freedom" of its occupants. You cannot, for example, take a single elevator directly from the 20th floor to the 60th floor. Instead, you need to change elevators on the 34th floor. … Yet the structure also permits thousands of persons on a daily basis to pursue their disparate purposes for entering the building. … Even if they could all be jammed into that space, they could not accomplish their purposes or, for that matter, any useful ends. … Imagine being able to push a button and make the structure of the building instantly vanish. Thousands of persons would plunge to their deaths. Like a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to act to accomplish their ends. Without any such structure, chaos would reign and the current population could not be sustained. But not all "social structures" are the same'. See Barnett (n 429) 2.
[453] Barnett (n 429) 2.

Drescher.[454] Or more easily we can relate the will with the pull and push causes of Dennett[455] where the self is the entity or system or programme that suspends the immediate effect of the push and pull, process the effect, and produce a revised effect. Dennett's metaphor seems a more appropriate model to show the relation of will with the self, specially when the discussion is about Freedom.[456]

Now let's try to get the sense of *Swadhinata* or Freedom with reference to the self and its relationship with the will. As has been mentioned earlier, Freedom is a state where one is guided or supervised by the self. Now the question is which part of the self is this? What about the will? Does the will exist in this state? Does the will cause any changes in self in this state? If yes, is the change positive or negative? Does the self have its own Will[457] apart from the mere will? Answers to these questions can be presented under the following equations:

A. ***Freedom solely Guided by Evaluative Self:*** We submit that as long as the matter is connected to Freedom, it is largely the Eastern unified part of the self that is in play. We may get the existence of the individualistic part of the self, but its impact remains limited; it is the unified part that plays the dominant role and neutralises the effect of its counterpart. Further, we submit that will does exist in this state, but this will is a unified Will as long as the scope of Freedom is concerned. As long as the Will is unified and the self is also unified, the self is the best evaluator and the best judge[458]. Admittedly, we may find the existence of, apparently, subjective will generated from the subject's response to the physical or constructive environment he or she is in. However, this subjective variation of the will does not necessarily present Freedom as a chaotic concept. Instead, it may help to update the unified Will.[459]

B. ***Freedom when the Individualistic Self and the Will are Introduced***: The individualistic will, a part of which cause concern to the opponents of intrinsic Freedom, is introduced only in the case when the individual is introduced to an interpersonal space. For example, we may consider a baby alone in a house having some toys. It is true that he or she can identify himself or herself differently from other members of the family. Nevertheless, he or she will not develop an individualistic will in relation to the toys until another baby (or baby-like person) comes into the house. Similarly, as part

[454] Dennett (n 99) 169. An organism can have both sorts of machines in its kit, relying on the former for quick-and-dirty lifesaving choices and relying on the latter for serious thinking about the future—a rudimentary faculty of practical reasoning. Locke relates Freedom with our control of actions in that manner so that 'they are not simply the product of immediate desire'; see Brady (n 225) 338.

[455] Dennett (n 99) 102.

[456] In this regard, we are also supported by Condorcet, who writes - Freedom is more keenly felt than that, and has more intensity than a single desire; see Condorcet (n 89) 182.

[457] Will with capital letter W to be distinguished from the general will. By Will, we want to refer to the will of the self or the accumulated whole.

[458] This point is further explained in Part II.

[459] The growing trend of the animal rights movement is an example of such a case. This point is further explained in Part II.

of the same equation, as the will becomes more action-oriented and individualistic, the self becomes more individualistic. One becomes more individualistic when more interpersonal issues are introduced. The interpersonal sphere of life is the plot where the individualistic self has the utmost possibility of playing its inward interest-motivated individualistic role. However, the presence of interpersonal issues and the individualistic will does not necessarily bring to an end of Freedom and hence, does not necessarily bring about the emergence of law.[460]

C. ***Freedom when the Individualistic Self and the Will Dominate***: When the action-oriented individualistic self starts dominating, it may generate a will that diverges from the Will of the evaluative self.[461] Since this difference does not necessarily result in problems of any sort in the interpersonal sphere, one can extend the scope of Freedom, at best, to include this diverse will of the individualistic self. However, none can claim that the scope of Freedom is stretchable to include an individualistic will that violates or contradicts the shared and common will of the evaluative self. As the action self with its increased individualistic willpower, starts restricting or annihilating the role of the evaluative self, the self, as a whole, starts losing its neutral and unified evaluating capacity. Thus, in this stage, what remains is only the will; even the action-oriented self is dissolved into will. From this sense, what one does as per his or her sole individualistic will is not Freedom at all. Even in such a stage, where the will exceeds the boundary of Freedom, we should not, necessarily, allow law to interfere as the stage, as a buffer zone, may play a significant role.

D. ***Applicability of Law in the Buffer Zone***: Theoretically, technically, and practically it is very important to maintain a buffer zone between Freedom and the law. To understand the point, let's take an example. B, a blind person asks help from X while crossing a road. The evaluative self motivated by the unified interest orders X to help the person. The executive self motivated by the individualistic interest instructs X to help the person if there is enough time to do so and if it is not conflicting with the self-interests of X. However, X ignores both instructions. X has time and it is not against his or her personal interest. Still, just following the instruction of his or her will, X denies helping B. An act is relatable to Freedom, as we have already submitted, only when it is guided by the self.[462] In this case, theoretically, we cannot say that X's act is relatable to his or her Freedom as he or she does not follow the instructions of either part of his or her self. However, there is a problem

[460] Mill (n 53) 156. Mill states - In the first place, it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society … In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining.

[461] We hold that even the will that is generated by the individualistic part of the self can be two types – a. reactionary will that originates as immediate reaction of any event; and b. static will that one develops throughout the life.

[462] However, we must submit here that the question whether an act is guided by the self or not is not a question of subjective capacity, choice, utility or pleasure; rather is a question of brute facts knowledge of which not confined but general and these are not a requirement of Freedom.

from the technical perspective. Although it may seem that the self even does not exist in the decision of X, the fact is self does exist. Will cannot exist without the existence of the self and, as Sartre and Nietzsche submit, Freedom is the precondition of will.[463]

Cannot one claim the opposite ie the will is the precondition of Freedom? Not possible.[464] Because, in that case, we have to answer countless questions we have no answer to at all. In that case, the will has to support the existence of the self. Otherwise, what will hold the will? What keeps this will hidden at one time and dominant at another? Who or what determines when the will be dominant and when it will remain hidden? If it is of its own, apart from the self, why should we make one responsible, when he or she is not in control of his or her will? Thus, in the language of Sartre – 'it is not enough to will; it is necessary to will to will'[465]. Consequently, the self has to exist to will to will, despite it does not have any so-called capacity, ability, rationality, power, and so on. The inevitability of expecting or supposing the presence of the self in every circumstance comes with the cloud of confusion whether it is the self or the will is in action. Therefore, not only the exclusive sphere of Freedom but also the sphere of will, the immediate next sphere of freedom should remain uninterrupted by law as long as X is not interfering with the Freedom of anyone else.

Apart from the practical reason, there are philosophical and theoretical reasons for protecting this buffer zone dominated by will. The buffer zone is a place where an individual gets the opportunity to work with his or her underdeveloped self to transform it into a more mature and responsible self. Everyone must have this opportunity to go through the process of self-development without being brainwashed by education, laws, agenda, ideologies, customs, superstitions and other stereotypes. This truth is realized and felt by all the genuine supporters of Freedom.[466] Unfortunately, everyone

[463] Sartre (n 182) 442–443. He goes on – 'if the will is to be autonomous, then it is impossible for us to consider it as a given psychic fact; that is, in-itself…If the will is to be freedom, then it is of necessity negativity and the power of nihilation. But then we no longer can see why autonomy should be preserved for the will. But this is not all: the will, far from being the unique or at least the privileged manifestation of freedom, actually-like every event of the for-itself-must presuppose the foundation of an original freedom in order to be able to constitute itself as will'. Pippin (n 243) 85.

[464] Sartre (n 182) 444. He states – 'how can it be maintained that a will which does not yet exist can suddenly decide to shatter the chain of the passions and suddenly stand forth on the fragments of these chains? Such a conception would lead us to consider the will as a power which sometimes would manifest itself to consciousness and at other times would remain hidden, but which would in any case possess the permanence and the existence "in-itself" of a property. This is precisely what is inadmissible'.

[465] Sartre (n 182) 444.

[466] Mill, Condorcet, Humboldt, Kant, Locke, Berlin, Dennett, Radbruch, Rousseau and many others are touched by the supreme truth. Mill states – 'Even despotism does not produce its worst effects, so long as Individuality exists under it. He further states - Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others; but he himself is the final judge. All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good'; see Mill (n 53) 128. Kant's position in this regard is restated by Berlin – 'all values are made so by the free acts of men, and called values only so far as they are this, there is no value higher than the

fails to stay on track; the lawjon approach and procedural insecurity divert them.[467] Everyone fails to place their trust in the supreme truth they all so firmly hold.[468]

Everyone has to take responsibility for his or her own life despite he or she may invite hell into his or her life.[469] This natural process tends to shape the individualistic self in a manner that can establish an intrinsic and spontaneous connection with the unified self with the least difficulty.[470] The more opportunity one gets to work with the raw self the better mature and unified self he or she becomes. This individual self-development process tends to boost the significance of Freedom and, immensely, contributes to updating the overall will of the evaluative self. Thus, the role of the individualistic self is very remarkable when the individual is driven by neutral[471] or constructive will.[472] Therefore, the buffer zone should be kept uninterrupted as much as possible. Admittedly, we know that the promise of will feds away when one is driven by the destructive will that may lead

individual. …All forms of tampering with human beings, getting at them, shaping them against their will to your own pattern, all thought-control and conditioning is, therefore, a denial of that in men which makes them men and their values ultimate'; see Berlin, *Liberty* (n 49) 185. Berlin himself posits – 'I wish to determine myself, and not be directed by others, no matter how wise and benevolent; my conduct derives an irreplaceable value from the sole fact that it is my own, and not imposed upon me'; see Berlin, *Liberty* (n 49) 36. Dennett states – ' We may destroy the planet instead of saving it, … A huge portion of our energy expenditure over the last ten thousand years has been devoted to assuaging the concerns provoked by this unsettling new vista that we alone have. He confirms us that there is no settled definition of value; it is our Freedom by which we will do it as we individually take it. He further states - Our unique ability to reconsider our deepest convictions about what makes life worth living obliges us to take seriously the discovery that there is no palpable constraint on what we can consider. It is all up for grabs. To some people, this is a fearful prospect, opening the gates to nihilism and relativism, letting go of God's commandments and risking a plunge into anarchy Stop that crow!'; Dennett (n 99) 5, 302. See also Mill (n 53) 80–81; Rothschild (n 172) 684; Pock (n 51) (see generally).

[467] To talk about the deviation of Rousseau, Berlin states – 'Rousseau says one thing and conveys another. Liberty for him is an absolute value'; see Berlin, *Freedom and Its Betrayal* (n 52) 32–33. As we have already seen in the previous Chapter Berlin himself does the same mistake for which he criticises Rousseau.

[468] We might have an explanation for Mill's deviation. His biography tells us his early life was influenced by the major figures of the lawjon approach like his father James Mill, Bentham, and Austin. While his later life was shaped by the influence of his wife Harriet Taylor who shaped his substance and introduced him to the sense, beyond sense, imagination, abstraction, and the art of life. As long as he followed the artistic and imaginative abstraction, his sense of Freedom is very close to the actual sense of Freedom but he made a serious flaw when he was driven by the flawed analytical methodology of Bentham and Austin.

[469] Mill (n 53).

[470] Apparently, the statement seems self-contradictory, but this is the exact way an individual dominated by his or her will becomes more inclusive, considerate, and more in line with the evaluative self. Admittedly, subjective will makes one, initially, individualistic. However, as he or she gets chances to work with his or her subjective will, he or she can relate their experiences with that of others. Thus, he or she, instead of becoming more individualistic, comes closer to others. On the other hand, individuals not having the opportunity to work with their subjective will never get the chance to understand the general nature of the will.

[471] Neither destructive nor constructive. For future reference, it is worthwhile to mention that this neutral stance of the individualistic role is supportive of the role-twisting requirement of law. We will discuss this role-twisting issue from the 6th chapter onwards. Further, it is worth noting that although the constructiveness of will is not an essential requirement of law, it is an extra benefit that the law may have.

[472] There is a misconception in Eastern societies that the individualistic will is necessarily destructive and blameworthy. While we admit that the individualistic will does generally contains a negative impact, it has some constructive significance too.

to solipsism, authoritarianism, etc. However, even that concern alone does not substantiate the interference of law into the sphere of will as long as one remains within his or her personal boundary or as long as the individualistic will-generated acts start affecting and threatening the Freedom or the will of another individual.[473]

In summary, Freedom is the existential constituting part of humans. Humans are not just organic or bodied entities; apart from the concrete body, humans consist of the abstraction. Freedom, being an indivisible part of the abstraction, refers to a state where the self is in charge of itself, and this is the only state in which life is manifested as human life. Consequently, to call anyone human is to presume the prevalence of the state. Therefore, everyone, irrespective of gender, age, mental condition, capacity, physical condition, etc, has it. There, are differences in the capacity and quality of relating one's action with his or her intrinsic Freedom, but he or she has it for sure. Human life is not just the action and reaction of the biochemical elements; nor does it the manifestation of the deterministic will or ghostly will.[474]

Admittedly, when the self takes a decision, emotion or passion ie anger, fear, happiness, will, disappointment, taste, or greed have a role (in some cases, has a very fundamental role), but still, we have reason to consider the decision as the decision of the self not of the emotion or like triggers. When the self is in charge of the decision, the emotions or the effects of other triggers are internalised in the self. In this process, the reactionary will or passionate will is processed by the system Will or the overall Will of the self and, thus, we get a result that is distinctively identifiable with the self instead of identifying it with the mere will. Just to put an example, we take food that is processed and transferred as the body that we are; our body consists of food, but the food is not the body itself. Emotions or triggers are just the immediate responses, which are generally automatic, and these have a separate

[473] In this regard, the wisdom that is reflected in Mill's statement is well-supportive for us. He states – 'In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign'; see Mill (n 53) 80–81. See also Rothschild (n 172) 684. She states – 'a man is called free if he is not subject in any of his private actions to the arbitrary will of an individual'. Rawls (n 132) 179,182. Rawls states - 'A basic liberty covered by the first principle can be limited only for the sake of liberty itself … the initial agreement on the principle of equal liberty is final. …Greater economic and social benefits are not a sufficient reason for accepting less than an equal liberty'.

[474] ALISON JONES, Interview with Michael Tomasello, 'Michael Tomasello: What Makes Humans Human?' (8 April 2019) <https://today.duke.edu/2019/04/michael-tomasello-what-makes-humans-human> accessed 3 May 2023; Boris Kotchoubey, 'Human Consciousness: Where Is It From and What Is It For' (2018) 9 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.00567> accessed 27 May 2023; Jaime Gómez-Márquez, 'What Is Life?' (2021) 48 Molecular Biology Reports 6223. Just to give a clue about the sophistication of process that take place in human action Tomasello's finding is worth noting – ' Tomasello states – 'We found that 2-year-old children – look just like the apes on physical things, such as causality, quantities and space. But … they are already way ahead. So, it's not just that humans are generally smarter, it's that we have a special kind of smarts. We are able to plug into the knowledge and skills of other people and to take their perspective, by collaborating, communication and learning from them in unique ways'.

identity apart from the very person the responses are connected to. By the time these are processed and internalised in the self, they lose their distinct traces; only the self remains.

We do not show the audacity to claim that in every case, the self is triumphant in the never-ending war against the will, neither do we need to prove that it is the case; it has to be presumed because this is the only presumption we can hold and thereby go forward. We do not have any alternative option.[475] Therefore, putting Condorcet's conspiracy presumption[476] aside, we submit that we should and must keep the law away as we have come to know that one under the supervision of the evaluative self or in the terms of the evaluative self is in the best hand one can be. No claim against intrinsic Freedom is maintainable and, hence, the sphere of one's Freedom is absolutely beyond the interference of law. In addition, even the sphere of one's will is not generally subject to any law as long as one is his or her own personal sphere and his or her actions or omissions are self-concerning and self-addressing. The emergence of the law or the interference of the law is expected thereafter. Self is the most appropriate entity in taking charge of itself, while the law can take charge of the environment of it subject to the approval of all selves constituting the environment.

3.2 **Clarifications**

Undoubtedly, the concept of Freedom we have presented above will attract substantial questions and counterarguments. Upcoming chapters, in due courses, respond to many of these tentative questions and counterarguments. Meanwhile, we think we should clarify two substantial features inevitably connected to the concept of Freedom.

3.2.1 Freedom Resources (FRs)

Absoluteness of Freedom gives rise to the concept of 'Freedom Resources' to be distinguished from the legal concept like property, rights, privileges, and so on. Freedom resources (FRs) are connected to the person himself or herself not with the goods, services, or status. Freedom resources are the existential elements inevitable for 'self-preservation', self-action, and self-expression. To explain it simply, we may say that FRs are the basic elements required, in general, for every human to live as human as distinguished from other animals. Therefore, FRs include things that are inevitable to live as animal + as a human. We submit that every human, by virtue of being so, has these resources; all human owns these resources by virtue of being human. Human owns these because these are inevitable part of his or her existence as a human.

[475] We will demonstrate in the next Chapters that the Hobbesian assumption does not fulfil the minimum requirement to be an alternative option.

[476] Condorcet (n 89) 187. He states - 'A few writers, either in good faith or because they were, or hoped to become, members of the dominant party, have bestowed the term liberty on the anarchy which arises from discord between various powers [within the state]'.

The obvious questions that will be thrown at us are – Why should the law recognise FRs? Under which law such resources are recognised? Which law interprets such resources? Such questions are the outcome of one of the fundamental claims of the lawjon followers that no one can have any legally enforceable claim to any resources without the permission or recognition of such claim by the law. To refute the claim, we will start with an, apparently, naive question (for further reference, we will label it as question no 1) - we do not need recognition of any law to take oxygen and to get sunlight, then why do we need the recognition of law to claim the FRs? We will come back to the question in a little while. Meanwhile, we want to submit the ground of impossibility that renders the claim of the lawjon followers unsustainable; their claim is simply impossible, hence liable to be rejected. As the very existence of death rejects the authority of law over it, so is the very existence of the self (or simply the existence of humans) renders the authority of law impossible to be sustained in the question of the availability of FRs. Fromm states that '[w]hen man is born, the stage is set for him'[477]. So is the case of the FRs; the moment one is born, FRs are already assigned to him or her.

The moment a person is born into this world with his or her body, both the organic and the abstract body, he or she comes with the claims connected to the needs of both the organic body and the abstract body. It, simply beyond the discretion of the law whether the law will recognise it or not; it is already recognised being the brute facticity. The moment X is born, he occupies the space, both the physical space and the constructive space; it is simply impossible for the law to deny this brute facticity. As a mere animal, X needs more than that space; X needs space to move around. The foods, wind, sunlight, etc become his or her organic body; the environment he or she lives in and his or her thought becomes part of the abstract body. As a human, his or her needs exceed the needs of a mere animal; in addition, he or she needs a house with facilities, at least, for peeing and pooing. As X is born as the progeny of the humans, who in the process of their development and marvellous achievements have destroyed many of the factors of natural habitats and in this process adopted many modern tools to survive, his or her house needs tools like heating system and or cooling system or other alternative measures without which his or her body will struggle, even may cease to survive in the extreme cases. If one is prevented to get these needs, it will be an act as heinous as murder or dehumanization of that person. These needs, including oxygen and sunlight, are the very facticity of his or her existence. Thus, the impossibility of their claim is proved, and at the same time, it is substantiated that FRs exist for every human being. It does not matter whether the positive law has already incorporated these resources in the statute or not and it has to ensure the security of these resources.

Why should the law take positive actions if someone lacks the FRs? What is the basis of the positive duty of the state? Although the question is wrong, it needs further clarification. Already we have

[477] Fromm (n 214) 32.

submitted and will further explain in the next chapter that Freedom does not require the state to perform a positive duty. X has these FRs from the moment he or she is born; he or she is already provided with these resources. His or her claim to FRs is not contingent but rather vested. As Fromm says – '"He" as a person and the property he owned could not be separated. A man's clothes or his house were parts of his self just as much as his body'[478]. Chin, in a relatable scenario, states – '[a] white person could take away a black person's freedom, but the white person could not give to the black person something inherent in the person. So the goal was not for Whites to give freedom to Blacks, but for Whites to stop denying Blacks their preexisting freedom'[479]. In the same vein, we want to say that, the state is not being asked to give something to X; the state is being asked to stop denying the existence of the FRs, and the Freedom of X. State to take corrective action for its own foundational legal validity as X has been dispossessed from his or her FRs by the state itself or by someone else who is subject of law. Thus, the action or duty the state is required to take or perform is already due. Now, we hope that question no 1 will not seem naive - we do not need recognition of any law to take oxygen and to get sunlight, then why do we need the recognition of the law to claim the FRs?

The excuse of the limitation of the resources has been presented as a noble answer to the question; sunlight and oxygen are limitless while other resources have limits. The answer is a historical lie, a hoax to befool people, and a trap to confiscate and centralise the resources.[480] However, given the scope of the thesis, we want to limit our discussion as much as it inevitably connected to the questions relating to the FRs. We submit that the noble plea of limitation is a hoax; at the least, the claim has no merit with reference to the FRs. From the discussion made in the previous paragraph, it is, philosophically, conclusive that such a claim has no value because the resources are there for everyone by the very virtue of one's birth. Theoretically, we could make an extended discussion about it and all of these in favour of our position. However, the question remains from the perspective of which theoretical disciplines? From the fundamental biological perspective, the claim does not stand as the discipline holds that, as far as we understand the discipline from a non-expert perspective, biological organisms grow and develop in a favourable environment.[481] Thus, the existence of X is the *prima facie*, proof of the

[478] Fromm (n 214) 141.

[479] Chin (n 83) 299–300.

[480] Rejecting the excuse of limitation, we submit that we care about the ownership of something because that is exploitable and manipulatable by humans. Were the sunlight exploitable the exploiters must have set rules to be the owner of the sunlight. We can see what happens in the case of water. Once not exploitable, hence considered as free of any claim of ownership. However, the moments it appears exploitable the exploiters (Specially in the state level) come with the demand for its ownership. However, we acknowledge, the matter is not as simple as to generalise in this way, but it is demonstratable that this is exactly the case.

[481] Hendrik Gommer, 'The Molecular Concept of Law' (2011) 7 Utrecht Law Review 141; Hendrik Gommer, 'The Biological Foundations of Global Ethics and Law' (2014) 100 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 151; Hendrik Gommer, 'The Biological Essence of Law' (2012) 25 Ratio Juris 59; Bill Freedman, 'Chapter 1 ~ Ecosystems and Humans' <https://ecampusontario.pressbooks.pub/environmentalscience/chapter/chapter-1/> accessed 27 May 2023;

existence of, at least, the natural resources. Now, if it is found that the natural resources allocated for X, have already been confiscated by the state or someone else, the state is automatically bound to return the resources.

Psychological, social, economic, and legal perspectives (separately or combined), also reject such a claim. If we, for example, consider the claim from the combined perspective, we see the very existence of the claim, its construction, and its interpretation themselves endorse the hollowness of the claim. Its interpretation through a, absurdly and senselessly, wide spectrum proves how our own psychological, legal, and economic absurdity is contributing to strengthening such an unfounded claim, while the claim itself fuels this absurd sense. This claim is diverting our brain to take the economic question not in the sense of the availability of resources but in the sense of making sense of the lack of resources. It is evidenced when we see even the mightiest economies of the world genuinely hold that they are struggling to provide the basic necessities to their people.[482] There might be some truth in their claim from the perspective of relativism, but the point to be noticed here is that the question of FRs is more a question of the brute facticity from which relativism can easily be removed.[483] On the other hand, the claim of limitation, as it cheaply holds, of resources has an infinite progress effect; the limit is limitless. Thus, the claim has already lost its minimal general acceptability for it fails to distinguish human needs from passion, ambition, luxury, and greed.

The material perspective is also completely against the claim. A century ago, Gandhi stated – '[e]arth provides enough to satisfy every man's need, but not every man's greed'[484] A half a century ago Fromm stated – '[t]he problem of production is solved-in principle at least-and we can visualize a future of abundance, in which the fight for economic privileges is no longer necessitated by economic

Werner Arber, 'Complexity of Life and Its Dependence on the Environment' in Wael K Al-Delaimy, Veerabhadran Ramanathan and Marcelo Sánchez Sorondo (eds), *Health of People, Health of Planet and Our Responsibility: Climate Change, Air Pollution and Health* (Springer International Publishing 2020) <https://doi.org/10.1007/978-3-030-31125-4_1> accessed 27 May 2023; Shao Hongbo, Chen Sixue and Marian Brestic, 'Environment-Living Organism's Interactions from Physiology to Genomics' (2015) 2015 International Journal of Genomics e270736; Clive G Jones, John H Lawton and Moshe Shachak, 'Positive and Negative Effects of Organisms as Physical Ecosystem Engineers' (1997) 78 Ecology 1946.

[482] 'What Has Caused the Global Housing Crisis - and How Can We Fix It?' (*World Economic Forum*) <https://www.weforum.org/agenda/2022/06/how-to-fix-global-housing-crisis/> accessed 24 November 2022; 'Why a Housing Crash Scares Britain like Nothing Else' (*POLITICO*, 28 September 2022) <https://www.politico.eu/article/housing-crash-scares-crisis-hit-britain-truss-kwarteng-uk-economy/> accessed 24 November 2022.

[483] Fromm (n 214). Fromm states – 'We must recognize the difference between genuine and fictitious ideals. … no reason for a relativism which says that we cannot know what furthers life or what blocks it. We are not always sure which food is healthy and which is not, yet we do not conclude that we have no way whatsoever of recognizing poison … is not a metaphysical question, but an empirical one'.

[484] Alexis Brassey, 'What Drives Man Toward Greed?' in Alexis Brassey and Stephen Barber (eds), *Greed* (Palgrave Macmillan UK 2009) 94 <https://doi.org/10.1057/9780230246157_7> accessed 24 November 2022.

scarcity'[485]. Theory apart, if we look at the empirical evidence, the limitation argument is in no way relatable to the question of FRs. Statistics and empirical evidence about Food, for example, reject such a claim; even if the current psychological, legal, and economic mess of people is not solved, the amount of food currently the world produces is more than enough to feed each people of the world, in fact, the people of two worlds.[486] Although, it will need another paper to explain the whole process, for this paper suffice it to submit that just a little bit of correction and re-organization of the psychological, economic, and legal mess of people, will prove conclusively that we have all these FRs.

Thus, there is no question as to the availability of the freedom resources, although there is a question relating to the method of the refund of the FRs. In addition, there may have other related questions like – what will be the consequence when everyone will have their FRs, automatically? Will not people become lazy and less productive? Why should he or she work when he or she knows that he or she is automatically entitled to get the resources he or she needs to preserve the body? Our answer lies in the conception of Freedom itself. Will anyone in the world consider such a person responsible or capable of taking care of himself or herself? The answer is negative. Since he or she is not capable of knowing or understanding the responsible way of taking care of his or her material body, the law may take the decision on his or her behalf as to what should he or she does to earn a livelihood or set the 'achievable condition' that he or she has to fulfil to get access to the Freedom resources. Will people, once get the taste of Freedom, want to lose the prospects of relating their actions to their Freedom? Relating to the method of refund, we submit that it will not be an impossible or unobtainable task, although it will need more extensive work. Evidently, it will be a more practical and more accomplishable task than the tasks required by, for example, Dworkin's material equality[487] or Rawal's hypothetical initial arrangement[488].

3.2.2 Merger and Parting of the Freedom Boundary

Before start discussing this obvious and indisputable phenomenon, a note of caution and clarification seems worthy. Given the intrinsic nature of Freedom, we should not take the word boundary from its concrete or physical perspective; instead, we take it as a concept. Although a concept, the Freedom boundary is not something imaginary or illusive; instead, the concept is a tentative reflection of the associated facticity which is demonstrable and justifiable with reference to certain phenomena we all are aware of. The chart discussed above has already given us some idea about the boundary between

[485] Fromm (n 214) 297.
[486] 'Can We Feed the World and Ensure No One Goes Hungry?' (*UN News*, 3 October 2019) <https://news.un.org/en/story/2019/10/1048452> accessed 25 November 2022; 'Without Clearing Any New Farmland, We Could Feed Two Earths' Worth of People' *Bloomberg.com* (15 December 2020) <https://www.bloomberg.com/news/features/2020-12-15/no-more-hunger-how-to-feed-everyone-on-earth-with-just-the-land-we-have> accessed 25 November 2022.
[487] Dworkin, *Sovereign Virtue* (n 1).
[488] Rawls (n 132) 54–55.

Freedom-reflective or Freedom-expressive actions or omissions. We will find further clarification about it in Chapter 8 which discusses how we can draw a conceptual and sufficiently meaningful Freedom boundary taking note of the phenomenon Freedom is associated with. Meanwhile, let's consider an excellent phenomenon associated with the Freedom boundary. The phenomenon is the lifting and merger of the Freedom boundary, and we submit that this phenomenon has a substantial legal significance; awareness about it will help us resolve all the confusion associated with certain relationships and their associated legal issues.

The phenomenon may also be linked to the waiver and delegation of some claims (or rights) associated with our Freedom. It is already an established fact that one's Freedom inevitably includes his or her right to waive a part of that right. To be more precise, a person 'X' may like to or want to delegate her right to take decisions in his or her Freedom expressive and Freedom reflective matters to someone else, suppose Y; Or, alternatively, X may allow Y to interfere in some of the Freedom expressive or Freedom reflective matters of X. Suppose, for instance, X is a celebrity and he or she delegates his Freedom reflective right of taking the decisions about her hairstyle to the hairstylist Y. Although Y is taking some of the Freedom reflective decisions of X, X's Freedom remains intact. Similarly, Z or even X may take some of the Freedom reflective decisions of Y. By virtue of the same equation, Y's Freedom remains intact. Thus, both X and Y's Freedoms remain intact even though some of their Freedoms reflecting personal decisions are being taken by a person other than themselves. We cannot meaningfully say that X has lifted the Freedom boundary for those Freedom reflective actions because there are deliberate and conscious acts on the part of X towards the waiver or delegation of those Freedom reflective personal decisions to Y. The same verdict is true for the Freedom of Y. Both X and Y exist as Free and different individuals with their respective Freedom boundaries intact. Although X takes some decisions for Y, X takes those decisions with his or her own individual identity as X, and vice versa; they have their separate individual identity with their separate Freedom boundary.

There are, however, certain special and spontaneous relationships where the delegation or waiver process of Freedom reflective decisions is not as conscious, explicit, or traceable as that of the above incidents. Neither is there any specific and traceable limit on the extent of waiver and delegation of rights. Instead, the relationships are so intense and deep as if, conceptually[489], there exist no two individuals with two separable Freedom boundaries; instead, they may conceptually seem to be one with a merged Freedom boundary. It may seem that two apparent physical individuals become one conceptual individual by lifting their respective Freedom boundaries that exist between them and

[489] As distinguished from physical and practical observation. Physically and practically the separate existence of the two persons involved in such relationships may seem unquestionable as the dominant version of the practical sense conceives humans through their concrete organic existence. However, we think that human existence is not limited to his or her concrete organic existence. Instead, we think humans' organic existence has two parts – concrete and abstract.

consequential merging the boundaries as a single and common Freedom boundary.[490] The intimate and deep relationship between romantic couples or spouses is one example of such a relationship where the merging phenomenon is seen. We should further clarify that the extent of intimacy and the deep feeling between the partners do not remain the same throughout all the stages of such a relationship. The merging phenomenon is seen at its profound level at the highest level of the connection between the partners and the phenomenon begins to fade away as the connection between the partners begins to weaken. Weakening of the relationship between partners leads to the parting process, the opposite process of the merging process. At one stage of the worsening relationship, the parting process completes and thus, one conceptual common individual identity is split into two separate individuals again upon the reintroduction of the respective Freedom boundary.

Another relationship of this nature is between a pregnant mother and her unborn child. This relationship begins at conception or when the mother becomes aware of the pregnancy and lasts at least through the first few months of the newborn's life. However, it wouldn't be surprising if the relationship is accepted to extend for a few years after the child's birth. Conception gives rise to the merger phenomenon of the Freedom boundary that is split after a few years of the birth of the child and hence gives rise to the introduction of separate Freedom boundaries between the mother and the child. There may be other relationships of such nature.[491] However, at this point, the question is – do we have enough evidence in support of the merger and splitting concept? Is our conception supported by demonstratable evidence or is this conception just an outcome of ghostly and naive thought conceived by fantasy and illusion? This relationship is backed by scientific, philosophical, and phenomenological evidence; we have in our support narrative consistency, the presumption behind the legislative history, and practical facticity.[492] Now it is well established in the disciplines of child psychology, medical sciences, and cognitive studies that a newborn keeps considering them as part of their mother following a few months of their birth and it takes several years before they develop a comprehensive separate identity apart from their mother.[493] Pregnancy and motherhood can bear a high cost for women; the very process may have the greatest toll and impact, both biologically and mentally, on women, starting with pregnancy and

[490] Such a merging phenomenon can roughly be compared to the Union of set theory of Mathematics.

[491] For instance, an individual's relationship with the state may involve such a phenomenon where the individual, in contrast with the existing practice, is supposed to play the dominant role, if, in any case, the state is taken with personhood.

[492] Given the scope of the thesis we resist our temptation not to discuss this in detailed in this thesis.

[493] Eva Dasher, 'Raising an Independent Baby' *BabyCenter* <https://www.babycenter.com/baby/baby-development/developmental-milestone-separation-and-independence_6577> accessed 15 May 2023; Wei Gao and others, 'Functional Network Development During the First Year: Relative Sequence and Socioeconomic Correlations' (2015) 25 Cerebral Cortex (New York, N.Y.: 1991) 2919; Richard Gilham and Child psychologist, 'Developmental Milestones Separation and Independence in Babies' *BabyCentre UK* <https://www.babycentre.co.uk/a6577/developmental-milestones-separation-and-independence-in-babies> accessed 15 May 2023; Philippe Rochat∗ and Tricia Striano, 'Perceived Self in Infancy' (2000) 23 Infant Behavior and Development 513.

lasting through the first few years of motherhood.[494] Mother's role during this period for the unborn and newborn is not only merely impactful but also life-shaping, personality-shaping, and identity-shaping.[495] This is the time when, in this relationship, a much more complex and phenomenological aspects take place beyond our naive observation and perception towards the fruition and conceptualisation of a new life with its human identity. To be very brief, this is the time when the inter-relationship between the mother and the child is so interdependent and merged it would be a sheer absurdity and an act of no-sense should we or the law tries to raise a wall splitting the interest of the mother and the child. In every circumstance, the natural relationship between a mother and child should not be interfered with, and the natural bond of the relationship must be kept intact.

A comprehensive understanding of the phenomenon could easily solve the issue associated with the abortion law. In this question of the right to abortion, the world is divided; from the *Roe*[496] to the *Dobb*,[497] it is obvious that we are simply lost in the confusion of the duality of the rights ie the rights of the pregnant and that of the foetus. The concept of the merger and parting of the Freedom boundary submits that the duality of the rights is just a hoax. The dynamism of the relationship involved is so unique that it is comprehensible only through compassion, and not by dogmatic legal logic. The issue

[494] Nahid Javadifar and others, 'Journey to Motherhood in the First Year After Child Birth' (2016) 10 Journal of Family & Reproductive Health 146; Tuija Seppälä and others, 'Development of First-Time Mothers' Sense of Shared Identity and Integration with Other Mothers in Their Neighbourhood' (2022) 32 Journal of Community & Applied Social Psychology 692.

[495] Alexandra Miranda and Nuno Sousa, 'Maternal Hormonal Milieu Influence on Fetal Brain Development' (2018) 8 Brain and Behavior e00920; Alexandra R Webb and others, 'Mother's Voice and Heartbeat Sounds Elicit Auditory Plasticity in the Human Brain before Full Gestation' (2015) 112 Proceedings of the National Academy of Sciences 3152; Gabriella A Ferrari and others, 'Ultrasonographic Investigation of Human Fetus Responses to Maternal Communicative and Non-Communicative Stimuli' (2016) 7 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2016.00354> accessed 15 May 2023; Xiaoxu Na and others, 'Mother's Physical Activity during Pregnancy and Newborn's Brain Cortical Development' (2022) 16 Frontiers in Human Neuroscience <https://www.frontiersin.org/articles/10.3389/fnhum.2022.943341> accessed 15 May 2023; Marion I van den Heuvel, 'From the Womb into the World: Protecting the Fetal Brain from Maternal Stress During Pregnancy' (2022) 9 Policy Insights from the Behavioral and Brain Sciences 96; Eamon Fitzgerald, Kahyee Hor and Amanda J Drake, 'Maternal Influences on Fetal Brain Development: The Role of Nutrition, Infection and Stress, and the Potential for Intergenerational Consequences' (2020) 150 Early Human Development 105190; Aida Salihagic Kadic and Asim Kurjak, 'Cognitive Functions of the Fetus' (2018) 39 Ultraschall in Der Medizin (Stuttgart, Germany: 1980) 181; Sussan A Rose and Judith F Feldman, 'Prediction of IQ and Specific Cognitive Abilities at 11 Years from Infancy Measures' (1995) 31 Developmental Psychology 685; National Research Council (US) and Institute of Medicine (US) Committee on Integrating the Science of Early Childhood Development, *From Neurons to Neighborhoods: The Science of Early Childhood Development* (Jack P Shonkoff and Deborah A Phillips eds, National Academies Press (US) 2000) <http://www.ncbi.nlm.nih.gov/books/NBK225557/> accessed 15 May 2023; Janet Currie and Douglas Almond, 'Chapter 15 - Human Capital Development before Age Five**We Thank Maya Rossin and David Munroe for Excellent Research Assistance, Participants in the Berkeley Handbook of Labor Economics Conference in November 2009 for Helpful Comments, and Christine Pal and Hongyan Zhao for Proofreading the Equations.' in David Card and Orley Ashenfelter (eds), *Handbook of Labor Economics*, vol 4 (Elsevier 2011) <https://www.sciencedirect.com/science/article/pii/S0169721811024130> accessed 15 May 2023.

[496] *Roe v Wade* [1973] US Supreme Court 410 U S. 113, 152.

[497] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court 19–1392. 213.

is exclusively connected to the Freedom of the foetus and that of the potential mother. The relationship between the potential mother and the foetus is so unique that the boundaries of their respective Freedom are not drawable, at all. Therefore, the action, if there is any, executable or due in relation to their Freedom can be executed only by the potential mother, and no one else. We acknowledge the compassion of others including that of the father, society, and so on. However, their compassion does not extend beyond the motivational or advisory role. The freejon approach substantiates that only the potential mother is in the position to take the final decision. The unnecessary dogmatism of law, in this regard, will diminish the dynamism of the relationship. On the other hand, the phenomenon relating to the relationship between spouses or couples is equally demonstrable. However, due to the scope of this thesis, we will postpone this discussion for a future research endeavour. Meanwhile, suffices to submit that the intrinsic nature of human life, their inevitable loneliness, constant insecurity of life and its purpose, and an overwhelming sense of responsibility, keep motivating them to be a completely dependent newborn again, at least for a certain moment. This, lead to the phenomenon observed between spouses or couples.

Chapter 4: Defending the Concept of Freedom

Chapter 2 lays down the dominant misconceptions about freedom, while the later chapter ie the 3rd chapter presents the appropriate conception of Freedom. This chapter is, particularly, dedicated to responding to the major questions that are likely to be asked against the conception of Freedom presented in the previous chapter.

4.1 Can the Stance and the Impact of the Actions of the Self be Meaningfully Separated?

The previous chapter has presented Freedom as a state in which the self is in charge of our (or its) thoughts, consciously or unconsciously, or actions (including the inactions). We have further demonstrated that human Freedom, being so existentially associated with the self, the many concerns that have been commonly raised connected to Freedom are groundless. Now the questions that are likely to be asked: Can the self be separated from its context or milieu? Can actions or impacts of the self be meaningfully distinguished from the actions and effects of other related factors and environments the self acts in and is, practically, subject to? Can the self have any stance of its own at all apart from the system or environment consisting of other individuals, society, culture, etc.? How logical is it to claim that the self has its role to play at all when determinism claims that everything is pre-determined? How do we know if the self is in charge or not?

We live among other humans; we constantly follow the fellows around us. We seek their attention and recognition.[498] As Knight states without intercommunication with other selves and society, the selves cannot act at all.[499] He further claims that the central practical problem with freedom is that '[a]ll human life is associative.[500] To him, an isolated individual or self cannot even think and such an individual cannot be called a human at all.[501] To Berlin, ultimate values, fundamental moral categories, and concepts become part of what we are and what our identities as humans are 'over large stretches of time and space'[502] and, as Berlin submits, – 'I am what I am, because I am uniquely situated in the social setting of my time and place. I am connected by a myriad invisible thread to my fellow beings'[503]. There are more radical stances about self: 'each of us feels that there is a single ''I'' in control. But that is an

[498] Berlin, *Liberty* (n 49) 202; He States – 'the only persons who can so recognise me, and thereby give me the sense of being someone, are the members of the society to which, historically, morally, economically, and perhaps ethnically, I feel that I belong … I am nothing if I am unrecognised'.
[499] Knight (n 132) 91, 99.
[500] Knight (n 132) 101.
[501] Knight (n 132) 96, 97, 100. In a similar tone, Fichte states - '[m]an is destined to live in society; he must do so; he is not a complete human being, he contradicts his own nature, if he lives in isolation'; See Berlin, *Freedom and Its Betrayal* (n 52) 72.
[502] Berlin, *Liberty* (n 49) 217.
[503] Berlin, *Freedom and Its Betrayal* (n 52) 101. He supports Fichte and Herder's stance that 'man is what he is because he is made by society'; see Berlin, *Freedom and Its Betrayal* (n 52) 67. He also supports Burke's stance ie , 'I form not an isolable atom, but an ingredient in a social pattern'; see Berlin, *Liberty* (n 49) 203.

illusion'[504]; 'there is no reason to believe that there is an entity in one that thinks, and afortiori no reason to believe that there is a simple thinking self.[505] Some even show the audacity to reduce the individual as 'an abstract element of a "concrete" social pattern'[506]. To draw a conclusion, to many, the self is just an illusion while for others, there is no such thing as the self that lives in the human body.

There is the self or the sense of the self that constructs the sense of reality thereby the worldly reality as distinguished from the 'absolute reality' (or absolute unreality). The existence of the self and its phenomenon is distinguishable from that of other selves and the context it is attached to. Eastern philosophies, for example, the Vedant claims that as the world is an illusion so the self is.[507] We should not forget that, as the Vedant itself claims, at the end of the day, all that we are talking about is this 'illusory' world and, hence, as long as our concern is about the world, we cannot ignore the illusory self. Absolute reality, in contrast, as the Eastern philosophies claim, is not knowable by the human.[508] Therefore, is it not the best decision to live in the illusory world with the illusory self? Western philosophers, by contrast, relate the self to the collections of 'drives' 'characters' or 'dispositions', etc.[509] To them, the 'overall master drive'[510], or 'stable, unified, and integrated, hierarchy of drives'[511], or 'deeper dispositions'[512], or intrinsic 'psychological dynamism'[513], or 'organized and integrated whole'[514] etc of an individual gives him or her the illusion of his or her self. Our theory of Freedom is good to go even with these meanings of self. As long as each living human body has its drives, characters, or dispositions, and it shows the symptoms of comparing, contrasting, processing and evaluating those drives, characters, or dispositions, our purpose is well served. Frankfurt also takes a similar stance about the meaning of self that converge with all these attributions about self. To him, it 'is the non-empirical conception of ourselves as rational agent, that is as centers of thought and action … [and may not be a] putative object – the self -but conception of oneself as an agent'[515]. Thus, whether

[504] Richard M Ryan and Edward L Deci, 'Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?' (2006) 74 Journal of Personality 1557.
[505] Patricia Kitcher, 'Kant on Self-Identity' (1982) 91 The Philosophical Review 41, 5.
[506] Berlin, *Freedom and Its Betrayal* (n 52) 102.
[507] Fost (n 437); Prabhu and Bhat (n 437); S Radhakrishnan, 'The Vedanta Philosophy and the Doctrine of Maya' 21.
[508] H Hudson, 'Buddhist Teaching about Illusion' (1971) 7 Religious Studies 141; Pema Düddul, 'How to Free Yourself From Illusion' *Tricycle: The Buddhist Review* <https://tricycle.org/magazine/reality-in-buddhism/> accessed 27 May 2023; Kashyap Vasavada, 'Concept of Reality in Hinduism and Buddhism from the Perspective of a Physicist' Journal of East-West Thought 15; Radhakrishnan (n 507); 'Maya | Indian Philosophy | Britannica' <https://www.britannica.com/topic/maya-Indian-philosophy> accessed 27 May 2023.
[509] Gemes and May (n 427) xviii, xx-introduction by May; Gemes and Janaway (n 289) 37–46.
[510] Gemes and May (n 427) xviii.
[511] Gemes and Janaway (n 289) 38.
[512] Gemes and Janaway (n 289) 38.
[513] Fromm (n 214) 29.
[514] Fromm (n 214) 44.
[515] Henry E Allison, 'We Can Act Only Under the Idea of Freedom' (1997) 71 Proceedings and Addresses of the American Philosophical Association 39, 41. He further states – 'freedom is not simply a property that we may

it is the self as a putative object, or the non-empirical illusory self or a processing unit, or mysterious energy or whatever else it may be, for sure, there is the existence of it out there or in thought. Its existence is manifested and evidenced by the fact that X is not Y and *vice versa*. It makes X as he or she is; it makes Y as he or she is. We may call it the self.

The existence of the self leads to questions relating to sorting it out from its milieu and from other selves.[516] We must demonstrate that the responsibilities for the acts and things, independent of its environment, are attributable to the self. To be more precise we need to show that everything is not necessarily event causation; instead, there are things that are caused by the agent ie the self. We have not claimed that the self is to be taken as an isolated entity. Instead, we acknowledge that the self is constantly interacting with its environment, surroundings, bodily facticity, drives, other people and things. But still, at the end of the day, there is a separate identity and a piece of evidence supporting that the identity takes charge of its actions or omissions. Consider the identical twins, who are brought up in the same environment and who show countless similarities, but at the end of the day, X is X and Y is Y – are two different selves.[517] There is similarity in their acts or behaviour but their acts and behaviour are not the same. This proves that it is not the milieu that is to be given all credit for the event caused; they themselves also play a role in this process. We do not show the audacity to claim that the self is not influenced or motivated by external factors or the context in its formation or continuation; it is 'neither possible nor desireable'[518]. Still, there is this sense of uniqueness, real or illusory. As Mill says, '[t]here is no reason that all human existences should be constructed on some one, or some small number of patterns ... even sheeps are not undistinguishably alike'[519]. This fact is supported by Gadamer's wisdom that '[n]othing exists entirely for the sake of something else, nothing is entirely identical with the reality of something else'[520].

Each self, being a separate identity from its core, in the same environment with the presence of the same social, cultural, historical, and other factors, acts and behaves differently, although the difference might

attribute to ourselves as rational agents on heuristic grounds; it is rather the defining feature of this very conception'.

[516] 'I am not disembodied reason. Nor am I Robinson Crusoe…My individual self is not something which I can detach from my relationship with others…for I am in my own eyes as others see me. I identify myself with the point of view of my milieu: I feel myself to be somebody or nobody in terms of my position and function in the social whole'; See Berlin, *Liberty* (n 49) 201–2, footnote page 202.

[517] For empirical and scientific evidence, see Jay Joseph, 'Separated Twins and the Genetics of Personality Differences: A Critique' (2001) 114 The American Journal of Psychology 1; Torgersen Am and Janson H, 'Why Do Identical Twins Differ in Personality: Shared Environment Reconsidered' (2002) 5 Twin research : the official journal of the International Society for Twin Studies <https://pubmed.ncbi.nlm.nih.gov/11893281/> accessed 27 May 2023; Dorret Boomsma, 'The Same, but Different' (2006) 38 Nature Genetics 735.

[518] Mill (n 53) 141.

[519] Mill (n 53) 131.

[520] Gadamer (n 205) 210.

be the slightest. We may live in the same environment, and we may be influenced by the same factors, but at the end of the day, we don't just react; we process things and we do it differently based on the nature of our own selves. As Fromm, states, '[h]uman nature is neither a biologically fixed and innate sum total of drives nor is it a lifeless shadow of cultural patterns to which it adapts itself smoothly'[521]. The hyperbolic claim that we become what our culture makes us or we do what the milieu makes us do, is, largely, fuelled by our way of living this life; in most cases, we live the life by imitation and this may, often, gives a false message that, probably, it is not us but the environment we live in causes us to do things that we do.[522] In this process, the expression of the selves of the common people is suppressed and, in some cases, seems almost muted. Fromm claims that artists and writers are among those people who, generally do not follow what the common people do.[523] Instead, they are among the few groups of people 'whose thinking, feeling, and acting were the expression of their selves and not of an automaton' and the expression is very strong.[524] If we could imagine a world, where all people were artists and they were born, brought up and lived in the same environment, then we could see the wide diversity in expressions of selves. We could get their diverse and subjective views about culture, tradition, and so on and thus, no one would come up with such a hyperbolic claim that we cannot distinguish what we do and what we are caused to do.

If we cast our eyes from the imagination to the brute fact of the body, we see the material body despite being made up of the same materials, reacts differently with different environments, medicines, or organisms. When this is the scenario with the relatively fixed biological body, how can one imagine that the self, which is constituted of the relatively more abstract components, diverse effects, or programmes, will be always in tuned with its environment in the same manner as that of other selves? Each of these selves has its own distinct basis of personality and has its own way of reacting to its milieu.[525] Berlin clarifies his position by accepting the fact that self is dependent on its milieu, but 'it does not follow that all my attributes [including social attributes] are intrinsic and inalienable and that

[521] Fromm (n 214) 37.

[522] We do not deny the immense importance of imitation in human life. To understand the importance of imitation and its extent of use in human life see Harriet Over, 'The Social Function of Imitation in Development' (2020) 2 Annual Review of Developmental Psychology 93; Richard W Byrne, 'Social Cognition: Imitation, Imitation, Imitation' (2005) 15 Current Biology R498; Masako Myowa-Yamakoshi, 'Evolutionary Foundation and Development of Imitation' in Tetsuro Matsuzawa (ed), *Primate Origins of Human Cognition and Behavior* (Springer Japan 2001) <https://doi.org/10.1007/978-4-431-09423-4_17> accessed 27 May 2023; Harry Farmer, Anna Ciaunica and Antonia F de C Hamilton, 'The Functions of Imitative Behaviour in Humans' (2018) 33 Mind & Language 378; Wood, 'Why Imitation Is at the Heart of Being Human' [2020] *Greater Good* <https://greatergood.berkeley.edu/article/item/why_imitation_is_at_the_heart_of_being_human> accessed 27 May 2023. Nevertheless, our point is that this process inevitably comes with drawbacks we are not aware of.

[523] Fromm (n 214) 285.

[524] Fromm (n 214) 285.

[525] Fromm (n 214) 209.

I cannot seek to alter my status within the 'social network', or 'cosmic web', which determines my nature'[526]. Frankfurt's observation in this regard is more decisive for our purpose. He posits that the 'difference between persons and other creatures is to be found in the structure of a person's will'[527]. The 'structure of a person's will' that is relatable to self, plays a significant role in breaking the hard rules of society, culture, etc and, thus embracing Freedom. This Freedom itself is the testament that the self has a role in the causation of the events.

Even if we, for a remote reason unfathomable, have doubt about the existence of the self and its separability, we submit that as Fromm does – 'we must recognize its existence'[528] and its separability. We have to accept it because this is the only way things in the world are working and we do not have any other alternative that may support all these human systems, specially the systems with normative force.[529] Denying self-causation is denying the existence of human agency and thereby, rejecting free will and accepting the event causation and thus, subscribing to one form of determinism. When it is the question of determinism it is a discussion of another dimension that leaves no space for the discussion of the lawjon approach while the freejon approach has, still, some hope.[530] At this point, we do not have

[526] Berlin, *Liberty* (n 49) 204–5.

[527] Harry G Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 The Journal of Philosophy 5, 6.

[528] Fromm (n 214) 317.

[529] In a world, where a human has no agency value, where a human is nothing more than a passive object of the circumstances, he or she does not bear any responsibility whatsoever. All human systems and institutions lose their authority to coerce any human. Berlin states – 'Determinism clearly takes the life out of a whole range of moral expressions … If determinism is true, the concept of merit or desert, as these are usually understood, has no application …when deterministsuse the language of moral … such talk is hyperbolic and not meant to be taken literally'; see Berlin, *Liberty* (n 49) 6–10. He further states – 'There are remedies that breed new diseases, whether or not they cure those to which they are applied. To frighten human beings by suggesting to them that they are in the grip of impersonal forces over which they have little or no control is to breed myths, ostensibly in order to kill other figments - the notion of supernatural forces, or of all-powerful individuals, or of the invisible hand. It is to invent entities, to propagate faith in unalterable patterns of events'; see Berlin, *Liberty* (n 49) 26. Baumeister and other state – 'The belief that scientists have shown that there is no such thing as free will is disturbing … lowering people's subjective probability that they have free will increases misbehaviour—for example, lying, cheating, stealing, and socially aggressive conduct'; see Roy Baumeister, Alfred Mele and Kathleen Vohs (eds), *Free Will and Consciousness: How Might They Work?* (Illustrated edition, Oxford University Press 2010) 1–2. Thus the rule of game of living in the world (illusory) is that we have to accept that there is the self, it acts, and its action is distinguishable from that of the context.

[530] Accepting the worldly reality indeterministic and hence, accepting the agent causation leaves the door open for both the freejon approach and the lawjon approach. However, for lawjon approach, availability of the free will is an additional requirement apart from the presence of the agent causation, while for the freejon approach, free will is not a requirement. On the other hand, rejecting the indeterminism and accepting the determinism will, for sure, shut the door of the lawjon approach completely with no exception, while the the freejon approach is, likely to be survived 'somehow'. This 'somehow' may have an explanation from Kant's antithesis of freedom where he claims that even in the deterministic world existence of Freedom is viable. See Kant (n 28) 480–490. A possible explanation in favour of such Freedom may be inspired by the concept of the Mathematical term 'stochasticism' or 'superdeterminism' a term used by the discipline of Physics. See Anthony R Cashmore, 'The Lucretian Swerve: The Biological Basis of Human Behavior and the Criminal Justice System' (2010) 107 Proceedings of the National Academy of Sciences of the USA 4499; Sabine Hossenfelder and Tim Palmer, 'Rethinking Superdeterminism' (2020) 8 Frontiers in Physics; *Does Superdeterminism Save Quantum Mechanics?*

the audacity to accept or reject determinism for - when I see myself as a tiny element in the vast universe, I do not find any reason to deny determinism, again when I see myself as the source of the observation of the grandness of the universe, I find no reason to accept the determinism. Therefore, practically and given the scope of the research it is appropriate to limit our discussion by accepting the possibility of agent causation ie accepting the self-causation.[531] If it is not the will of the self, then who or what is the source of the will? Nothing will be as absurd as the claim that we are automata through which society, culture, and the milieu express their will.

Further, as long as the discussion is connected to human sciences or social sciences where the question of normativity is associated, denying self-causation is not only absurd in theory but also quite chaotic and dangerous as has been proved on numerous occasions.[532] Rejecting or undermining self-causation and thereby confusing it with event-causation is akin to ignoring the significance of the self. This is not only prejudicial to the process of self-cultivation but also an impediment towards the flourishing of the milieu in which the self acts.[533] Therefore, while there are plenty of discussions rejecting determinism, we should stay away from those discussions to make sure that we are mindful of the objective of this thesis.

Answers lead to new questions – if the self is in the driving seat of our actions and thoughts, which self or which part of self? Could we ever be able to know whether it is the unified self or the individualistic self? Is it possible to find out whether a particular act is self-caused or context-caused? If it is not possible, how can we save one from bearing unnecessary responsibility for an act not caused by himself or herself?

Berlin is afraid of the 'metaphysical fission' of the self and submits that this division of self is largely responsible for making an already complicated issue more complicated and thus paving the way for

Or Does It Kill Free Will and Destroy Science? (Directed by Sabine Hossenfelder, 2021) <https://www.youtube.com/watch?v=ytyjglyegDI> accessed 13 November 2022.

[531] Berlin points it out well and states - I do not claim to have refuted the conclusions of determinism; but neither do I see why we need to be driven towards them; see Berlin, *Liberty* (n 49) 29–30.

[532] To understand the benefit of accepting self-causation or agent-causation and the danger of rejecting it see Meghan Elizabeth Griffith, 'Freedom and Responsibility: An Agent -Causal View' [2003] Doctoral Dissertations Available from Proquest 1; Michael Moore, 'Causation in the Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2019, Metaphysics Research Lab, Stanford University 2019) <https://plato.stanford.edu/archives/win2019/entries/causation-law/> accessed 27 May 2023; William L Rowe, 'Responsibility, Agent-Causation, and Freedom: An Eighteenth-Century View' (1991) 101 Ethics 237; Guy Grinfeld and others, 'Causal Responsibility and Robust Causation' (2020) 11 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.01069> accessed 27 May 2023.

[533] Fromm's opinion is worth-noting here – 'Organic growth is possible only under the condition of supreme respect for the peculiarity of the self of other persons as well as of our own self. This respect for and cultivation of the uniqueness of the self is the most valuable achievement of human culture and it is this very achievement that is in danger today'; see Fromm (n 214) 291.

manipulation.[534] We submit that the Hegelian or Fichtian fission of the self he is referring to is in no way identical to our division of self. The division he is referring to contains, 'on the one hand, a 'higher', or a 'real', or an 'ideal' self, set up to rule a 'lower', 'empirical', 'psychological' self or nature, on the other'[535]. Further, he points out that the people are the lower or the ruled self while the ruler or the higher self is identified with 'institutions, Churches, nations, races, States, classes, cultures, parties, and with vague entities, such as the general will, the common good, the enlightened forces of society, the vanguard of the most progressive class, Manifest Destiny'[536]. We submit that the problem he is afraid of is not directly linked to the division of self, rather it is linked to the super-imposed mechanical conception of the self that undermines the self itself and glorifies the superficial entities identifying as the higher self although the so-called higher self is not the part of the self at all![537] Thus the concerns relating to the fission of the self-resolves.

In response to the question of whether an act is caused by the self or not, the answer depends on the perspective we are talking from. If we, as usually and mistakenly[538], take Freedom from the external perspective, the answer, is generally and arguably, negative. From the internal perspective, the answer may be both ie positive or negative; the self may or may not separate its decision from a decision shaped or influenced by politics, society, or culture. Then how can we distribute the responsibility of action – as legal responsibility is a question of who is in charge? Chisholm has an answer – 'an agent freely performs an action …only if he could have done otherwise... at least one of the events that are involved in the act is caused, not by any other events, but by something else instead. And this something else can only be the agent—the man'[539]. However, our submission is that we do not need to find out the answer; the question is not relevant for Freedom remains outside of the realm of law. In the realm of Freedom, subject to one exception of 'possibility or prospects'[540], it is sufficient to presume that the self is in charge.

4.2 What is the Scope of Freedom?

From the concept of Freedom, it should have been clarified that one's Freedom does not entail him to do whatever he wants neither the scope is subject to any sort of balancing. Still, to some, it may remain

[534] Berlin, *Liberty* (n 49) 36, 179, 181.
[535] Berlin, *Liberty* (n 49) 36.
[536] Berlin, *Liberty* (n 49) 37.
[537] The Hegelian forms of institutions or artificial entities do not fulfil the minimum requirement to be considered as, in any way, relatable to our unified self. Self has no representation or expression in these artificial entities. Instead, the entities are self-suppressing.
[538] As we have seen in the previous chapter, Freedom is not an external phenomenon. External or observer's view may be mistaken as my sickness may or may not be noticeable or discoverable by the second person. I have a higher chance to understand it when I take it from an internal perspective.
[539] Alfred R Mele, 'Chisholm on Freedom' (2003) 34 Metaphilosophy 630, 630, 634.
[540] To be explained at the end section of this chapter.

as a grey zone in the question of the scope and the extension of Freedom, hence requiring further elaboration in this regard. With reference to such discussion, Mill's harm principle is readily taken into consideration – we can do everything that is 'self-regarding' or 'self concerning' 'so long as what we do does not harm [others], even though they [other] should think our conduct is foolish, perverse, or wrong'[541].[542] The beauty of Mill's concept of Freedom is that it frees our Freedom from unnecessary restrictions ie what others think about our conduct; others' feelings, disgust, discomfort, moral position, etc, as long as our actions are self-regarding, are not legitimate grounds for restricting Freedom.[543] The spirit of Mill's conception of Freedom is well reflected in the narrative of Fromm who want the least governmental intervention in an individual's personal life, and, if possible, there should be no intervention at all.[544] Unfortunately, the harm principle as it is commonly interpreted contradicts with this spirit. The common interpretation of Mill's harm principles claims that our extent of Freedom is subject to the avoidance of the harm to others. His overall submission about Freedom implies that his stance in favour of 'other's harm' as a limit to Freedom is not conclusive, because he is completely aware of the negative consequences of counting it as a condition for the interference.[545] Freedom loses its significance in the presence of such restrictions as '[t]he line which Mill attempts to draw between actions with which the law may interfere and those which it may not is illusory'[546].[547] Therefore, we

[541] Mill (n 53) 83.

[542] Constant also take resort to the harm principle in putting a limit on Freedom. He states - each to develop our own faculties as we like best, without harming anyone; see Constant (n 141) 323.

[543] Mill (n 53) 83. The spirit of Mill's conception of Freedom is as profound as Condorcet, Constant, Tocqueville, Humboldt, and others. Sorkin states – 'Humboldt proposed the reduction of state power to the barest minimum order to insure freedom for individual self-cultivation'; see Sorkin (n 250) 55.

[544] Fromm (n 214). Wolf has exactly the same stance against government intervention; see Robert Paul Wolff, *In Defense of Anarchism* (First edition, University of California Press 1998).

[545] He does not believe that the 'damage, or probability of damage, to the interests of others, can alone justify the interference of society'. See Mill (n 53) 156. He wants to say mere allegation of harm is not sufficient to interfere. Clearly, as he holds, harm is a criterion that, if considered as a decisive criterion for interference can be made up anyway. Thus, it is clear that Mill was quite sure about the danger of considering harm as a decisive criterion for interference.

[546] Hart and Hart (n 350).

[547] The category harm is so extensively interpretable any human action, however intimate or personal that is, can be declared as harmful for someone else. A person from Bangladesh can bring the same allegation against a person living in Italy for the latter uses heater in Italy. A Make-up user in France is responsible for the starvation of B living in India. In both the cases we can establish a meaningful and proximate link requires to make one legally responsible under the existing law of EU. To construct a link of these two incidents see 'Ugly Truth behind Global Beauty Industry' (21 September 2014) <https://www.aljazeera.com/features/2014/9/21/ugly-truth-behind-global-beauty-industry> accessed 27 May 2023; Leahanna Sine, 'L'Oréal's Dilemma: Aligning Beauty Trends With Ethical Goals' (2022) 13 Journal for Global Business and Community <https://jgbc.scholasticahq.com/article/34697-l-oreal-s-dilemma-aligning-beauty-trends-with-ethical-goals> accessed 27 May 2023; Sunera Saba Khan, 'Child Labour: The Dark Side of Makeup Industry' *The Financial Express* (Dhaka, 13 January 2020) <https://thefinancialexpress.com.bd/views/reviews/child-labour-the-dark-side-of-makeup-industry-1578838247> accessed 27 May 2023. Berlin states – 'Men are largely interdependent, and no man's activity is so completely private as never to obstruct the lives of others in any way'; see Berlin, *Liberty* (n 49) 171. Hart states – 'in an organised society it is impossible to identify classes of actions which harm no one or

reject the harm principle in the discussion of the scope of Freedom. While we, definitely reject, as vague terms as state security, and public interest. We also think that Humboldt's 'strictly exceptional'[548] or Jefferson's second person injury exception[549] does not sound appropriate in the discussion of the scope of Freedom. Instead, we find that Sartre better reflects our position - 'no limits to my freedom' can be found except freedom itself or, if you prefer, that we are not free to cease being free'[550].

We submit that the concept of Freedom itself clarifies its scope. Freedom is a state where the self is in charge of its actions and thoughts. No limitation, no restriction, and no exception apply to this state; it is absolute. This is purely an internal state of being for being as humans. There is no reason for preventing one to be in this state; society, law, and no other institutions should have the authority to interfere in one's life as long as his or her actions are self-addressing. Mill's position and reasoning in this regard are very close to ours. He reasons that in one's matter of his or her own feelings and circumstance, he or she is the more suitable person to take the decisions than anybody else.[551] Therefore, if the society or law has 'anything to say'[552] about his or her decisions at all, it can do so with the condition that the statement must be based on 'general presumptions'[553].[554] Society, at best, can advise such a person, but not more than that. In the matters of 'person's own concern' [and 'self-addressing'][555], he or she is the 'final judge'.[556] Because, as Mill states '[a]ll errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain

no one but the individual who does them'; see Hart and Hart (n 350). Quinney states – 'A government can declare as criminal almost anything that can arbitrarily be defined as a harm to others'; see Quinney (n 54) 24.

[548] Humboldt (n 214) 92. He posits, 'security, which alone prescribes the proper limits of State action, does not render such regulations generally necessary, since every case in which this necessity occurs must be strictly exceptional'. However, the significant point is, Humboldt mentions that to ensure security the most important thing is the guarantee of the Freedom of thought. He states – 'It cannot surely be forgotten, that freedom of thought, and the enlightenment which only flourishes beneath its shelter, are the most efficient of all means for promoting security'; see Humboldt (n 214) 68.

[549] Charles Murray, *By the People: Rebuilding Liberty Without Permission* (Reprint edition, Crown Forum 2016) Prologue – The Paradox. He holds that a good government is one that 'shall restrain men from injuring one another [and] shall leave them otherwise free to regulate their own pursuits of industry and improvement'.

[550] Sartre (n 182) 439. Rawls also claims the same but to be diverted to another direction; see Rawls (n 132) 188.

[551] Mill (n 53) 140.

[552] Here Mill uses the word 'interference'. We have reason to believe that he does not want to mean the meaning that word interference usually means. Rather, he wants to mean something with lesser imperative impact like 'anything to say'. See Mill (n 53) 140.

[553] The emphasis on the 'general presumption' indicates how passionate he is in making sure that Freedom is respected. The point to be noted here, he is saying that the society or law may have anything to say (just saying, not forcing or compelling) about one's judgement about his or her personal life only when the judgement is backed by a general presumption as distinguished from the individualistic kind of presumption. This clarifies why heterosexual people should not be allowed to make any judgement addressing the issues of homosexual people.

[554] Berlin, *Liberty* (n 49) 140.

[555] We suggest that along with Mill's 'self-concerning' 'self-regarding' or 'person's own interest', we should use 'self-addressing' to be used to avoid the complexities that may be raised in association with these terms Mill uses.

[556] Mill (n 53) 140.

him to what they deem his good'.[557] Therefore, any self-addressing thoughts or actions are in the exclusive zone of which the self is the final judge and this is so without any exception. Gibbons posits that [w]hen an action cannot be done with reasonable safety, it cannot legitimately be done at all.[558] Taking the contra equation into consideration, we submit that when an action or state has nothing to do with the safety of the person other than the very person whose action or state is in question, it is inappropriate and confusing to associate a safety provision as a condition for the action or state.[559] This submission agrees with the spirit of Humboldt who states that 'it is freedom, which always suffers from the interference, however slight, of the State'.[560]

What is self-concerning or self-addressing? How do we understand which acts or thoughts are self-concerning or self-addressing, and which are not so? The answer to these questions along with the question relating to the scope of the Freedom is directly connected to the question - what are the things that the self has the prospect of taking charge of? By default, in the absence of any political privilege, social arrangement, legal license or entitlements and so on, the self has the prospect of taking charge of those things or thoughts it owns or is constituted of. Self owns and is constituted of the organic and mental body it is associated with or is a part of. The self, also, is in charge of the existential resources required to preserve and nourish both the organic and the mental parts of the body and we identify these existential resources as FRs. As a conscious animal, he or she needs to think and as a social animal, he or she needs to express that thought. Therefore, one's Freedom extends to the actions and thoughts concerning and addressing the body, the needs of the body, and the self, as a whole. Please note that the self, as opposed to the dominant view, does not own any property or person except the Freedom resources. Therefore, by default, Freedom does not extend to property, goods, etc. As long as the physical effects of the actions or thoughts remain within the body the self is in charge of, the actions, thoughts or expressions can sufficiently be called self-concerning.[561] In addition, we have Mill's explanation of 'self-concerning' that refers to matters, directly and in the first instance, connected to the person in question.[562]

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[557] Mill (n 53) 140–41.

[558] Hugh Gibbons, 'The Purpose of Law' (*Biology of Law*) 22 <http://www.biologyoflaw.org/Purpose/PurposeLaw.pdf> accessed 2 November 2022.

[559] Mill's voice is similar in this regard – 'the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect [therefore, society has no right to interfere in the personal space of individuals]'; see Mill (n 53) 140.

[560] Humboldt (n 214) 69.

[561] We find Humboldt on our side. He prescribes a reasonable test in this regard – 'there occurs no such deprivation-when one individual does not overstep the boundary of another's right, then, whatever disadvantage may accrue to the latter, there is no diminution of rights. Neither is there when the injury itself does not follow until he who suffers becomes active on his own part, and, as it were, joins in the action, or, at least, does not oppose it as far as he can'; see Humboldt (n 214) 87.

[562] Mill (n 53) 82–83. He also, specifically, mentions some areas of Freedom – 'the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and

On the other hand, the mental effects of one's actions or expressions, though self-concerning, may not be limited to the mental body of the very person; by virtue of the nature of such effect, it is normal that the effects will go beyond the body of that person and will affect the mental body of others. Such effects cannot, necessarily be contained with reference to physical boundaries. However, human being a social animal, self-expression is an existential part of the self. To solve this problem, we, for the concept of Freedom requires so, suggest the term 'self-addressing'. In the cases, where the physical boundary of mental effect is not drawable, the best strategy is to decide who has been addressed by the action or expression. If the action or expression is addressed to the very self who makes those, X, Y or Z should not contribute to pulling the effects onto them. If they do so, it is their problem; they volunteer themselves in dragging them into the space of that person who makes such an expression. Humboldt has an excellent remark in this regard:

> He who utters or does anything to wound the conscience and moral sense of others, may indeed act immorally; but, so long as he is not guilty of being importunate [self-imposition][563], he violates no right. … those who were exposed to the influence of such words and actions were free to counteract the evil impression on themselves with the strength of will and the principles of reason. Hence, then, however great the evils that may follow from overt immorality and seductive errors of reasoning, there still remains this excellent consequence, that in the former case strength of character, in the latter the spirit of toleration and diversity of view, are brought to the test, and reap benefits in the process.[564]

Further, we should clarify here that self-addressing actions or expressions also include written materials as those generally more aimed at expressing the self, specially the open-addressed materials that are not specifically targeted.[565] If, one alleges that a particular open-addressed expression is in fact targeted to him or her? All open-addressed materials have reason to be counted as self-addressed given the

feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological … liberty of tastes and pursuits; of framing the plan of our life to suit our own character'.

[563] We find the relevance of this word with our self-imposition start of which marks the end of the self-addressing and hereby marks the cessation of Freedom and the starting point of despotism, authoritarianism, etc.

[564] Humboldt (n 214) 87.

[565] For example, opinions published in the public media. Along with many other scholars, Tocqueville gives the utmost importance to ' freedom to write'; see Alexis de Tocqueville, *Democracy in America:Historical-Critical Edition of De La De´mocratie En Ame´rique* (Eduardo Nolla ed, James T Schleifer tr, Liberty Fund 2010) 305. Rawls states – 'freedom of thought and liberty of conscience, freedom of the person and the civil liberties, ought not to be sacrificed to political liberty'; see Rawls (n 132) 177. Humboldt states – 'it is that freedom of thought is so vital, and anything that diminishes it so fatal'; see Humboldt (n 214) 68. Mill gives the utmost importance to the Freedom of expressing and publishing and states – 'liberty of expressing and publishing opinions … almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it'; see Mill (n 53) 82–83.

importance of self-expression.[566] Therefore, unless there are physical[567] and constructive[568] signs of self-imposition, the expression is liable to be counted as self-addressing. Even some of the published written and documentary materials, which are generally and dogmatically considered public documents, should be considered as just self-expressing, and hence, just self-addressing. For example, documentary and media posts in 'social media' are, by default bound to be self-addressing.[569] We submit that any expression specifically targeted to government, public office, etc is also self-addressing as the self has a stake in those if we want to make sure that individuals have proper representation in those institutions.[570]

Still, there remain some alleged hard cases where the dividing line between the self and others seems blurred. For example, Mill claims if a father 'deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness'[571]. Humboldt also reminds us about the duty of the parents.[572] He prescribes punishment for such parents.[573] Mill suggests punishments also for 'being drunk on duty'[574], for 'violation of good manners'[575] or for being indecent[576]. Similarly, Knight is confused about 'whether a regulation prohibiting a locomotive engineer from getting drunk while off duty, or drinking intoxicating liquor at all, or going into a saloon, would be considered an infringement of his liberty'[577]. Being so confused he proposed that each of such

[566] For example, one reason is provided by Mill – 'We have a right, also, in various ways, to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours'; see Mill (n 53) 141–42.
[567] Physically forcing someone to accept one's statement.
[568] Addressee and addressor of the statement are in such a relationship that bears conclusive proof in support of the ground that the imposition is likely to be taken place. For example, the employee and employer relationship where an employer can unduly deprive the employee of the promotion if the latter does not comply with the expression.
[569] Once people used to express themselves in physical meetings or gatherings. Now the trend has changed. Now, they are doing the same things online from their personal wall or account. Each personal wall or space is one's personal space. Other people may like that expression or may not. If X does not like one's post, he can unfollow him or her or abstain from peeping into his or her account. There is no way to accept that such publication can be counted as an element of the offence of defamation. It, whether oral or written, is purely a personal statement, unless the written piece is in a platform taken by people or by virtue of state recognition as an expert platform to which people in general rest their faith.
[570] we reject the Hegelian artificial form of state and institutions. Instead, we accept that an individual has representation, in its practical and meaningful sense, in the state and other public institutions and, hence, his or her Freedom extends to the state and other public institutions, at least, in the question of Freedom of expression. Thus, speaking about state or other public institutions is akin to speaking about himself or herself.
[571] Mill (n 53) 143–44.
[572] Humboldt (n 214) 66.
[573] Mill (n 53) 144.
[574] Mill (n 53) 145.
[575] Mill (n 53) 160.
[576] Mill (n 53) 160.
[577] Knight (n 132) 95.

cases should be decided based on 'practical necessity, reasonableness, or "rightness" of any given restriction in any given case'[578] and thus, he wants to make the scenario complicated.

We submit that the matters are not as complicated as these are commonly presented; understanding the meaning of Freedom is sufficient to find the line between the area of Freedom and beyond. In the first case, where Mill proposes punishment for parents, we reject his proposal for reasons discussed in the previous chapter at the time of explaining the merger and splitting of the Freedom boundary. Mills' second case does not include any point of dispute - as long as the area of life is in charge of self, Freedom exists; the moment he is on duty, his or her Freedom is in no way relatable to the act of being drunk. Mill states – 'the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom'[579] (hereinafter, position 1). When such is the position of Mill, his conclusion supporting the punishment for the violation of good manners or decency is not acceptable.

Suppose, X, a naturalist, wants to go to the public park nude. Can it be counted as punishable? As per Mill's position 1, it is not, whereas he expressly suggests punishment for indecency. What does our concept of Freedom suggest? It is X's body; whether he or she will cover his or her body is relatable to X's Freedom. There is no, *prima facie*, reason, of its own, to bring the matter inside the sphere of law and punish him or her; the law cannot, generally, prohibit or put restrictions on X's Freedom relating to covering or not covering his or her body, even if the park is a public place. There may be a user manual for using the property of the park and X must follow that. However, as long as it is X's body, there should not be any prescription. Other people have the option not to stare at him or her, if this disturbs them. Until this point, the matter is as simple as this. But if it is a sensitive place and X's naked body has the possibility of having a concrete impact on the place, there can be a prohibition of nudity by law subject to other considerations to be discussed in Chapter 8.

Apart from the dimension of Freedom and law, there can be a third dimension ie sphere of politics, culture, religion, etc. We must keep in mind which dimension a particular incident is referred to; there is no chance of dragging into an incident of one dimension to the sphere of another dimension.[580] Suppose, for example, the park is an exclusive property belonging to a church and it has taken a decision not to allow any nude person in the park as it is against their religious rules. The matter is now purely within the sphere of the third dimension, and, hence, neither Freedom nor law, *prima facie*, have the authority to interfere in this issue.[581]

[578] Knight (n 132) 95.
[579] Mill (n 53) 145.
[580] The boundary and scope of these three dimensions have been discussed in detail in Chapter 8.
[581] However, it does not necessarily prevent the church authority from taking the help of the law. In that case, the law will take a decision following its own legal plot and thus, the law might need to uphold a religious rule of the church. It does not, however, render the religious rule the status of law; it, still, remains a religious rule.

Does Freedom extend to the making of statements or expressions that may seem wrong, derogatory, or offensive? Mill, (also Humboldt)[582] shows some conclusive and outstanding reasons in favour of an affirmative answer to this question, but to conclude leaving confusion.[583] He states that the Freedom of expression must be 'absolute and unqualified'[584] and, hence people must not be silenced except the conclusive pieces of evidence of instigation and the traces of instigation generated 'overt act' are found.[585] Based on the grounds he shows, he could easily conclude that one must not be silenced under any circumstances. When the matter is, specially, between an individual and mighty entities like the state, even the narrowest space for interference is very dangerous.

The acceptance of the religious rule by a court of law never upgrades the religious rule to a law. This point is explained in Chapter 8.

[582] Humboldt (n 214) 67–68. He states – 'The man who is accustomed to judge of truth and error for himself: and to hear them similarly discussed by others, without fear of the consequences, weighs the principles of action more calmly and consistently, and from a higher point of view, than one whose inquiries are constantly influenced by a variety of circumstances not properly part- of the inquiry itself Inquiry, and the conviction which springs from free inquiry, is spontaneity; while belief is reliance on some outside power, some external perfection, moral or intellectual. Hence there is more self-reliance and firmness in the inquiring thinker, more weakness and indolence in the trusting believer. Doubt is torture only to the believer, and not to the man who follows the results of his own inquiries; for, to him results are generally far less important. During the inquiry, he is conscious of his soul's activity and strength; he feels that his perfection, his happiness, depend upon this power; and instead of being oppressed by his doubts about the propositions he formerly took to be true, he congratulates himself that his increasing g mental powers enable him to see clearly through errors that he had not till now perceived. The believer, on the contrary, is only interested in the result itself … While all other methods are confined to the mere suppression of actual outbreaks, free inquiry acts immediately on the dispositions and sentiments; and while everything else only produces outward conformity, it creates internal harmony between will and activity. When shall we learn, moreover, to set less value on the outward results of actions, than on the inner temper and disposition from which they flow?'

[583] To see the reasons he shows, follow pages 83 – 106. He states – 'the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation … We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still … If we were never to act on our opinions, because those opinions may be wrong, we should leave all our interests uncared for, and all our duties unperformed … [the strength of the human judgement is in] the means of setting it right are kept constantly at hand ... [free speech however offensive is the means… one can judge with confident only when his opinion is open to criticism] ... the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. [The only manner] the nature of human intellect to become wise … that mankind ought to have a rational assurance that all objections have been satisfactorily answered … not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself. ... [if ...opinion with criticism …context full] any part, the shell and husk only of the meaning is retained, the finer essence being lost … He who knows only his own side of the case, knows little of that... Nor is it enough that he should hear the arguments of adversaries from his own teachers, ... He must be able to hear them from persons who actually believe them ... He must know them in their most plausible and persuasive form … We have now recognised the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds'; see Mill (n 53) 83–106..

[584] Mill (n 53) 83. He further states – 'Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest. In page 86 (footnote) he states - If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered'.

[585] Mill (n 53) 87 (footnote).

When the matter is Freedom of expression, instigation is not a relevant issue at all; instigation must have the element of the crossing of the boundary where freedom ceases to exist. In fact, instigation is a matter of different categories having no relationship with the concept of Freedom. Mill himself is aware of the fact that the instigation 'is not strictly a case of self-regarding conduct'[586]. Therefore, it is not only illogical but also prejudicial to make a reference to the concept of instigation as a ground of exception to Freedom. When we link two (different) elements as alternatives to each other, there must exist a contributory or complementary connection.[587] Freedom is never a complementary factor to instigation. A case of surgical operation by a doctor for removing a damaged cyst is in no way relatable to the possibility of an act of smuggling human body parts. It will be illogical to say that a doctor can remove human cysts subject to the condition that he or she is not doing it for smuggling purposes. Although the provision seems benign, this can be turned into cancerous. Every time doctors need to do it, they will need to take permission from the courts. This will not only make the doctor's life measurable but also the life of the patients. Freedom is way distinguishable from that of the category of instigation; it is not contributory to instigation at all; instead, the opposite ie preventive.

What happens in the act of instigation? Why does someone get instigated? Not because the instigator states something but because of the trust and belief the instigating statement comes with. A person who is being instigated must have a genuine belief in the statement of the instigator. When we restrict free opinions, any permitted opinion may become special and authoritative as such opinion is likely to have greater weigh only because the opinion is permitted. To put it in another way, when we are left with only a few people who are permitted to opine and permitted to express a particular type of opinion, any statement made by them, only by virtue of being expressed, gets the genuine status as the statement is associated with implied permission of the law.[588] This creates increased trust in the statement or opinion. Exactly this mental effect makes it possible to create instigating masters like Hitler or propaganda masters as influential as the gods. However, when opinions are absolutely free, the instigating effect of the opinion decreases or even diminishes. Further, the responsibility is shifted to the person so instigated to be more careful before acting on the effect of instigation. Thus, restriction on the Freedom of expression to prevent instigation is counter-productive. It, on the one hand,

[586] Mill (n 53) 160.

[587] For example, we can say – everyone must have a house under this housing law unless it is found that someone already has a house. We cannot say everyone must have a house under this law unless it is found that someone already has a boat. Admittedly, there may have a connection in a special case based on special circumstances, but there is no general link between a boat and a house.

[588] While we acknowledge that legal recognition enhances the justification of any act or statement, we do not accept the claim of legal positivism that positive law, by virtue of being promulgated as a law, creates its own authority. This is a sheer misunderstanding about the nature and source of the authority of law. Hart, Raz, Gardner and many other positivists are driven by this misunderstanding. See Raz, 'Authority, Law and Morality' (n 105); Hart and others (n 20); Gardner, 'Legal Positivism' (n 19). The enhancement of justification is due to the law's own Value that is assumed to be reflected in humans' sense of law. This point will be further clarified as we will proceed to our discussion in the upcoming chapters.

demotivates people to be mature and more responsible, on the other hand, paves the way to unleash torture on the people who are weak. Therefore, the freedom of expression must be absolute.

One may ask the questions - how do we compensate for the attack on one's religious feelings? How do we tackle the outrage generated due to the attack on their faith? Our position in this regard is, more or less, almost similar to that of the previous discussion about instigation; in fact, these two points are connected. X's religious sentiment is not attacked only because Y says something derogatory about the religious figure or religious faith of X – rather it is because of the rules or law that bans such statements and the situation and pre-determined mindset originates in consequence of the existence of such law.[589] X does not logically become aggrieved because Y has said so but because of X's assumed comparative disadvantage and the threat of his existence with his faith ie X think if the statement goes unchecked his or her faith will be in danger. Legal recognition of such a statement as derogatory intensifies X's belief and also the sense of being aggrieved. Thus, the existence of such a law gives rise to the agitation.

Someone believes something in some way – only because of this reason we have to believe the same and in the same way and we cannot express our belief differently – if this becomes the provisions of law then it would be terrible. We can look at the history of Christianity with all sorts of prohibitions against Freedom of expression. It did not pay off at all; the withdrawal of the prohibition did.[590] The spoon-feeding technique and protectionism are not good for any purpose. What was the case of

[589] Our claim is substantiated if we look into the incidents attacking the religious feelings of certain religious groups. We submit that such incidents are much higher in the countries where there are stricter blasphemy laws in force and more interestingly the blasphemy laws are applied against the minority people in the majority of the cases. See, for instance, Zaheer Akhtar, 'Blasphemy Cases in Pakistan: 1947 – 2021' (*CRSS*, 26 January 2022) <https://crss.pk/blasphemy-cases-in-pakistan-1947-2021/> accessed 27 May 2023; daily sun, 'In the Name of Blasphemy Law Minority Is Being Abused and Harassed by Majority in Pakistan: Conference | Daily Sun |' *daily sun* <https://www.daily-sun.com/post/568109/In-the-name-of-Blasphemy-law-minority-is-being-abused-and-harassed-by-majority-in-Pakistan:-Conference> accessed 27 May 2023; Virginia Villa, 'Four-in-Ten Countries and Territories Worldwide Had Blasphemy Laws in 2019' (Pew Research Center 2022) <https://www.pewresearch.org/short-reads/2022/01/25/four-in-ten-countries-and-territories-worldwide-had-blasphemy-laws-in-2019-2/> accessed 27 May 2023. This eventually reconfirms how the restriction on Freedom of speech, instead makes the law counterproductive. Furthermore, in the absence of concrete statistics, our preliminary finding suggests that the stricter the blasphemy law is in a country, the higher the number of blasphemy cases. For the list of the countries with stricter blasphemy laws, see 'Ranking Countries by Their Blasphemy Laws' *The Economist* <https://www.economist.com/erasmus/2017/08/13/ranking-countries-by-their-blasphemy-laws> accessed 27 May 2023.

[590] Here we are referring to the fundamentalism in Christianity during the time of Spinoza, Galileo, Giordano Bruno and many other Enlightening scholars when statement against Christianity was considered as capital crime. This was the time when more people were charged for blasphemy. To know how disturbing the Christianity-driven blasphemy law was and to know their impact on the freedom of expression see Gerd Schwerhoff, 'Horror Crime or Bad Habit? Blasphemy in Premodern Europe, 1200–1650' (2008) 32 Journal of Religious History 398; Martha G Newman, 'Defining Blasphemy in Medieval Europe: Christian Theology, Law, and Practice', *Blasphemies Compared* (Routledge 2020); Paul Cliteur and Tom Herrenberg, 'The Fall and Rise of Blasphemy Law'. We submit that the increased number of blasphemy charges has been always proportionate to the presence, application, and severity of the blasphemy laws. As the application and severity of blasphemy laws decrease, charges of such crimes drop, and the freedom of expression increases.

Christianity centuries ago, is the case of Islam now.[591] Restriction on Freedom of expression will never save the weak. Instead, the restriction will be used as a brutal weapon.[592] The mighty group will never stop offending the faith of the weak. On the other hand, even if the weak group tries their best to refrain from spelling out such statements, the mighty group will, anyway, make up or stage the existence of such derogatory statements and, thus they will attack the weak group.[593] For example, see the instances of Bangladesh, Pakistan, and, recently, in some parts of India.[594] The prohibition is used as a form of weapon to demolish the weak group.[595] We have historical evidence too. Restriction on free speech could not prevent the loss of billions of lives taken because of the direct effect of the propagation, instigation, and incitement of Hitler, Polpot, Stalin and other propaganda masters. However, there is enough reason to be convinced that free speech would have never allowed it to have happened. Probably, the propaganda masters would never become what they become taking advantage of becoming the authoritative speakers.

[591] It appears to us that the level of protectionism exhibited by certain Islamic countries and the severity of punishment prescribed by their criminal laws for expressing opinions against the religion are largely comparable to the state of protectionism of Christianity in Medieval Europe. In the same vein, the increased protectionism of Hinduism in India under the pro-Hindu regime is responsible for an increased number of atrocities against Muslims on the ground of protecting Hinduism. See Danylo Hawaleshka, 'History Illustrated: The Rise and Rise of Islamophobia in India' *Aljazeera* (18 April 2023) <https://www.aljazeera.com/gallery/2023/4/18/history-illustrated-the-rise-of-islamophobia-in-india> accessed 28 May 2023; 'India: Surge in Summary Punishments of Muslims' (*Human Rights Watch*, 7 October 2022) <https://www.hrw.org/news/2022/10/07/india-surge-summary-punishments-muslims> accessed 28 May 2023.

[592] Meghan Fischer, 'Hate Speech Laws and Blasphemy Laws: Parallels Show Problems with the U.N. Strategy and Plan of Action on Hate Speech' 35 Emory International Law Review 177; 'Pakistan Blasphemy Laws Increasingly Misused to Settle Petty Disputes against Christians' *The Independent* (10 December 2015) <https://www.independent.co.uk/news/world/asia/pakistan-blasphemy-laws-increasingly-misused-to-settle-petty-disputes-against-christians-a6768546.html> accessed 27 May 2023; Roswitha Badry, 'The Dilemma of "Blasphemy Laws" in Pakistan – Symptomatic of Unsolved Problems in the Post-Colonial Period?' [2019] Politeja 91.

[593] In the absence of any concrete statistics, we submit our assumption that the blasphemy charges are usually brought by the majority people against the minority people; the opposite case is not the usual case. However, for the support of our claim see United Nations High Commissioner for Refugees, 'Refworld | Policing Belief: The Impact of Blasphemy Laws on Human Rights - Pakistan' (UNHCR 2010) <https://www.refworld.org/docid/4d5a7009c.html> accessed 27 May 2023.

[594] 'Amit Shah Flags Post-Taliban Effect; Raises Attacks on Hindus with Bangladesh Minister - The Economic Times' <https://economictimes.indiatimes.com/news/defence/amit-shah-flags-post-taliban-effect-raises-attacks-on-hindus-with-bangladesh-minister/articleshow/95611975.cms> accessed 24 November 2022; 'CAA-NPR-NRC: The Law Is Being Weaponised Against the Constitution' <https://thewire.in/government/caa-npr-nrc-the-law-is-being-weaponised-against-the-constitution> accessed 24 November 2022; PTI, 'Hindu Temple, Homes Vandalised in Bangladesh over Facebook Post: Reports' *The Hindu* (17 July 2022) <https://www.thehindu.com/news/international/hindu-temple-homes-vandalised-in-bangladesh-over-facebook-post-reports/article65650637.ece> accessed 24 November 2022.

[595] Here we should reemphasise that the religion itself is not responsible for any of these incidents. The mighty groups just use religion as a shield. However, it should also be mentioned that fundamentalism and protectionism pave the way to use religions as an effective shield and thereby putting one religion against another religion.

Now one may point to the incident of Denmark ie burning Quran.[596] If we understand what we have discussed about 'self-concerning' and 'self-addressing', it becomes clear that the incident is in no way relatable to his Freedom. The incident was not purely an act of expression of thought; instead, the person has a clear intention to offend the faith of the Muslims.[597] As a person, one can burn his or her own books (that may be any book) or other properties (assigned to him or her under the provision of law) of his own. Burning a specific book, with an expressed intention to offend someone else is something different and such an act, by default, comes under the provisions of law like defamation, instigation, misrepresentation, etc. North Indian Hindus consider eating cows a sin. Muslim faith holds that there is no problem in eating cows, and they express their faith by word or by eating it. It would be absurd to say that the Muslims are offending the Hindu faith. Conversely, Muslims consider eating pork a sin. It will not be an act of derogation if a Hindu doctor and religious leader expresses or publishes his or her faith explaining how harmful and sinful it is to eat the cow. However, if he or she starts sending the message specifically addressing the Muslims and takes some concrete steps such as burning the Quran or forcing them to consume his or her belief, then it will be a case other than Freedom of expression.

When it comes to the expression of opinion about the state and its institutions, it is as if the expression of opinion about self. Two observations of Humboldt explain it all: 1.'The State on the other hand has no lack of means for enforcing the authority of its laws, and preventing crime';[598] and 2. 'State association is merely a subordinate means, to which man, the true end, is not to be sacrificed'[599]. While we always maintain the position as that of Humboldt that individuals should never be subordinate to the state and while we do not want a corporate or spirited form of state and its institutions that were the aspiration of Hegelian philosophy - we hope that the state and its institutions can be a reflection of the unified self although not becoming the master of the self or individual. This may seem like a union of the spirit of Humboldt and the positive spirit of Hegel. This difficult task is possible only when individuals will be given enough scope to directly participate in the formation and functions of the state and its institutions. Admittedly, Given the gigantic size of the current states, the 'concrete organic'[600]

[596] 'Quran Burned in Front of Denmark Mosque, Turkish Embassy' <https://www.aljazeera.com/news/2023/1/27/quran-burned-before-a-mosque-and-turkish-embassy-in-copenhagen> accessed 27 May 2023.

[597] 'Who Is Rasmus Paludan, the Swedish Far-Right Leader Who Burnt Quran in Front of Turkish Embassy' (*Free Press Journal*) <https://www.freepressjournal.in/world/who-is-rasmus-paludan-the-swedish-far-right-leader-who-burnt-quran-in-front-of-turkish-embassy> accessed 27 May 2023; 'Who Is Rasmus Paludan: Politician Criticized By Muslims Because He Often Burns The Al-Qur'an' *VOI - Waktunya Merevolusi Pemberitaan* (25 January 2023) <https://voi.id/en/news/247175> accessed 27 May 2023.

[598] Humboldt (n 214) 68.

[599] Humboldt (n 214) 84. We find a similar observation from Thoreau who 'rejects viewing the "state" as any kind of respectable or authoritative figure, to the degree that he is willing to spend time in jail to prove so'; see Batters (n 302) 17.

[600] We prefer not to use the word 'physical' as this gives a misconception about the composition of the human body. We hold that the human body consists of an organic part and an abstract part. But a common

(or simply physical) participation of all selves is not possible. However, it does not follow that people's participation through their so-called representatives is sufficient or acceptable in any balance.[601], Absolute constructive participation of all selves is the only acceptable and logical alternative to the concrete organic participation of all. Absolute Freedom of expression is the way to absolute constructive participation.

In this role of state formation and state functioning, they will say anything and everything about the state and the state institutions. Positives, negatives, criticisms, rumours, true, false – the Freedom of expression may include anything when the expression is addressing the state and its institutions. Let them blame the state activities; let them, if they want, spread rumour against the state mechanism. Despite the enormous power of the state, many say that the government will collapse if such kinds of expressions are allowed.[602] Let some governments be collapsed.[603] Let there be instability for some time; let the system be built organically, and spontaneously and let the system be developed with the development of the developer themselves ie the people.[604] The benefit of the temporary chaos will be much more rewarding than the chaos itself. Selves will grow in this process; they will be more responsible. They will truly own stakes in the state and in the state institutions as they will find that their actions and behaviour are reflected in the actions and in the consequences of the states. They will see their true reflection in the state; hence, they will be bound to be more responsible and mature while expressing their thought. Whatever difference we see between the European states and Asian states it

misconception is that the organic part is considered a physical part while the abstract part of the body is considered a mental part or metaphysical part. We, instead want to say that both parts are physical as opposed to metaphysical; one part is concrete while the other part is abstract of the same physical body.

[601] The enormous flaws of the representative form of governance have been reflected countless times in the narrative of numerous scholars such as Tocqueville, Fromm, Wolf, Dworkin, and others. This point is further discussed in chapter 7.

[602] Interestingly, scholars from all sections believe that the Freedom of speech may turn out to be extremely dangerous for state security. See Russell A Miller, 'Balancing Security and Liberty in Germany' (2010) 4 Journal of National Security Law & Policy 369; Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression' (2021) 22 Human Rights Review 91; Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 UNSW Law Journal 1; Andrew Clapham, 'Balancing Rights—Free Speech and Privacy' in Andrew Clapham (ed), *Human Rights: A Very Short Introduction* (Oxford University Press 2015) <https://doi.org/10.1093/actrade/9780198706168.003.0006> accessed 27 May 2023. They just cannot see the even even higher dangers involve in the restriction of the Freedom of speech.

[603] Italy has seen 69 governments in the last 77 years. That means every (almost) one year, it has a new government. Has this ruined Italy to dust? However, we agree that the collapses of the governments in Italy have not been the consequences of the absolute constructive participation of the people in general. That would have been the most appropriate method of developing the organic and representative government in the real sense.

[604] This suggestion is not something that comes out of the blue; we have the vision and wisdom of Tocqueville, Constant, Condorcet, Humboldt, Mill, and many others on our side. People will have to say anything against the government until the people and the government come to the same surface, and this will ensure the establishment of the government of the people and a true democracy.

is the direct result of the same formula part of which has been followed by the European countries while the Asian countries have not followed at all. To conclude this section, again, Humboldt is worth quoting:

> He who has been thus freely developed should then attach himself to the State; and the State should test itself by his measure. Only through such a struggle could I confidently hope for a real improvement of the national constitution, and banish all fear of the harmful influence of civil institutions on human nature.[605]

4.3 Are We Promoting Irrationality

From the discussion made up until this point, a tentative conclusion can be drawable about Freedom: 'It is all up for grabs'[606]; it is for all, men-women, children-adult, intellectuals-savages, irrespective of capacity, and maturity; it is absolute and under no circumstances this can be violated; even the so-called holy principles that are chiefly credited for keeping the state system functional ie state interest, public interest public order - nothing can come on its way; this permits one to say whatever he or she wants, irrespective of reasons or rationality. The conclusion, for sure, will attract strong opposition and a lot of dogmatic questions.[607] Are we patronizing and preaching irrationality or inciting chaos? Are we set to destroy the human civilization that has claimed to be built on the human rationality and reasoning of hundreds of years? How would government function? How would the judiciary function? How would the executives execute the judicial orders? What will happen to moral, social, political, and religious values? Are not we sensitive or respectful of the human institutions built over time?

Our precise and conclusive submission is - we do not have any intention to incite irrationality or chaos. But we do submit that 'rationality and reasoning'[608] **(Hereinafter RR)** must not be taken as a prerequisite for Freedom. Neither do we need to ask for this requirement nor is it helpful in dragging such a requirement into the sphere of Freedom. We submit that Freedom without the requirement of rationality and reasoning will in no way lead to irrationality or chaos. Furthermore, we submit that subjecting Freedom to this requirement is rather dangerous and prejudicial. This requirement is not only

[605] Humboldt (n 214) 68–69. Mill states – 'Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing ... even occasionally an intelligent deviation from custom, is better than a blind and simply mechanical adhesion to it'; see Mill (n 53) 124.

[606] Dennett (n 99) 302.

[607] The type of questions and concerns the conception of the Freedom may be met with is traceable from the observation of Dennett – 'To some people, this is a fearful prospect, opening the gates to nihilism and relativism, letting go of God's commandments and risking a plunge into anarchy'; see Dennett (n 99) 302.

[608] Although, there is a specific difference between rationality and reasoning, given the scope of the thesis we use the words to refer to one sense.

a threat to human Freedom but also an effective and proven weapon to unleash chaos in the name of order.[609]

We do not see any reason to put RR as pre-conditions of Freedom.[610] Why do we want to see RR as a requirement of Freedom? What purpose does it serve? Let's see the rationale and reasons that earn the support of millions of 'rational and reasonable people' for Hitler who would end up killing six million people:

> [H]is [Hitler's] domination of other peoples is for their own good and for the good of the culture of the world; the wish for power is rooted in the eternal laws of nature and he recognizes and follows only these laws; he himself acts under the command of a higher power-God, Fate, History, Nature … He and the German people are always the ones who are innocent and the enemies are sadistic brutes. … Germany's mission is ordered by "the Creator of the universe.[611]

Anything, no matter how horrific, offensive, or irrational is this, can be rationalised and can be supported by countless reasons; just what it needs the context and the expertise to take the utmost benefit of the context. To be precise, we submit two reasons to support our submission that this requirement neither should be associated with Freedom nor is there any such scope, given the very nature of Freedom.

4.3.1 Reasoning and Rationality (RR) Lacks the Quality to Function as a Requirement of Freedom

RR has always been overrated as a denominator of the quality of any action, thought, concept, etc. We want to submit that it does not have the quality to be considered a requirement of Freedom. We submit two decisive grounds in support of our claim, while there are other grounds left untouched.

A. Lacks the Essential Features of Defining Characters

The minimum qualification of any requirement of any concept is that it must have the features essential for defining the concept. It must have the ability to define or identify the concept it is the requirement

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[609] 'The Danger of Reason' (*Big Think*, 6 August 2010) <https://bigthink.com/surprising-science/the-danger-of-reason/> accessed 27 May 2023; Jana Katharina Funk, 'Beyond Instrumental Rationality. For a Critical Theory of Freedom' [2021] Estudios de Filosofía 91; Amartya Sen, *Rationality and Freedom* (First Edition, Belknap Press: An Imprint of Harvard University Press 2004); Christophe Salvat, 'Freedom and Rationality' [2008] Working Papers <https://ideas.repec.org//p/hal/wpaper/halshs-00216204.html> accessed 27 May 2023; Achin Chakraborty, 'Rationality, Freedom and Reason' (2005) 40 Economic and Political Weekly 2913; Interview with Sean Illing, 'The Myth of Rational Thinking' (25 April 2019) <https://www.vox.com/future-perfect/2019/4/25/18291925/human-rationality-science-justin-smith> accessed 27 May 2023.

[610] Melel and Donald also take the same stance. They posit that Freedom should not be subject to this requirement. See Mele (n 539) 646; Merlin Donald, 'Consciousness and the Freedom to Act', *Free will and consciousness: How might they work?* (Oxford University Press 2010) (see generally).

[611] Fromm (n 214) 260.

of; the requirement, to the least, must be referred to in the constituting definition of the concept. Hydrogen and oxygen, for instance, are two chemical requirements of water. Why should we consider either hydrogen or oxygen as a requirement of water? Both elements have characteristics by virtue of which we can define or evaluate water. Both elements have the quality not only to provide us with a constituting definition of water but also to evaluate the quality and characteristics of water. To take another more relevant example, let's consider neutrality, suspense, and surprise as requirements of judicial reasoning. Should neutrality, suspense, and surprise be considered inevitable requirements of judicial reasoning? We think none will disagree that neutrality is an inevitable requirement, while the other two are not requirements of judicial reasoning. Why? The answer to this question lies in the very features, quality, or merit of neutrality, itself. Neutrality has essential qualities or features that help define judicial reasoning as what judicial reasoning is meant to be; neutrality helps define the very nature and identity of judicial reasoning. By this time, it should have been clarified that, apart from contributing to the misconceptions, RR has no role in the conceptualisation of Freedom. Nevertheless, the most striking fact is that the defining element itself has no definition of its own; there cannot be anything more confusing when X has been counted as a defining factor of Y, where X, itself, is undefinable.

RR is as confusing as the generally used term freedom, if not more confusing; RR has the same infinite regression problem in its interpretation as that of the cheaply used term freedom.[612] We suspect even extensive studies and research on RR will afford us to comprehend a reasonably acceptable meaning of RR. To date, we have not found any such meaning that is well accepted and reasonably makes sense, in particular, when the discourse is about Freedom and law. The RR has many perspectives too – personal and interpersonal, for example.[613] Interpersonal perspective, for sure, is not compatible with Freedom. Its interpretation changes along the disciplines, subjects, professions, methods, and many more factors.[614] To physical sciences, it refers to causes, calculative deductions, comparing shapes,

[612] Just to get an idea about the complexities involved in association with the meaning of RR, see Michael D Baumtrog, 'Delineating The Reasonable And Rational For Humans : Rozenberg Quarterly' *ISSA Proceedings 2014* <https://rozenbergquarterly.com/issa-proceedings-2014-delineating-the-reasonable-and-rational-for-humans/> accessed 28 May 2023; Gerald F Gaus, 'The Rational, the Reasonable and Justification*' (1995) 3 Journal of Political Philosophy 234; Larry Krasnoff, 'The Reasonable and the Rational' in David A Reidy and Jon Mandle (eds), *The Cambridge Rawls Lexicon* (Cambridge University Press 2014) <https://www.cambridge.org/core/books/cambridge-rawls-lexicon/reasonable-and-the-rational/E9E210F565379AE05E35CDC2F692BBDF> accessed 28 May 2023. Baumtrog cites Eemeren and Grootendorst who state - ' [w]ords like "rational" and "reasonable" are used in and out of season in ordinary language. It is often unclear exactly what they are supposed to mean, and even if it is clear, the meaning is not always consistent'.

[613] Igor Grossmann and others, 'Folk Standards of Sound Judgment: Rationality Versus Reasonableness' (2020) 6 Science Advances eaaz0289.

[614] David Cooper, 'Two Types of Rationality' [1965] New Left Review 62; Thomas Nickles, 'Historicist Theories of Scientific Rationality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/spr2021/entries/rationality-

fitting one element into another element, relating, substituting, and so on. What does it mean in social sciences, specially, in the disciplines where normative value plays a significant role? More importantly, what does it mean in everyday life that is more associated with Freedom? It is rational to take the advice of the educated person, while, at the same time it is irrational not to listen to the advice of X, only because he or she is not educated. It is rational to try time and again to achieve the goal; it is also rational not to try time and again as it is likely that the process would repeat the same mistake time and again.

Undoubtedly, the common buzzword ie reason and rationale receives impetus from the natural sciences and, hence, the confusing inference of the term in social sciences.[615] To Hegel, X is rational in relation to Y means reason dictates that X is inevitable for Y.[616] According to him, '[t]o want the universe to be other than what it is … is like wanting twice two to be seventeen'[617]. He finds inspiration from the findings of the natural sciences while harnessing and presenting the rules of the universe as it is. Berlin, terms Hegel's endeavour as an outcome of 'ludicrous – both ignorant and grotesquely dogmatic'[618]. Hegalian rationality inevitably requires a blueprint of the inevitable universal process. Do we have the blueprint? The answer is, for sure negative, and, apparently, we will never get it because it is not obtainable.[619] Life, at least in considerable cases where Freedom is involved, does not take place in terms of mathematical calculations. However, it does not mean that life is irrational or disordered; evidently, it has its own ways of calculation and standards of calculation of its unique nature that are not relatable to the units of measurement of the physical sciences. Darwinian or Newtonian rationality is measurable because they have units and digits; the very fact that is rationalised is either the cause or the effect of some other facts. By contrast, the reality of human relationships may not be essentially linked to such a cause-and-effect relationship.[620] Further, those scientific rationality is testable by the

historicist/> accessed 28 May 2023; Ulrich Dettweiler, 'The Rationality of Science and the Inevitability of Defining Prior Beliefs in Empirical Research' (2019) 10 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.01866> accessed 28 May 2023; Hilary Putnam, 'The Impact of Science on Modern Conceptions of Rationality' (1981) 46 Synthese 359; Joseph A Schumpeter, 'The Meaning of Rationality in the Social Sciences' (1984) 140 Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics 577.

[615] Demonstrability, widespread acceptance, and envious success of the natural sciences inevitably drive other disciplines specially disciplines of Arts and social sciences, unnecessarily, adopt the methods of natural sciences and explain things through the prism of the natural sciences. We think, for instance, even using the word 'science' itself is an example of such an inferiority complex of the disciplines like Arts, sociology, and law; the matter is that the prestige of law will be increased if the related studies take the name – legal sciences. The freejon approach submits that the core methodology of law is fundamentally different from scientific studies. Law has its own methodology, and its methodology is in no way less reasonable or acceptable than that of the scientific methodology.

[616] Berlin, *Freedom and Its Betrayal* (n 52) 92.

[617] Berlin, *Freedom and Its Betrayal* (n 52) 107.

[618] Berlin, *Freedom and Its Betrayal* (n 52) 107.

[619] We will need the objective meaning of rationality and the objectives must follow the objectives of humans themselves. As we have already discussed that these objectives are unknowable. If, at all, these objectives are obtainable, it is through Freedom alone; Humboldt (n 214).

[620] Kitcher (n 505) 49.

dual parameter ie positive and negative while life, in times, takes place beyond the dual parameter.[621] The representational rationality of the physical sciences is completely incompatible with human rationality in human relationships.[622]

The criteria or standards that are conventionally considered as the denominator of measuring rationality in human relationships, may, in practice, achieve the quite opposite results. Education, nationalism, majoritarianism, normality, are few to name that are, by default, considered as the denominators of rationality and reason.[623] In reality, people when educated may lose the ability to be free because he or she is already brainwashed by the education system.[624] Fromm shows us that 'the person who is normal in terms of being well adapted is often less healthy than the neurotic person in terms of human values'[625] while the society that is constituted of normal humans can be called 'neurotic'[626].

Again, there are factors, like emotion, inclination, sensuality, 'abnormality', presence of which are dominantly considered as the denominator of irrationality.[627] Emotional virtues like compromising, inclination to sharing, love, trust, imagination, etc have been presented as sheer irrationality by the colonial western powers and the scientific community motivated by the Cartesian rationality. In this process, we are not questioning the rationality itself but also depriving ourselves of the of the immense possibility the soft factors could afford us with.[628] For scholars like Humboldt, Fromm, Tocqueville and many others, emotion and inclination are something that must be appreciated for the sake of reason and rationality, itself.[629] Whatever danger the emotion or sensualism involves can be eliminated only by the real exercise of the mental faculty and the real exercise necessarily involves practically acting on and dealing with the emotion or the sensualism instead of suppressing or ignoring them.[630]

B. Lacks the Qualifying Character

[621] Berlin, *Freedom and Its Betrayal* (n 52) 96. Usually, we consider yes as the opposite of no, good against bad, but to life, to the self, to the mystery of the self, this may not be the case.
[622] Kitcher (n 505) 68. Kitcher states – 'Nothing is intrinsically a representation of anything; alternatively, something can be a representation only if it is part of a representational system…Under what circumstances can we regard an entity as possessing states that are representational for it?'. We do not have any answer.
[623] Berlin, *Liberty* (n 49) 195. As profound supporters as Berlin, Mill also put over-emphasis on education as requirement of rationality, hence, as requirement of Freedom and produce statement like – 'the uneducated are irrational, heteronomous, and need to be coerced'.
[624] Humboldt (n 214) XXXIV; Condorcet (n 89). Fromm states, 'education too often results in the elimination of spontaneity and in the .substitution of original psychic acts by superimposed feelings, thoughts, and wishes'; see Fromm (n 214) 267.
[625] Fromm (n 214) 160.
[626] Fromm (n 214) 161.
[627] Humboldt (n 214) XXXI; Fromm (n 214) 270.
[628] For example, Fromm remind us how emotion is essentially connected to creativity. See Fromm (n 214) 270.
[629] Humboldt posits that the 'all strength springs from man's sensuous nature'. He, with reference to sensualism, emotion, recommends that 'we must at least preserve, with the most eager concern, … cherish anything that can in any way promote them'; see Humboldt (n 214) 20, 79.
[630] Humboldt (n 214) 78–79.

Nerhot states that the validating principle must comply with the 'rules of acceptability'[631]. With the same spirit as that of Nerhot, we may logically expect that the assumed requirement or condition of Freedom ie RR must have qualifying characters of its own. We can expect that the qualifying element ie RR must be distinguishable in terms of its value and impact. For instance, as we have seen in the previous section, neutrality has its own quality, merit or value that adds value to judicial reasoning, while neither suspense nor surprise has any such value to offer. In the presence of neutrality, the value of judicial reasoning is increased. Similarly, it is expected that in the presence of RR, the concept ie Freedom will be endowed with value and the impact of RR will be reflected in the concept itself. Both points fail.

c. Lacks Value

The presence of RR does not necessarily add value to Freedom as RR itself lacks the value of its own. Although we usually think so, in fact, we cannot necessarily say that something has a value, normative or prescriptive, only because it has rationale and reasons in their usual understanding. To have its own value, the RR must be based on or 'governed by normative principles'[632]. Unfortunately, this is not the case on many occasions, if not in the majority of the cases. Our claim is substantiated if we pay attention to the usual processes of rationalization. Unfortunately, there are unlimited varieties of processes of rationalisation. We find, one of the readily available rationalisation processes is based on value-neutral factors such as shapes, sizes, colours, or levels. An elaborate discussion of this rationalization process will give us an idea of how futile and absurd the rationalisation process can be.

Our observation is that people, when rationalising anything, may not act on the concrete principles of rationality as such, instead, they are driven by the reflection or impression the subject of rationalisation leaves on them. The impression or the reflection is projected by or through the shapes or structures of things (or nothing) or thoughts.[633] For example, they look at the giant structure of the Pyramid and they are wondered at the magnificence the structure projects on them, while rarely they are anguished or feel sorry for the people who suffered extremely in the process of building the Pyramid. Their rationalization process is largely influenced by the magnificence of the shape of the structure of the things or ideas; neither the normative past nor the normative future associated with the shape is relevant in this process.

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[631] Nerhot, 'Interpretation in Legal Science' (n 22) 202.

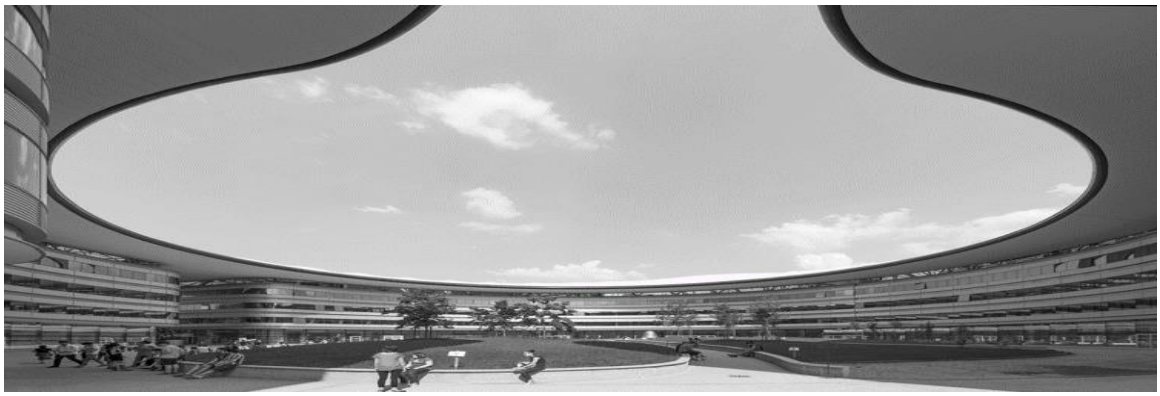
[632] Allison (n 515) 42.

[633] Green and Cohen state – 'simple patterns of movement trigger in people's minds a cascade of complex social inferences. People not only see these shapes as 'alive'. They see beliefs, desires, intentions, emotions, personality traits and even moral blameworthiness'. See Joshua Greene and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything.' (2004) 359 Philos Trans Royal Soc B 1775, 1782. For further evidence of such kind, see Brian J Scholl and Patrice D Tremoulet, 'Perceptual Causality and Animacy' (2000) 4 Trends in Cognitive Sciences 299; Andrea S Heberlein and Ralph Adolphs, 'Impaired Spontaneous Anthropomorphizing despite Intact Perception and Social Knowledge' (2004) 101 Proceedings of the National Academy of Sciences 7487; Fritz Heider and Marianne Simmel, 'An Experimental Study of Apparent Behavior' (1944) 57 The American Journal of Psychology 243.

The marvellous Einaudi Campus of the University of Turin, for example, triggers the human faculty of appreciation so overwhelmingly that it blocks other human faculties like the faculty that helps relate the subject matters. To the students, and to the visitors, the structure gives a sense of grandness through which they evaluate the quality of the university although the structure is not directly connected to the quality of a university.[634] At times, the students are attracted by the structural beauty of the campus because they can relate it, though unconsciously, with the futuristic or science-fictional structures they have been watching in the movies from their early childhood.

We reason that one should not be beaten up for stealing food as the person does it, out of extreme hunger. The impression created by the hunger of the thief when projected back to us we become sympathetic to the thief and hence we support forgiving the thief. However, on the other hand, when we are projected with the impression of the person whose property has been stolen, we support punishing the thief. In both cases, the impression is in the driving seat, but we give credit to our skill of reasoning.[635] Both impressions are outcomes of the shapes or structures we associate with ie emptiness

[634] Now one may claim that the structure does play a direct role in the value generation of the institution. Structure boosts human imagination. For example, take a look at the sky through the oval of the structure:



It will boost human imagination. A student can get a new look at the sky and certainly, this looks through the eyes of the structural architecture will generate a renewed temptation of looking at the sky. The sight will give him or her a boosting sense regarding the grandness of human achievement. Consequently, he or she will strive to achieve similar grandness in the future. Admittedly, from this perspective, the shape has a value-generating capacity, but, at the same time, it may have a value-decreasing capacity too. A student, who sees the sky through the structure, can find a new meaning about the sky and about everything that the sky influences. However, simultaneously, what we are overlooking is the fact that the imagination of the student is being hijacked by the structure and the imagination of the architecture of the structure. The structure and the architect's imagination, though unconsciously, start dictating the student's imagination. The gigantic structure tells the student - 'I am the framework of your vision; you see what I want to show you; you are so small'.

[635] At least on some occasions, the skill of reasoning does not have anything to do with making the decision; at times, the impression or the projection based on which we act is so common and repetitive that is automatically recorded in our memory, consciously or unconsciously (however we think, in most of the cases, the process is subconscious or unconscious). Assumably, this observation led Hume to conclude that there is no causal relationship – 'every effect is a distinct event from its cause'; cited in Kitcher (n 505) 48. Metaphorically and to understand easily, we can relate this process to the recording of information on the hard disk of the computer. As the information and its output are iterated, the computer generates an output of its own based on the pattern

– hunger of the thief (absence of food that should have existed); absence of the goods stolen that should have existed with the victim whose goods have been stolen.[636] Our motivation and self-reflection are boasted by grandness, good, beauty, hope, or expectation (triggers of love, pleasure or interests) whereas the smallness, absence, bad, threat, or disappointment (triggers of hatred, pain or suffering) come with demotivation.

We may be asked – 'take the example of a war that not only support but also incite the killing of people (of the other side), even if the people are innocent. Is not the killing ie absence of or reduction of humans, a demotivational instance?'. The answer is negative and the explanation supporting our negation is reflected in the argument of Tocqueville who explains why Cicero was not disturbed by massacres of the 'foreigners'.[637] People are so brainwashed in the disguise of promoting nationality, religiosity, and idealism that they consider the people of the opposite side as negatives ie enemies (bad, hate, threat, etc). In such a case reduction of the negatives increases the positives. Thus, the shape or structure (concrete or abstract, present or assumed, past or future, given or planned, existing or imagined) plays a decisive role in the backstage of human actions.[638] Our acts of attraction, submission, domination, love, hatred or any other actions are the outcome of the shapes or structures of the things (physical, abstract, imagined or …) associated with the actions. The shape of the face, the shape of the woman's body, the structure of the building, the immensity of reputation, the organization of the petals of flowers, the figures of statistics, the imagined shapes of comfort (for example, the woollen cover of animal, ...), etc lead to the actions associated with the shapes or structures. For example, we submit ourselves to the mammoth structure of building or state while we like to dominate the children and other whose shapes comes to us in the form of small or distorted shapes like 'uncivilised people', 'a rickshaw puller', 'an infidel who worships idols' 'or 'an untouchable who eats cows'.

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of iteration and the background programmes. Repetition of the impression and its effect cause a similar effect in the human brain that comes up with an output of the process, consciously or unconsciously. We, being overwhelmingly satisfied by the incident of output reiteration, name this process of generating output as rationalisation. Interestingly, the similar and the same process is found everywhere in nature. Lymphocytes – blood cells, all other immunological and programming cells of the body, genes, even coronavirus, AI function of computers - the same and or similar process is seen everywhere. How absurd it would sound if we started to say that Lymphocyte is rational, or coronavirus is rational!!

[636] Another point of interest is that whether we are supporting the thief or owner of the goods is depending on whom we are considering the victim. Who will be considered a victim to us does not, necessarily, depend on any normative justifications; instead, it depends on our biasness that is usually shaped by our immediate, heuristic, and disproportionate reactions to the incidents we go through.

[637] Tocqueville (n 565) 994. He states – 'Cicero, who raises such loud cries at the idea of a citizen crucified, finds nothing to say about these atrocious abuses of victory. It is clear that in his eyes a foreigner is not of the same human species as a Roman'.

[638] Tocqueville (n 565) (see generally); Fromm (n 214) (see generally); Wolff (n 544) (see generally); Gommer, 'The Biological Foundations of Global Ethics and Law' (n 481).

Now, if we shift our attention from value-neutral rationalisation to value-based rationalisation, we do not have many reasons to be hopeful. The very basic questions that remain unanswered are – what kind of value? Who is valuing it? For what purpose? To economists, value is the utility; to businessmen, it is the profit; to the believer, it is the religious rules, heaven, etc; to the idealists, it is their ideology. Foner states – '[o]n the eve of the Civil War, slaves represented the largest concentration of property in the United States, with an aggregate value that exceeded the combined total of all-American banks, factories, and railroads'.[639] During that period, the American rationale and reasons must have been dictated and shaped by the immense market value of the slaves. Condorcet submits that the 'the greatest utility of society, a vague principle and a fertile source of bad laws'.[640] Again, there is outcome-based rationalisation – RR favours the victors.[641]

Rationality is appreciated because it is considered evaluative where the result or outcome is deduced based on the discussion, analysis and evaluation of the data, information, facts etc, and hence, it rules out the possibility of biased and prejudicial results.[642] However, the point of significance is that, in many cases, if not in the majority of the cases, it is a post-judgemental or as Nerhot identifies it a teleological process where we directly reach the result and then collect the materials and organise our logic to support our logic.[643] In such a case the reasoning is bound to be influenced by subjectivity, or may be taken based on the impression (pleasure, satisfaction, void, etc) the subject matter or a consideration in association with the subject matter creates in our mind.[644] Again, although reasoning based on inclination or impression makes people's day-to-day life convenient, it can, often, bring humans to wrong conclusions. For example, humans are inclined to generalise.[645] Tocqueville demonstrates that

[639] Foner (n 125) 59.
[640] Rothschild (n 172).
[641] To Maistre, war and the associated irrationality are the only basis of rationality; see Berlin, *Freedom and Its Betrayal* (n 52) 151.
[642] For accounts that claim rationality necessarily filter out biases and prejudices, see Keith E Stanovich, Richard F West and Maggie E Toplak, 'Myside Bias, Rational Thinking, and Intelligence' (2013) 22 Current Directions in Psychological Science 259; Howard Schuman and John Harding, 'Prejudice and the Norm of Rationality' (1964) 27 Sociometry 353.
[643] Alfred R Mele, *Autonomous Agents: From Self-Control to Autonomy* (1st edition, Oxford University Press 1995) 6; Nerhot, 'Interpretation in Legal Science' (n 22). Mele states – 'Self-control can be exercised in the face of present motivation (as in some of the scenarios just envisaged) and of anticipated motivation'. Although self-control is not relatable to Freedom, the self in the case of Freedom works in the same manner ie based on the present, past, and future motivation. Even based on unconscious motivation. Dennett and Kant also suggest the same that what we mean by reasoning is, in fact, 'inquiry by projecting a framework that determines the kind of explanation to be sought rather than what will be encountered in the course of experience; see Allison (n 515) 41.
[644] Mele (n 643) 148. In such a case, as Mele states, the reasoning may be dominated by the 'values produced by brainwashing'.
[645] Tocqueville (n 565) 727 (footnote), 730. He states – 'among us the taste for general ideas has become a passion so unrestrained that it must be satisfied in the slightest thing'.

generalisation, at times, is the process of moving away from the truth, instead of finding it.[646] Unfortunately, however, in the majority of cases, human rationalisation is nothing but generalisation.

Further, we cannot avoid that the attentional hierarchy has a huge effect on the rationalisation process. However, in many cases, the attention process itself may remain in the unconscious stage and hence, the claim of RR becomes futile and problematic.[647] Another very important factor that is particularly important when the rationalisation is taken as a condition for Freedom is who is doing it.[648] Is it government or the individual? The powerful or the weak? The USA can rationalise any of its acts while Bangladesh cannot. Elon Musk can easily fire hundreds of employees and rationalise that decision easily, while his employee's rationale, despite being supported by reasons of substance, may be accepted as of no merit. However, the most radical stance against the requirement of reasoning and rationality is that Freedom precedes reasoning and rationality.[649]

d. Lacks Impact

Finally, what is the impact or possible impact of treating RR as a pre-condition for Freedom? We submit that the impact is devastating, confusing, and counter-productive. It is demonstrable that the pre-condition fails to ensure the benefits we commonly and readily expect. We assume that the RR requirement will act as a safeguard against the atrocities committed in the name of Freedom and, thus, makes sure that the organizational and public order is maintained, and the civilisation is survived. Our first point of submission is, as clarified from the concept of Freedom, that Freedom, in no way, gives rise to the concerns that the RR is expected to provide safeguard of. Instead, the requirement invites the diseases it is expected to be the cure of. Tocqueville points out that 'it is through good order that all peoples have arrived at tyranny … A nation that asks of its government only the maintenance of order is already a slave at the bottom of its heart'[650]. Tocqueville and Condorcet are horrified by the society that is taken as a 'machine' and the people that are taken as 'docile instruments' to 'form the spirit of citizens'.[651]

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[646] Tocqueville (n 565) 728, 728 (footnote). He states - '[g]eneral ideas do not attest to the strength of human intelligence, but rather to its insufficiency, for there are no beings exactly the same in nature: no identical facts; no rules applicable indiscriminately and in the same way to several matters at once'.

[647] Donald (n 610) 22.

[648] Batters (n 302) 14. Batters states – 'Because it is the sane who define insanity, the lawmakers who define lawlessness, the discourses made by these institutions fail to constitute a universal sense of normativity'. This indicates how fluid the concept of reasoning and rationality may be based on who is interpreting it.

[649] Humboldt (n 214) 28. Humboldt states – 'The true end of Man, or that which is prescribed by the eternal and immutable dictates of reason, …is the highest and most harmonious development of his powers … Freedom is the first and indispensable condition which the possibility of such a development presupposes'. Knight submits that Freedom is a pre-rationality phenomenon that defines rationality itself; see Knight (n 132) 101.

[650] Tocqueville (n 565) 952.

[651] Rothschild (n 172) 695, 700. Batters asks – ' To what degree, however, are these institutions creating the same problems they were formed to prevent?' see Batters (n 302). Maistre seems to take the most radical position against rationality. His position as Berlin depicts - 'whatever is irrational lasts, and that whatever is

The RR is expected to defend against discrimination, prejudice, slavery, etc. while contributing to the true development of humans. Unfortunately, the very RR has been used as the justification for doing the same.[652] Tocqueville tells us how the European try their best to reason in favour of slavery and as he cynically submits that 'Jesus Christ had to come to earth in order to make it understood that all members of the human species were naturally similar and equal'[653]. There are countless judgements including that of the highest courts of the countries that have used reasoning and rationality as a weapon to support slavery.[654] Fromm posits that '[r]eason, by becoming a guard set to watch its prisoner, nature, has become a prisoner itself; and thus, both sides of human personality, reason and emotion, were crippled'[655]. Thus, in the mission of developing a human person, at times, it is doing exactly the opposite. Humboldt warns us that '[e] enlightenment and a high degree of mental culture, which can never spread where the spirit of free inquiry is fettered by laws [and reasons]' [656]. Therefore, unless we have an appropriate interpretation or explanation of rationality and reasoning, nothing should be subject to the requirement of rationality and reasoning. However, whether we have the appropriate interpretation of RR or not, Freedom can never be subject to such a requirement as the former precedes the latter.

4.3.2 Freedom without Reasoning and Rationality Requirement is not Irrational or Chaotic

The very nature of Freedom itself is assuring; Freedom does not leave any scope for irrationality and chaos. Conceptual complexity, practical impossibility, and obvious detrimental consequences in association with the concept of rationality and reasoning justify our stance not to consider the RR as a precondition for Freedom. However, it does not mean that Freedom is devoid of reasons and rationale. The RR is inbuilt, and the very nature of Freedom includes all the defensive attributes against any probable chaos.

A. The RR is Inbuilt

Although it is not a requirement, by its very nature, Freedom includes intrinsic values that may essentially be named rationality and reasoning from the different perspectives of the term. The acceptance of the very existence of absolute Freedom itself is the indication of RR, as Freedom is the 'product of reason'[657] and the process of reasoning and rationalisation does not, necessarily, need to be

rational collapses; it collapses because anything which is constructed by reason can be pulverised by reason; anything which was built by the self-critical faculties cannot stand up to attack by them'; see Berlin, *Freedom and Its Betrayal* (n 52) 158.

[652] For instance, all the dictators, white Americans, philosophers like Mill, Rousseau justify the unfreedom of black, uncivilised and many other people on the ground of lack of rationality and reasoning of these people.

[653] Tocqueville (n 565) 733.

[654] For example, the USA Supreme Court Judgements until the 20th century.

[655] Fromm (n 214).

[656] Humboldt (n 214) 65–66.

[657] For example Humboldt submits, 'reason cannot desire for man any other condition than that in which each individual not only enjoys the most absolute freedom of developing himself by his own energies'; see Humboldt

experiential or empirical.[658] According to some scholars the 'spontaneous thought of the subject' (ie Freedom), by nature, is inseparable from the exercise of the faculty of rationality by the subject.[659] On the other hand, for scholars like Dennett, the whole process is, inevitably, an illusion and, in fact, in the background, it is just a heuristic process.[660] However, what is important to notice, both blocks of scholars are accepting that reasoning and rationality, spontaneous or illusory, is by default inbuilt into Freedom.[661] Rawls posits that 'there is no antinomy between freedom and reason' and '[t]he suppression of liberty is always likely to be irrational'.[662]

The very nature of Freedom guarantees the presence of the RR. The blessing of Freedom has its own cost, and, at times, the cost is very high to afford and extensively burdensome to bear.[663] If we do not follow the trend, we will be criticised, humiliated, ostracised and so on even if we do not do anything wrong.[664] Tocqueville artistically depicts the scenario of how one, who wants Freedom, experiences death while living.[665] This is the situation we all want to avoid at any cost.[666] Therefore, it is usual that he or she, who wants to lead a free life, will not work without processing things; it is not an automatic and mechanical process. The individual who dares to go against the trend or dominant stances has to work very hard towards improving himself or herself so that he or she can stay strong and focused while

(n 214) 20. Allison (n 515) 41. Allison refers to the stances of Kant and Dennett who see Freedom as the product of reason.

[658] Kant takes Freedom as an idea 'that is, a product of reason that can never be encountered in possible experience'. Dennett also takes Freedom as a product of reason, but the reasoning is heuristic. In either case, reason is there; see Allison (n 515) 41.

[659] Allison (n 515) 39–41.

[660] Allison (n 515) 39–41.

[661] Allison (n 515) 39–41.

[662] Rawls (n 132) 452. In addition, as Allison claims, we do not have any other choice but to presume that Freedom is rationally justified; reason and rationality, whatever might be the interpretation of it, is always a part of Freedom; see Allison (n 515) 47. He explains that if X wants to act, he or she has to act only under the idea of Freedom, otherwise, he or she does not act at all and 'the Idea of freedom is inseparable from the thought of reason as practical'.

[663] Fromm, Mill, and many other scholars show how difficult and challenging it is to lead a free life by not following or imitating the life of others. See Mill (n 53) 141; Fromm (n 214); Tocqueville (n 565) 418.

[664] Mill (n 53) 141. Tocqueville states – 'he is exposed to all types of distasteful things and to everyday persecutions'; see Tocqueville (n 565) 418.

[665] Tocqueville (n 565) 418–19. Tocqueville depicts the situation that one has to face when he or she wants to claim his or her Freedom and, accordingly, go against society: - 'The master no longer says : You will think like me or die ; he says : You are free not to think as I do ; your life, your goods, everything remains with you ; but from this day on you are a stranger among us. You will keep your privileges as a citizen, but they will become useless to you. If you aspire to be the choice of your fellow citizens, they will not choose you, and if you ask only for their esteem, they will still pretend to refuse it to you. You will remain among men, but you will lose your rights to humanity. When you approach your fellows, they will flee from you like an impure being. And those who believe in your innocence, even they will abandon you, for people would flee from them in turn. Go in peace; I spare your life, but I leave you a life worse than death'.

[666] Mill (n 53) 141.

facing all the challenges.[667] This is the wisdom that might have motivated (although unconsciously) Rawls to state: 'for him acting unjustly is acting in a manner that fails to express our nature as a free and equal rational being. Such actions, therefore, strike at our self-respect, our sense of our own worth, and the experience of this loss is shame'.[668] This is the wisdom that gives Fromm the confidence to state that if Freedom is taken from the perspective of its relationship with the self, 'only a sick and abnormal individual will be dangerous'[669]. His belief is that the psychology of the individuals 'is fundamentally social psychology'[670] and hence, we can, blindly while, still, safely and assuredly, have enough trust in individuals' absolute Freedom.

B. Defending the Cases of the Children and the 'Uncivilised' People

It requires a little more extended discussion when the assurance of RR is sought with reference to the Freedom of the children, 'uncivilised people', and other people of this category who are alleged to have insufficient mental development to afford the blessing of Freedom. The universal misconception that people of this category do not have the minimum level of RR to afford Freedom is due to three reasons – misconception about Freedom, underrating the relevant capacities of these people, and overrating the relevant capacities of the mature, educated, and civilised people. As we have already noticed that the RR has many layers ranging from the ability to deliver the most sophisticated and complex convictions to the ability to deliver general heuristic conclusions essential in our day-to-day life. The misconception that Freedom requires a platinum class of rationality, is due to the idealistic interpretation of freedom preached by the Enlightenment thinkers.[671] Further, aligning Freedom with flamboyant concepts like 'self-control' in the sense of controlling the self is also responsible for such misconception.

The interpretation of Freedom we have presented in the previous section should have now clarified the misconception created by the Enlightenment thinkers. On the point 'of self-control', it should be reemphasised that Freedom is not, necessarily associate-able with the gigantic task, if not absurd, as

[667] Humboldt (n 214) 88. He states – 'the very lack of positive assistance invites men to enrich their own knowledge and experience'.
[668] Rawls (n 132) 225.
[669] Fromm (n 214) 296.
[670] Fromm (n 214) 318.
[671] For example, scholars like Hegel, Marx, and Spinoza hold that 'in a society of perfectly rational beings the lust for domination over men will be absent or ineffective'; see Berlin, *Liberty* (n 49) 192. We may presume that these 'perfectly rational beings' might fulfil the criteria for the platinum class of rational beings. Neither do we need this kind of utopian society nor is it safe for the regime of Freedom (rather such a society will be a kind of pathological society); see Fromm (n 214). We are saying that all people are free with an expectation that some are responsible enough to take care of their life while some are not ... but whatever the case is, as long as the effect of the work of one is self-addressing, the law must not interfere in that case. Instead of going for the impossible and absurd duty of deciding what is rationality or setting some arbitrary standards of rationality, it is way more practical to take the risk of assuming rationality in everyone or, at least, it is way more practical and meaningful not to impose the superficial concept of rationality as a requirement for Freedom.

controlling the self. Who is to control the self? Who is there apart from the self? In addition, we should note that the alleged process of 'self-controlling' involves the inevitability of the consciousness or awareness that is not a necessary condition for Freedom.[672] Thus, Freedom is not controlling the self; if we want to say something like this, at all, we can say it is rather relatable to self-alignment. Instead of controlling the self, Freedom is relatable to quite the opposite idea ie freeing the self. Self-control is more a concept shaped with reference to the others ie what other thinks, and what others say. On the other hand, although others are relevant in the process of the formation and the development of the self, others are not the primary or direct point of reference in the case of Freedom. Thus, the process involved in Freedom is the intrinsic process that all humans own by default. In this process, if anything requires at all apart from Freedom itself, is the entry level of rationality. Everyone, including all children and uncivilised people, possesses it and it is evidenced in their ability to learn as complex things as language and walking.

Subjecting Freedom to the attainment of platinum-class rationality will be as illusory as subjecting children's walking to the learning of the law of physics and acquiring language to the learning of advanced-level grammar. Therefore, as many others before us claim, all people irrespective of their ages and educational and intellectual capacities, intrinsically possess the RR requires to afford Freedom.[673] Dennett endorses our stance by claiming that '[n]ot everybody can be a Shakespeare or a Bach, but almost everybody can learn to read and write well enough to become an informed citizen'[674]. According to Fromm, the self is an 'organized and integrated whole of the personality' and this structure is 'guided by the individual" s will and reason'.[675] We submit that the selves in the children and in the 'uncivilised' people are also organised; they are as organised as the mature. Even the lunatic self has

[672] For understanding the importance of self-awareness and consciousness in self-controlling see Ted O'Donoghue and Matthew Rabin, 'Self-Awareness and Self-Control', *Time and decision: Economic and psychological perspectives on intertemporal choice* (Russell Sage Foundation 2003); Pei Wang, Xiang Li and Patrick Hammer, 'Self-Awareness and Self-Control in NARS' (2017); MI Posner and MK Rothbart, 'Attention, Self-Regulation and Consciousness.' (1998) 353 Philosophical Transactions of the Royal Society B: Biological Sciences 1915; Frederic Peters, 'Consciousness and Self-Regulation' (2009) 30 The Journal of Mind and Behavior 267; David Vago and Silbersweig David, 'Self-Awareness, Self-Regulation, and Self-Transcendence (S-ART): A Framework for Understanding the Neurobiological Mechanisms of Mindfulness' (2012) 6 Frontiers in Human Neuroscience <https://www.frontiersin.org/articles/10.3389/fnhum.2012.00296> accessed 28 May 2023.

[673] Humboldt, by default, consider all human including children to have reasons except specifically proved otherwise. To him, the opposite ie not having the reasons is rather exceptional; see Humboldt (n 214) 125. Berlin states – 'It is true that Kant insisted, following Rousseau, that a capacity for rational self-direction belonged to all men; that there could be no experts in moral matters, since morality was a matter not of specialised knowledge … but of the correct use of a universal human faculty'; see Berlin, *Liberty* (n 49) 198. Following Rousseau, Condorcet states – 'the natural sentiment of liberty was to be found in all human hearts'; see Condorcet (n 89) XXVII.

[674] Dennett (n 99) 274. However, we claim that to have the blessing of Freedom no one needs to learn reading and writing because the capacity requires to be an informed citizen is of much high standard than to exist as a simple free human being.

[675] Fromm (n 214) 44.

this pattern of organization, and this is evidenced in the fact that be he or she is a lunatic or a child, none is unpredictable, or they are as much unpredictable as other mature. Lunatic has the overall master drive ie the madness; so is the case for the children. Adults generalise and, in most cases, the generalisation is based on nothing logical.[676] Children also do the same but with one exception their generalisations are immediately evaluated by the adult while the adults usually escape such evaluation.

Undoubtedly, the adult has some advantages in the question of reasoning as they are more informed and experienced. But this is not enough to consider them decisively advanced to the extent that can render discrimination against children acceptable. The nature of the information and experience often are such that can confuse them (adults), and these usually come with prejudices. Consequently, while the overall scenario is considered, we can easily see in many matters judgement of the children is more 'reasonable' than that of the adult.[677] A man X, who subscribes to ideology 'A' shows a significantly higher level of altruism when a person of the same ideology is attacked; on the other hand, he or she will show less or no altruism for another person of a different ideology.[678] But if X is a child his or her decision will be much more neutral and with less prejudice. In the question of adaptability, in many regards, the adult has to accept the triumphant of the children. Isn't adaptability *per se* imply the presence of rationality? We think the answer is positive – adaptation is meant to include reasonable and rational behaviour.[679] People, over time, increasingly acquire artificially learned behaviour that makes people less adaptable in society with other people. On the other hand, children with their more original and natural behaviour are more adaptable and this demonstrates the presence of reason and rationality in the intrinsic process.[680]

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[676] Tocqueville (n 565) 728–33.

[677] In fact, recent empirical and clinical evidence has started to show that children are not as naive as commonly thought about their capacity of making moral judgement. See Gavin Nobes, Georgia Panagiotaki and Kimberley J Bartholomew, 'The Influence of Intention, Outcome and Question-Wording on Children's and Adults' Moral Judgments' (2016) 157 Cognition 190; Vic Larcher, 'Children Are Not Small Adults: Significance of Biological and Cognitive Development in Medical Practice' in Thomas Schramme and Steven Edwards (eds), *Handbook of the Philosophy of Medicine* (Springer Netherlands 2015) <https://doi.org/10.1007/978-94-017-8706-2_16-1> accessed 28 May 2023; 'Children Can Make Adult-like Moral Judgement: Study' *The Economic Times* (25 September 2016) <https://economictimes.indiatimes.com/jobs/mid-career/why-you-should-be-interested-in-product-management-and-where-you-can-learn-it/articleshow/99788545.cms> accessed 28 May 2023.

[678] Jihwan Chae and others, 'Ingroup Favoritism Overrides Fairness When Resources Are Limited' (2022) 12 Scientific Reports 4560; Aino Saarinen and others, 'Neural Basis of In-Group Bias and Prejudices: A Systematic Meta-Analysis' (2021) 131 Neuroscience & Biobehavioral Reviews 1214; Chae and others; Maykel Verkuyten, 'Group Identity and Ingroup Bias: The Social Identity Approach' (2021) 65 Human Development 311.

[679] Admittedly, there are findings that may infer a negative answer to this question. For instance, Mueller finds that mature people certainly have more cooperative capacity, and the capacity is learned. See Dennis C Mueller, 'Rational Egoism versus Adaptive Egoism as Fundamental Postulate for a Descriptive Theory of Human Behavior' (1986) 51 Public Choice 3. Nevertheless, it is certain that the higher cooperative behaviour does not necessarily indicate higher adaptability; children's success in adapting with a new environment is a testament of that. Hence adaptability and, also rationality might have some intrinsic basis beyond the learned basis.

[680] For example, let's see the possibility of Integration of X & Y in a particular region of a particular state 'S'. Suppose, X is a foreigner. Who will integrate more easily? Definitely Y. Does he do it consciously? Not at all.

We may see the reactive attitudes in the children more than that of the adults (because generally, adults are more capable of rechannelling or hiding their reaction), but destructiveness is not a hallmark of children's character, instead, it is the adults who are prone to develop it more over time as a consequence of leading a self escaping life and for having the capacity to wait longer for the opportunity to engage in such behaviour.[681] We hope no one will claim that the destructiveness in character is positively related to rationality and reasoning. Fromm is supporting us by claiming that destructiveness is not a rational behaviour as reactive hostility.[682]

Like others, Frankfurt, also keeps children outside of the touch of Freedom with the logic that they cannot form 2nd order desire.[683] What does this 2nd order desire mean? To him, the ability to evaluate his 1st order desire.[684] Frankfurt posits that children are not rational agents because they are 'not concerned with the desirability of [their] desires themselves'. We are sceptical of his submission as we observe that children as young as 2-year-old are very much aware of the desirability of their desire; they can easily assess the value of their desire and its comparative acceptance value to different people.[685] Again, Frankfurt states that – '[n]ot only does he pursue whatever course of action he is most strongly inclined to pursue, but he does not care which of his inclinations is the strongest'[686]. Again, we differ; children's sense of priority is very strong. Admittedly, at times, they are confused. We believe, so are the adults.

What kind of risk is involved in association with the Freedom of children? Our submission is – nothing. The fear that children will make it a complete mess and make the world upside down if they are given Freedom is just a myth. There is no such possibility at all; they are rather way safer than adults. In fact, if there is any risk at all, it is in relation to the adults. Children imitate whatever they see around them; they follow what the adults do.[687] Therefore, even if they do something wrong, that may be because of

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Again, suppose X & Y, are both 2-year-old children. This time the difference in the integration process will be negligible; both children will have a similar pattern of integration. Thus, we find that X being children is more adaptable than X, an adult.

[681] Fromm (n 214) 202–03.

[682] Fromm (n 214) 203. We find in our side Humboldt also if we understand his spirit of the development of the sensual energy; see generally Humboldt (n 214).

[683] Frankfurt (n 527) (See generally). To him, even some rational adults cannot form the 2nd order desire.

[684] Frankfurt (n 527) 11.

[685] We observe they are quite good at reading people's attitude, specially of their nearest relatives, about their choices. One can easily observe that babies, when asking things, they understand which things between A & B to be asked from person 1 (for example mother) and person 2 (for example father).

[686] Frankfurt (n 527) 11.

[687] Carrie Shrier, 'Young Children Learn by Copying You!' [2014] *Michigan State University Extension* <https://www.canr.msu.edu/news/young_children_learn_by_copying_you> accessed 28 May 2023; Gisela Telis, 'Kids Overimitate Adults, Regardless of Culture' <https://www.science.org/content/article/kids-overimitate-adults-regardless-culture> accessed 28 May 2023; Zanna Clay, Harriet Over and Claudio Tennie, 'What Drives Young Children to Over-Imitate? Investigating the Effects of Age, Context, Action Type, and Transitivity' (2018) 166 Journal of Experimental Child Psychology 520.

the adults around him or her; it is more for the adults who are insincere to the children.[688] Locke states, '[T]hough a Man would prefer flying to walking, yet who can say he ever wills it?'[689] The same is applicable to the children. Their minds may roam around the many varieties of desires, but they never will those. They may be more unstable, but they have more reasons to be afraid of, to be afraid of being left alone. One of the most absolute rules of nature as nicely put by Fromm, '[t]he possibility of being left alone is necessarily the most serious threat to the child's whole existence'[690]. Children are, unlike anyone, by default so associated with their parents and guiding environment that they rarely make the 'final decision' and accordingly act against the decision of the parents or guardians at the expense of taking the courage of suffering loneliness and insecurity.[691] They do assess time and again the probable effects of their action. Admittedly, there are exceptions; at times, some children may not follow the process. Ironically, they will do the same anyway; it simply does not matter whether their Freedom is recognised or not. Thinking is not doing or deciding nor taking a side, let alone attaching the self.

One may ask, when they are so dependent on their parents, then how is it possible that they are Free? Children's submission is in no way in conflict with their Freedom because this submission is of different nature than the submission to authority and, the point that is more significant is that the submission to parents is not paternalism.[692] Further, given the factual limitation of the children, their prospects of connecting their Freedom to the actions that express the symptom of Freedom is limited. Eventually, recognition of their Freedom will not fuel a 'dramatic'[693] increase in their Freedom expressing actions. If the recognition has nothing much to do with inspiring children to involve in more Freedom expressing behaviour, then what is the point of recognition of Freedom for them? Here comes the brilliance of Freedom; there are, at least two points that necessitate the recognition of Freedom for children and other people with limitations: 1. The adults will know that they have Freedom and thereby will try not to

[688] Fromm (n 214) 272.
[689] Rickless (n 130).
[690] Fromm (n 214) 36.
[691] Human children, by the very design of the nature, are too much dependent on the parents or on their guardians; and they invest their all attempts to seek the approval of their guardians for their actions. Specially, their relationship with their mother in their early ages is so dynamics that shuts the door of committing any such things people are afraid of. Interestingly, even if they want to destroy something or cause a difficulty to establish his or her demand, they do it after a deep cause and effect assessments.
[692] As Fromm clarifies that our relationship with our teacher and parents is in no way similar to that of a relationship between the slave and the master. Paternalism is more related to the later relationship. He explains – 'between teacher and student and that between slave owner and slave are both based on the superiority... The interests of teacher and pupil lie in the same direction. The superiority has a different function in both cases : in the first, it is the condition for the helping of the person subjected to the authority; in the second, it is the condition for his exploitation'; see Fromm (n 214) 186–87.
[693] For example, they will start claiming that: 'we are free now, we will lead the life we want'; or 'look, parents, we are free, so we will live separately'; or 'this is my life, my body, so whatever I wish I will do with this body; I will take drugs; I will destroy this body'. However, in the unlikely case, if any child says so, he or she will do the same; it simply does not matter if Freedom is recognised for them or not.

brainwash them with their prejudices. This will create an excellent environment where the selves of the children and others with limitations will be developed with less prejudice and higher originality, whether they are aware of the recognition of their Freedom or not. They are not part of the problem; the problem lies with us. Adults and intellectuals are the problems who unnecessarily (or being hypersensitive) interfere in their way of life beyond the point of factual necessity. 2. The most important thing is on recognition of their Freedom, the absolute inalienability and universality of Freedom will remain intact. Given the way human unconsciousness works in driving humans in their life, it is immensely important to deliver the message that Freedom is for everyone, and it is inviolable. As evidence, we can refer to the positive impact of the absolute abolition of the death penalty by the European countries.[694]

Once they (children) were considered as evil.[695] Thanks to the progress of humanity; thanks to human Freedom for which we could come out of such an evil notion about children. Now probably time has come to further advance this understanding about them and accept that they are also like us just with a smaller shape. They are individuals with their own personalities with their inbuilt dignity. We think that they forget (only because we tend to forget), but they don't forget the invasion of their Freedom; they just cannot express it; but they remember it throughout their life, if not consciously but unconsciously (this unconsciousness has a major role in deciding human behaviour). We have countless pieces of evidence endorsing the facts that they feel offended, and they bear the trauma of it throughout their life.[696]

C. Freedom Offers Insurance Against the Chaos

Concerns relating to the chaotic effects of absolute Freedom on the functioning of the state mechanism are equally mythical and, maybe propaganda towards an attempt to keep the power centralised.[697]

[694] As there is an intrinsic value and benefit in the absolute abolition of the death penalty, there is an intrinsic value and benefit in the absolute honour of Freedom and the value and benefits are unreplaceable by anything else. Human like all other animals, imitate, follows, and take the heuristic decisions. In this process, humans are driven by the unconscious. When it is set in the unconscious brain that Freedom is absolute, humans, by default will follow that.

[695] Brandt (n 74); Adler (n 74).

[696] Anne C Petersen and others, 'Consequences of Child Abuse and Neglect', *New Directions in Child Abuse and Neglect Research* (National Academies Press (US) 2014) <https://www.ncbi.nlm.nih.gov/books/NBK195987/> accessed 28 May 2023; Constance L Chapple, Kimberly A Tyler and Bianca E Bersani, 'Child Neglect and Adolescent Violence: Examining the Effects of Self-Control and Peer Rejection' (2005) 20 Violence and Victims 39; Charlotte C Schulz and others, 'Emotional Maltreatment and Neglect Impact Neural Activation upon Exclusion in Early and Mid-Adolescence: An Event-Related FMRI Study' (2022) 34 Development and Psychopathology 573; Robert F Anda and others, 'The Enduring Effects of Abuse and Related Adverse Experiences in Childhood' (2006) 256 European archives of psychiatry and clinical neuroscience 174.

[697] The concern or fear about Freedom is not directly linked to what Freedom really is; it is rather more a matter of political strategy. See Robert Higgs, 'Fear: The Foundation of Every Government's Power | Robert Higgs' [17/0572005] *The Independent Institute* <https://www.independent.org/publications/article.asp?id=1510> accessed 28 May 2023.

Instead, we submit that the stance in favour of absolute Freedom will rather ease the functioning of the state mechanism. Scholars like Humboldt, and Tocqueville, demonstrate conclusively that Freedom is proportional to the reduction of the duties of the state.[698] On the other hand, Freedom is reversely connected to chaos and tyranny; higher regulations lead to a decrease in consistency, sincerity, and harmony in human character.[699] Even if the people are regulated by the 'best of laws', even if such a state achieves the prosper, peace and tranquillity, such a state will always seem to Humboldt as 'a multitude of well-cared-for slaves'[700]. There is no difference between such a state and a state that is ruled by an absolute tyrant.[701]

States are afraid of the raise of the rebellious desires. In the short term, it may seem Freedom is responsible for this, but in the long run, Freedom is the only solution to such concerns.[702] The state being a gigantic entity can survive in the short term to suffer the chaos. In this regard, Tocqueville states, '[t]he tyranny of one man will appear more tolerable than the tyranny of the majority'[703]. Therefore, there is no logic to suppress the development of individual free energy with reference to ambiguous and dangerous provisions like state interest, public order, and so on. Given the nature of Freedom and its area, the damage an individual can do is always repairable by the mighty state, but if the state is left with an option to interfere in one's Freedom, it can do it anytime it wants; an individual is too insignificant to defend his or her position.[704] In addition, as we have mentioned earlier, Freedom has an enormous toll on an individual for Freedom is, necessarily, associated with the fear of being alone. Therefore, our position is in support of absolute Freedom before which, as Condorcet wants, ''the

[698] Humboldt (n 214) 11.

[699] Humboldt (n 214) 69–70. He further states that 'such person less regard for morality, and wish more frequently to evade the laws'. States find it rational to train the people and guide them to maintain an equilibrium between pleasure and the means available to them. Humboldt's principle of not providing positive obligations ie prescriptions or directions by the state may lead to a situation without any specification and prescription for the citizens in performing their actions. In such a situation, admittedly, people will not get readymade guidelines from the state to identify and mind the disproportion between self-cultivation and the means available for it. The absence of such guidelines may lead people to cheaply shape their framework of actions and thus lead to interim chaos. Still, Humboldt wants to keep people away from the morals sparked by the law or state. Because even if these morals seem effective the effectiveness will be proportionate to the harm because such artificial shaping of will create some machines only, not the humans.

[700] Humboldt (n 214).

[701] Tyrant can help people get the same state of peace and tranquillity. Following the Machiavellian principles torture them to an extreme extent so that they forget that they were ever human beings. Do not educate them, do it time and again; they will be domesticated for sure. They will be as peaceful and loyal as other domestic animals or like the gladiators and the slaves who could sacrifice their lives for their masters. This way a dictator may establish a more 'peaceful' and 'prosperous' state than a State like North Korea. Hopefully, none of us wants this kind of peace and prosperity.

[702] Humboldt (n 214) 79–80. He states – 'spiritual energy is not heightened by such a process [by coercion], nor are his views of his vocation and his own worth made clearer, nor does his will gain greater power to conquer his rebellious desires'.

[703] Tocqueville (n 565) 413 (footnote).

[704] Humboldt (n 214) 68.

interest of power and of the wealth of a nation must disappear '[705]. The big enterprise state is a collection of people of various interests and, hence, there is the possibility of a conflict of interests. The harmony and unity of these conflicting interests are very much dependent on the internal and natural communication of the people. Increased state interference in this process led to increased artificial divisions among the people, and thus lead to worse complications of the situation.[706] This is precisely why Constant says, '[e]very time governments pretend to do our own business, they do it more incompetently and expensively than we would'[707] Thus, state mechanism can perform, to its best, by allowing the individual to work with his or her own self to the extent his or her absolute Freedom may afford.[708]

In the absence of the guarantee of the presence of reasoning and rationality, the feared and imagined risk of absolute Freedom is disproportionate to the prospects of absolute Freedom. The limit of the prospects of the human is 'indefinitely perfectible'[709] and we will never know who will lead this journey of perfection from time to time.[710] Mill reminds us that these leaders or genius 'can only breathe freely in an atmosphere of freedom' because such people are 'less capable … of fitting themselves … into any of the small number of moulds which society provides'[711]. In addition, we must not forget to hold it in our mind that 'there is something still left for it to accomplish'[712] What is to be afraid of - is it Freedom, or the fear of Freedom itself? Tocqueville answered two centuries ago; the wisdom reflected in his answer remains unaccomplished even these days:

> I admit straight on that I fear the boldness of desires much less for future generations than the mediocrity of desires. What, according to me, is principally to fear in the coming centuries is that in the midst of the small, incessant and tumultuous occupations of life, ambition may lose its impetus and its grandeur; that human passions may become exhausted and lower and that each day the appearance of

[705] Rothschild (n 172).
[706] Humboldt (n 214) 80–81. He states – 'The more active the State is, the greater is the number of these. If it were possible to make an accurate calculation of the evils which police regulations occasion, and of those which they prevent, the number of the former would, in all cases, exceed that of the latter.
[707] Constant (n 141) 315.
[708] As Foucault states – 'The risk of dominating others and exercising a tyrannical power over them arises precisely only when one has not taken care of the self and has become the slave of one's desires'; see Batters (n 302) 9. Humboldt states – 'The greater a man's freedom, the more self-reliant and well-disposed towards others he becomes…. his system of ideas will be more consistent, and his sensations more profound; his nature will be more coherent, and he will distinguish more clearly between morality and submission to the laws'; see Humboldt (n 214) 69.
[709] Condorcet (n 89) XXXIV.
[710] Rawls points it to us that 'Even if the general capacities of mankind were known (as they are not), each person has still to find himself, and for this freedom is a prerequisite'; see Rawls (n 132) 184.
[711] Mill (n 53) 129.
[712] Mill (n 53) 130.

> humanity may become more peaceful and less elevated … they must take great care not to discourage the sentiment of ambition too much.[713]

Unfortunately, still we are afraid of the 'fear of Freedom' and it comes to us through the disguise of different words and phrases that Nietzsche considers 'pointless and are motivated in self-deceit'[714]. Disappointedly, a scholar as updated as Berlin, at the end loses the track that was laid down by Tocqueville or Humboldt and, absurdly, states that [f]reedom is not freedom to do what is irrational, or stupid, or wrong'[715]. We are bound to modify the statement - Freedom is not limited to doing rational, intellectual, and smart things; for X bungee jumping may be a stupid, or unnecessary thing, while Y may sense the most pronounced symptom of his Freedom in it. This leads us to conclude this section by citing Dennett – '[o]ur unique ability to reconsider our deepest convictions about what makes life worth living obliges us to take seriously the discovery that there is no palpable constraint on what we can consider'[716]

[713] Tocqueville (n 565) 1127.
[714] Janaway (n 446). Nietzsche gives us the list of these pointless things - self-knowledge, voluntarist ''spontaneity,'' self-realization, autonomy, freedom from external constraint, morality, rational agency, authenticity, ''non-alienated'' identification with one's deeds, power to do what one desires'.
[715] Berlin, *Liberty* (n 49) 190.
[716] Dennett (n 99) 302.

Chapter 5: The Comparison Problem and The Confirmation Problem

Chapters 4 and 5 have discussed the conception problem, the prime problem that keeps the legal arena confused and afraid of Freedom and hence, the problem could disrupt the introduction of the freejon approach. As the previous chapters have explained and, successfully, resolved the conception problem, the major barrier that could challenge the freejon approach has been removed. This chapter explains and resolves two more problems ie the comparison problem and the confirmation problem, which are, by and large, by-products of the first problem. Resolution of the first problem should avail us to resolve these two problems as the ability to solve these two problems is proportionate, on the one hand, to our success to resolve the first problem, on the other hand, the strength of the foundation of the freejon approach.

5.1 The Comparison Problem

The previous section of our discussion has laid down the freejon approach and by now we should have got the actual concept of Freedom. The meaning should assure everyone that there exists no reason to be afraid of Freedom. The concept of Freedom shows that the lawjon approach is based on a grave misconception and this suffices why should we look for an alternative approach, for example, the freejon approach. A comparison between these two approaches further reveals the foundational, functional, and objective insolvency of the lawjon approach while convincing us that the alternative option, ie the freejon approach is better.

5.1.1 Foundational Comparison

In order to justify, prioritise, or approve any system, arrangement, or theory, it must have a foundation or philosophy, specially, when it is connected to legal discourse or other discourses in the social sciences. Professor Gardner, a self-declared positivist and supporter of the lawjon approach, acknowledges the fact that the positive law does not have any philosophical foundation at all, and it does not need any.[717] Can the lawjon approach afford not having a foundational philosophy and, thereby, not having a valid foundation at all? A system may practically escape the question about its foundational validity, only if it can function without any prejudice and without any dispute. However, as we have seen at the beginning of this thesis, the approach is taking a lot of tolls on human life, specially on the individual life, the building block of all human systems. Therefore, the approach cannot escape the question as to its foundational validity; it must have not only the foundation of its coercive actions but also justify the foundation itself.

[717] Gardner, 'Legal Positivism' (n 19) 199.

Now we have two approaches in our hands – on the one hand, the freejon approach that gives Freedom the utmost importance, while, on the other hand, we have the lawjon approach to which Freedom has no significance until and unless it is recognised by the law. To the lawjon approach, Freedom has secondary importance and is subject to unlimited restrictions. Is the freejon approach overrating the importance of Freedom? Is the lawjon approach underrating the importance of Freedom? Answers to both questions lie in the answer to another question – what is the importance of Freedom in our life?

Spinoza states that human "have never transferred their right and surrendered their power to another so completely that they were not feared by those very persons who received their right and power"[718]. He further states that ''[n]obody can so completely transfer to another all his right, and consequently his power, as to cease to be a human being, nor will there ever be a sovereign power that can do all it pleases'.[719] With the same spirit, Rawls states that '[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override'.[720] Part of this untransferable and inviolable human core is Freedom. Even Hart, a positivist, finds that there is something very special in Freedom and he says, 'my argument will not show that men have any right (save the equal right of all to be free) which is "absolute," "indefeasible," or "imprescriptible"'.[721] With a similar spirit scholars and philosophers of diverse sections accept the inalienability and the absoluteness of Freedom.[722] Freedom is not only a value but also 'the essence of the universe of value'[723] and consequently, at present, even dictators feel the urge to show that minimum Freedom is guaranteed and to give Freedom 'to take first rank in the hierarchy of ultimate values'[724].

[718] Cited in Aurelia Armstrong, 'Natural and Unnatural Communities: Spinoza Beyond Hobbes' (2009) 17 British Journal for the History of Philosophy 279, 282; Noel Malcolm, *Aspects of Hobbes* (Oxford University Press 202AD).
[719] Armstrong (n 718) 282.
[720] Rawls (n 132) 3.
[721] Hart, 'Are There Any Natural Rights?' (n 13) 176.
[722] Armstrong (n 718); Nigel Warburton, *Freedom: An Introduction with Readings* (Psychology Press 2001) 129; Berlin, *Liberty* (n 49) 177; Constant (n 141) 322; Berlin, *Freedom and Its Betrayal* (n 52) 35; Pock (n 51) 65–66; Malcolm (n 718). Malcolm posits that 'laws forbidding people to express their beliefs will render those people sullen and hostile, and thereby weaken the power of the state' (page 50). Berlin, referring to Locke, posits, 'there ought to exist a certain minimum area of personal freedom which must on no account be violated' and if violated, it is nothing but despotism. To Constant, Freedom is the 'recalcitrant part of human existence'. To Rousseau, Freedom is 'the most sacred of human attributes – indeed not as an attribute at all, but as the essence of what being a man is'.
[723] Knight (n 132) 108.
[724] Pock (n 51) 65–66.

Thus, fortunately, it is certain that the value of Freedom in our life is absolute, existential, and uncompromisable.[725] Unfortunately, however, many of these scholars, apparently, contradict themselves by expressly supporting the interference of the law into an individual's personal sphere.[726] This, allegedly, gives the lawjon approach a narrow space to justify its interference, although, factually, its interference is limitless. We, by contrast, submit that there is no scope of interference, at all. Their first position regarding Freedom with its utmost value is fundamental, substantial, original, and static. Their absolute normative position ie Freedom should be absolute, always remains the same. However, the allowance of interference is involuntarily accepted because of, apparent, practical necessity, as they do not have sufficient trust in any alternative approach other than the lawjon approach. What should be done, must be done when it can be done. Now, the freejon approach suggests that it can be done. Therefore, with the emergence of the freejon approach, the lawjon approach loses its significance. Now, whether, theoretical, philosophical, practical or ethical whatever perspectives we take the law and legal system from, Freedom must be accepted as the foundation or the starting point of everything.

Admittedly, there are a few scholars who, although acknowledge the absolute value of Freedom, submit that the 'inner freedom' (however not to be confused with the idealistic freedom) we are talking about has no worldly value.[727] For example, Arendt posits – '

> [I]nner freedom, this inward space into which men may escape from external coercion and feel free… and it was originally the result of an estrangement from the world in which certain worldly experiences were transformed into experiences within one's own … it seems safe to say that man would know nothing of inner freedom if he had not first experienced a condition of being free among others as a worldly tangible reality.

[725] To Denning, it is elementary; see Denning (n 168) 35. To Rousseau, Freedom is asolute. To him, 'if a man is coerced …he becomes a thing, a chattel'; see Berlin, *Freedom and Its Betrayal* (n 52) 33–34. To Lynd, 'that freedom is a power of personal self-direction which no man can delegate to another'; see Quinney (n 54) 13. To Humboldt, Freedom is an indispensable condition while Tocqueville claims that we are endowed with Freedom by birth; see Humboldt (n 214) 28; Tocqueville (n 565) 733. Sartre's point in this stance is most conclusive – 'freedom …which is the very condition of my being … Man is free because he is not himself but presence to himself. Thus freedom is not a being; it is the being of man **…** freedom is identical with my existence'; see Sartre (n 182) 268, 441, 444. Knight states – 'other values conflict with freedom and must be given preference over freedom'; see Knight (n 132) 110.

[726] Sartre (n 182); Humboldt (n 214). Rawls states – 'limitation of liberty is justified only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse'; see Rawls (n 132) 188.

[727] Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (n 43); Arendt (n 162). Waldron, for example, states – ' There is no appeal to the general value of freedom. The appeal is made instead to sense of reciprocity: we will support your goals, if you leave us the space to pursue ours; see page 280.

> …Without a politically guaranteed public realm, freedom lacks the worldly space to make its appearance. [728]

We submit that Freedom is not the 'estrangement' from the world; human Freedom is, rather a worldly phenomenon that has come into play as the result of human actions. It is completely based on worldly pleasure, restraints, expectation and, thereafter, being processed by the self. Arendt's claim (also of Fromm's) is fuelled by her biased belief that the subject matter of philosophy and metaphysics are unworldly and have nothing to do with worldly life[729]. While some works of philosophy and some philosophers might give her such a radical belief, the belief itself is groundless. However, putting the dispute aside that will require a detailed discussion, it should be reemphasised that the self we have depicted in this thesis and the Freedom associated with the self is a worldly phenomenon.[730] The phenomenon has an immediate, direct, and inevitable to worldly life and its being; to reject the connection is to reject all the phenomena of the world. With the same tone and confidence as that of Dennett, we submit that Freedom is 'real as language, music, and money—so it can be studied objectively from a no-nonsense, scientific point of view'[731]. Freedom is, as Fromm describes, 'rooted in the conditions of human life'[732]. With reference to her objection to the absence of a political guarantee, the thesis submits appropriate responses in the later sections of the thesis.

There is one argument, which may apparently go in favour of the lawjon approach, that people themselves do not want Freedom to the extent that liberal scholars like Mill, Condorcet, and others ask for.[733] While we acknowledge this point, we do not see how it favours the lawjon approach. Instead, such an argument goes against the very foundation (which is already fragile) of the lawjon approach. The foundational assumptions of their approach ie 'people are evil and greedy', and 'they only run after their own interest' are rejected by themselves. They want to claim that Freedom, the existential element for humans, is one of the most important conditions to be considered human, but many people do not want this! There must be an explanation behind the surprising and self-contradictory stance of humans. The latter section explains how the detrimental effect of the lawjon approach is responsible for this contradictory and appalling situation. However, meanwhile, suffice it to say that only because many people or the majority of the people do not want absolute Freedom, does not, anyway, justify the deprivation of the minority who want it. We

[728] Arendt (n 162) 28–29.
[729] Arendt (n 162); Fromm (n 214) 293, 317, 322.
[730] Dennett (n 99) 305. Dennett states – 'Human freedom is not an illusion; it is an objective phenomenon, distinct from all other biological conditions and found in only one species, us'.
[731] Dennett (n 99) 305. Later Chapters further substantiate this point.
[732] Fromm (n 214) 322.
[733] Berlin, *Liberty* (n 49).

should not forget that, as the wisdom of Tocqueville teaches us that the tyranny of the majority is the worst form of tyranny.[734]

The lawjon approach loses its grounds again when we reasonably want to know what is the foundation of the positive law that is followed in this approach. Whence does the positive law get the source or authority of coercion an essential component of the positive law and that of the lawjon approach? If we consider the lawjon approach, which claims human is subject to the law by birth, the law must be considered as a supernatural entity that exist prior to the human civilization and that has its own voice independent of the human civilization. Otherwise, the coercive authority of law ceases to exist, because a man-made law cannot impose coercion over another man or woman without its normative basis.[735] However, they may, as they claim, take resort to fiction. Unfortunately, even fiction loses its foundational validity if it does not subscribe to a complete fictional theory like that of Giambattista Vico[736]. Unfortunately, to subscribe to such a theory is to accept the supernatural lawmaker.[737] Thus, the stark irony is that the positivists do not have any such normative theory that can be considered as complete and convincing. On the other hand, although natural law theories have a foundation of their law in nature or in God, their foundation itself is prejudicial to human Freedom.[738]

As the positivists deny the super-natural sources and accept only the human source, the coercive authority of law can be justified only on one condition that the law is made and approved by people; the law made and approved by the sovereign authority or representative authority does not fulfil the minimum

[734] Tocqueville (n 565) 413 (footnote).

[735] Duguit (n 46) 825–826; Walter S Wurzburger, 'Law as the Basis of a Moral Society' (1981) 19 Tradition: A Journal of Orthodox Jewish Thought 42; Quinney (n 54) 1.

[736] Gianbattista Vico, *Vico: The First New Science* (Leon Pompa ed, 0 edition, Cambridge University Press 2002); Donald Phillip Verene, *Knowledge of Things Human and Divine: Vico's New Science and Finnegan's Wake* (Illustrated edition, Yale University Press 2003). Alternatively, as many scholars suggest, they may take resort to the comprehensive theoretical framework. Unfortunately, they fail to fulfil even this condition. Chapter 6 discusses it in detail about it.

[737] Vico entrusts on the supernatural lawmakers ie God. See Vico (n 736) (See generally) ; Verene (n 736) (See generally) .

[738] In this case human Freedom is subject to those dogmatic concepts of natural law theories. According to these theories, human Freedom is subject to countless conditions of nature like uniform control, religious convictions, rationality, reasoning, and so on. See Gardner Williams, 'Human Freedom and the Laws of Nature' (1944) 41 The Journal of Philosophy 411; Jason A Heron, 'Natural Law, Freedom, and Tradition: A Catholic Perspective on Mediating Between Liberty and Fraternity' in Bharat Ranganathan and Derek Alan Woodard-Lehman (eds), *Scripture, Tradition, and Reason in Christian Ethics: Normative Dimensions* (Springer International Publishing 2019) <https://doi.org/10.1007/978-3-030-25193-2_6> accessed 2 May 2023; Philip A Hamburger, 'Natural Rights, Natural Law, and American Constitutions' (1993) 102 The Yale Law Journal 907, 908.

requirement.[739] Positivists' fiction that the people are the source of law fails to fulfil the requirement of the basic rule of fictionalising if legal coercion is imposed on people instead of accepting the coercion voluntarily by the people. Bekrycht states that '[i]t is not possible to effectively undertake the act of regulation without a prior effective act of granting the possibility of regulation'[740]. In order to claim that coercion is voluntarily accepted by the people, the inevitable requirement is to accept that the people are blessed with intrinsic Freedom. People who do not have the Freedom cannot act voluntarily. One who cannot act voluntarily does not owe any legal responsibility.[741] Therefore, for the sake of their own validity, it is to be accepted that humans are intrinsically free and that Freedom is not subject to the provisions of law. Further, the positive law suffers from another point of view as Habermas explains when 'citizens vest laws in themselves, that is to create a situation in which the sovereign [people] is also the legislator, namely the sender and the recipient of law', positive law loses its foundation' ie the command of the sovereign and the sovereign is above the law.[742] There is no such problem with the freejon approach.

From the ethical perspective, it is obvious that no legal system or mechanism can survive denying the foundational validity of Freedom. As we have seen earlier that the lawjon is based on the misleading assumption that humans are naturally evil, wicked and opportunistic and, therefore, must be kept chained by the law. Is this approach ethical that sees humans from such a pessimistic perspective? Who decides what is good or bad for humans? Who has the authority to judge human conduct when all humans are evil? We have sufficient evidence that proves the opposite is true.[743] It is too general a conviction and completely misleading and, hence, does not fulfil the minimum requirement to be considered as a basis for any normative force. There are millions of instances where strangers are seen risking their lives to save people,

[739] Wolff (n 544) (see generally); Fuller, *The Morality of Law* (n 20); Quinney (n 54). Chapters 6 and 7 discuss this point in detail. Further, the sense of law as discussed in Chapter 8 demonstrates conclusively why such concepts of sovereign authority, political authority, and political representations are incompatible in the discourse of law.

[740] Tomasz Bekrycht, 'Positive Law and the Idea of Freedom' in Bartosz Wojciechowski, Tomasz Bekrycht and Karolina M Cern, *Jurysprudencja* (Wydawnictwo UŁ 2017) 70 <http://repozytorium.uni.lodz.pl:8080/xmlui/handle/11089/22050> accessed 30 October 2022.

[741] We acknowledge that there are legal discourses that, in some special circumstances, prescribe legal responsibility even if the act is involuntary. See Deborah W Denno, 'A Mind to Blame: New Views on Involuntary Acts' (2003) 21 Behavioral Sciences & the Law 601; Kimberly Kessler Ferzan, 'On Jeffrie Murphy's "Involuntary Acts and Criminal Liability"' (2015) 125 Ethics 1119; Stephen Bogle, 'Involuntariness in Negligence Actions' (2023) 43 Legal Studies 122; Jeffrie G Murphy, 'Involuntary Acts and Criminal Liability' (1971) 81 Ethics 332. We submit that even these exceptional cases are misleading; involuntary acts never gives rise to legal responsibility.

[742] Bekrycht, 'Positive Law and the Idea of Freedom' (n 740) 76. In his opinion it – 'leads to quite embarrassing situation, giving rise to contradictory situations, that the sovereign is at the same time the subjected entity'.

[743] Jonathan Haidt, 'Moral Psychology and the Misunderstanding of Religion', *The Believing Primate: Scientific, Philosophical, and Theological Reflections on the Origin of Religion* (Oxford University Press 2009); Haidt (n 74); Ward (n 74); Jean-Jacques Rousseau, *Discourse on the Origin of Inequality* (Oxford University Press 1999).

animals, or the property of others. Humans by their state of nature may be evil on some occasions, but they are also altruistic on many other occasions, if not generally so.[744]

Even Hobbes, one of the main proponents of the lawjon approach, himself, claims that the wicked are fewer.[745] However, he, 'taking the form of an egoism'[746] wants to assume that all people are evil on the precautionary ground as, in his opinion, we do not know in advance who is evil and who is not. One can take precautionary measures by installing a fire alarm to protect the house – this makes sense. However, if one refrains from making a house, itself, as a precautionary measure, it will be absurd. Accordingly, Hobbes's precautionary measure is an absurd measure. If the fire defense system causes more harm than the anticipated harm the system is expected to defend against, then what is the point of having that system? The damage involved in considering humans evil is worse than the benefit that is expected by regulating the personal spheres of the human being.[747] Therefore, regulations that are based on the contention that humans are evil must be avoided.[748] Further, the lawjon approach fails the purposiveness test too.[749] What is the main purpose of the lawjon approach? The purpose should not mean mere purpose; it must be a valid purpose because the lawjon, as we have discussed in Chapter 1, is substantially an objectives-bound approach.[750] Lawjon sufferers extremely at this point. Being a foundationless approach lacks the basis for setting the purpose.[751] Its strongest claim that it knows the ends of human life, is the greatest weakness of

[744] Rothschild correctly states – 'The proposition that men act only out of their own interest is either childish (equivalent, trivially, to saying that ' men desire only that which they desire') or false. The proof is that people feel remorse, … 'that they are touched by novels and tragedies, and that a novel whose hero acted in accordance with the principles of Helvetius ... would be most displeasing to them' see Rothschild (n 172) 682.

[745] Malcolm (n 718).

[746] Hobbes (n 66) xv.

[747] In fact, it is rather better not to have such kind of sadistic law, at all. In the absence of such a law, people will get the opportunity to work from within and eventually, this will avail a higher benefit than the sadistic law would have. In this regard, Spinoza states: 'people will unite and consent to be guided as if by one mind not at reason's prompting but through some common emotion, such as . . . a common hope, or common fear, … it follows that men by nature strive for a civil order, and it is impossible that men should ever utterly dissolve this order'; cited in Norman L Whitman, *An Examination of the Singular in Maimonides and Spinoza: Prophecy, Intellect, and Politics* (Springer Nature 2020) 82.

[748] As Hampsher-Monk states that in the absence of the attributed law imposed from outside, the human state of nature is sufficient to take charge of their personal life. See Iain Hampsher-Monk, *A History of Modern Political Thought* (Blackwell Publishers 1992). However, the upcoming Chapters demonstrate that such laws fail to comply with the minimum requirements of legality.

[749] Pock (n 51) 65. Radbruch considers purposiveness as one of the main components of any legal system. Radbrauch, when talking about the legal system, must have in his mind the landscape of the lawjon approach and hence substantiates his claim.

[750] This is why our discussion about lawjon's cost and benefits is essential.

[751] It does claim that it has purposes like regulating people, maintaining order, and so on. The Chapters ahead discuss how baseless and misleading these purposes are. Above all, the question involved in this case is more substantial – on the basis of what they set the purposes.

the lawjon. The end is not knowable.[752] For the freejon approach, the foundation, itself, lays down the ends; Freedom is the purpose, although the freejonhas no purpose to pursue – the purpose is manifested intrinsically.[753]

5.1.2 Functional Comparison

As is the case in the foundational comparison, so is the case in the case of the functional comparison; when we compare the two approaches, we find that there are numerous defects in the ways the lawjon approach functions. The lawjon follows the top-to-down functional strategy; the state or the sovereign body orders and people follow the orders. The approach holds that the things in the state, function well when the individuals are intimately guided by the state and its institutions.[754] Here is a practical question connected to this point: what is more practical - imposing law from up on the people or letting law to be flourished from the grassroots level and automatically accepted and subscribed to by the people? Yes, it is true that there is this paradox. However, cannot law leave some issues to be decided in line with Freedom while, still, the law will have a vast scope of its application in other interpersonal issues? Further, even Hobbes knows very well that human nature is such that they 'don't like taking orders' whereas they will do a lot of more positive things when they know that they are doing with their choice.[755] The lawjon approach, arguing the importance of the top-to-down regulatory mechanism, promotes mechanical and artificial law that is, as they claim with pride, autonomous.[756] However, the truth is that the claim of legal autonomy is not

[752] Rawls states – ' Even if the general capacities of mankind were known (as they are not), each person has still to find himself, and for this freedom is a prerequisite'; see Rawls (n 132) 186. Radbruch tries to prescribe an inalienable aim along with other aims like justice, certainty, … human rights but fails to provide what these exactly mean; see Pock (n 51) 66. Vico claims that the human end's knowable only by its maker ie the God and human will never know it. See Vico (n 736) (See generally); Verene (n 736) (See generally) .

[753] In this regard we find Fromm in our side: '[Freedom] implies the principle that there is no higher power than this unique individual self, that man is the center and purpose of his life; that the growth and realization of man's individuality is an end that can never be subordinated to purposes which are supposed to have greater dignity.' see Fromm (n 214) 291.

[754] Malcolm (n 718); Bruce D Fisher, 'Positive Law as the Ethic of Our Time' (1990) 33 Business Horizons 28; BM Fissell, 'The Justification of Positive Law in Plato' (2011) 56 The American Journal of Jurisprudence 89, 91.

[755] Karl Widerquist and Grant McCall, 'Myths about the State of Nature and the Reality of Stateless Societies' (2015) 37 Analyse & Kritik 233.

[756] Brian Bix, 'Law as an Autonomous Discipline - Oxford Handbooks' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2012) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199248179.001.0001/oxfordhb-9780199248179-e-043> accessed 29 May 2019; Owen M Fiss, 'The Autonomy of Law' (2001) 26 YALE JOURNAL OF INTERNATIONAL LAW 517; Bruce W Frier, 'Autonomy of Law and the Origins of the Legal Profession' (1989) 11 Cardozo Law Review 259.

backed by any strong justifications or practical necessity, but rather backed by opportunism, confusion, and ignorance.[757]

One of the worst aspects of the lawjon approach is that it wants to regulate people, and its emphasis is more on external regulation. The evils and the impossibility of external regulation are well known.[758] It is, on the one hand, the most complex task, on the other hand, not only insufficiently productive but also counter-productive.[759] Conversely, when the opposite strategy is followed ie state is only to facilitate people and regulation is entrusted with the people themselves, the benefit is much higher.[760] What is more problematic with the lawjon approach, it must presume all the problems and the solution thereto in advance. Unfortunately, the fact is, as Knight posits, 'solution or answer is not given in advance, like the end in economic activity … In reality, a problem is perhaps never fully given or understood until it is solved but is in varying degree progressively defined and clarified in the process of solution'[761]. In such a case, the freejon is the most appropriate approach.

The lawjon approach, which is more compatible with the rule of the King-Queen or dictator, finds its worst difficulties in the democratic regime where the approach needs to take care of the democratic principles including Freedom. We all know that the democratic regime presupposes freedom of speech and thought, minimum compulsion, and settling issues through discussion, as these are the preconditions of the principles of democracy themselves.[762] Fromm posits that the right to express our thought makes sense only when 'we are able to have thoughts of our own'[763]. He further tells us that Freedom, in its true sense, makes sense 'only if the inner psychological conditions are such that we are able to establish our own individuality'[764]. According to him, 'enhancing the actual freedom' is the precondition for progress in democracy and the only way the 'actual freedom' is ensured is 'in the activity fundamental to every man's existence, his

[757] While the scope of this thesis is not sufficient to discuss how opportunism shapes the autonomy concept, the Chapters ahead demonstrate how the autonomy concept is the outcome of the confusion and ignorance of the sense of law, morality of law, and so on.
[758] Rothschild (n 172) 684. It is stated that 'man prefers to depend on nature than on other men; he suffers less if he is ruined by a hailstorm than by an injustice'. Berlin states – 'my conduct derives an irreplaceable value from the sole fact that it is my own, and not imposed upon me'; see Berlin, *Liberty* (n 49).
[759] 'Externally regulated … behaviors are dependent on the continuous presence of the controls, …External regulation also typically leads to a low quality of behavior because, when controlled, people tend to do only what is required. Finally, external regulation is often associated with lower well-being, engagement, and satisfaction'; see Ryan and Deci (n 504) 1569–70.
[760] Humboldt (n 214) 130–31. He states – 'A State, moreover, whose sphere of action is so narrow needs less power, and this needs correspondingly less defence … the free cooperation of the members … secures all those benefits'.
[761] Knight (n 132) 98.
[762] Rawls (n 132) 197, 206; Fromm (n 214) 108.
[763] Fromm (n 214) 266.
[764] Fromm (n 214) 266.

work'[765]. Where does the lawjon, at all, fit in here? Nowhere at all; lawjon does not fit in with any of these conditions, and, hence we see its, as Habermas terms, 'paradoxical achievement'[766] to generate more paradoxes. The very foundation of the lawjon approach dictates that Freedom is not its concern.[767] Although it claims that it is the only way to ensure meaningful Freedom, in practice, because of the very mechanism of its functioning, it is more to restrict Freedom instead of protecting Freedom.[768] From the lawjon perspective, Freedom is always about balancing: one loses it while another gains it. At the end of the day, it can never fulfil the best. What is more shocking, is that the state, while in the loop of balancing, can, in the disguise of protecting one's Freedom, justify the implication of any arbitrary power exercised by it.[769] Thus, the lawjon approach is an effective weapon to unleash tyranny on people in the disguise of the protection of Freedom. To make the scenario more complicated, the lawjon approach takes resort to further paradoxes. For example, centralization is the functional basis of the approach while the ideal form of democracy encourages decentralization.[770] Eventually, the freejon approach is more compatible with democracy as the approach is fundamentally decentralized.

5.1.3 Outcome and Prospect Comparison

The fundamental flaw of the lawjon approach is, as it is apparent, based on heuristic knowledge, biased information, and rumour.[771] We doubt, if they do these at all, that the lawjon followers properly take into consideration human psychology, sociology, matters that influence human behaviour, the nature of human

[765] Fromm (n 214) 299.

[766] Bekrycht, 'Positive Law and the Idea of Freedom' (n 740) 77.

[767] In fact, many of the proponents of the approach takes immense pride in accepting the fact Freedom is not primary concern at all. For example, see the theory of Dworkin who on many occasions claim that once the material equality is ensured considering Freedom is not an inevitable issue. See specially Dworkin, *Sovereign Virtue* (n 1).

[768] Pettit (n 150) 595. Pettit explains the process of how, under the current lawjon approach, the increase of the Freedom of X, coupled with the increase of the arbitrary power of the state and the state mechanism. He states that 'any such increase demonstrates that the lawmaking authority responsible has a degree of arbitrary power over at least those who are disadvantaged, since they would hardly tolerate the change otherwise … It still remains that any such increase will reduce the capacity of the less privileged to defend themselves against interference by the favored few. They will find that the new elite are better protected or have better resources than previously '.

[769] Hitler, Polpot, Stalin, and all other dictators used the same method. In the disguise of protecting the interests and Freedom of their citizens, they justify their acquisition of unlimited power that they used 'legally' in the extermination of millions of people.

[770] For instance, Raz states that the authority of law is distinguishable from the authority of other normative systems because it is not claims of child or mad but of a centralised body; see Raz, 'Authority, Law and Morality' (n 105) 302. For the importance of decentralization as a democratic value, see SK Sharma, 'Democratic Decentralization: Context and Crises' (1978) 39 The Indian Journal of Political Science 349; Larry Diamond, 'Why Decentralize Power in A Democracy? | DiamonddemocracyD8' (Stanford University 2014) <https://diamond-democracy.stanford.edu/speaking/speeches/why-decentralize-power-democracy> accessed 29 May 2023.

[771] Berlin, *Liberty* (n 49) 169. Although he is not aware of the lawjon approach, the system he is depicting here is exactly the lawjon approach that is, to his opinion, devised to degrade people and such system 'rest on no rational or scientific foundation, but, on the contrary, on a profoundly mistaken view of the deepest human needs'.

communication, etc at the time of setting the objectives of the approach and predicting the probable consequences of the approach. They seem never to care about monitoring the impact of their approach and of the assumptions their approach is based on. The sadistic and pessimistic assertions, the lawjon approach is based on, have some detrimental and dangerous implications. They choose an alarming and misleading path without understanding the general reasons why people do what they do. The assertion that all people are evil never serves the positive role that the followers of the approach expect. Even if anyone can ever prove, arguendo, that the assertion has a precautionary role to play, law and legal discourse must not accept this sadistic assertion because of its serious negative impacts on human behaviour. The authoritative regimes, dictators, opportunists, corrupt people, manipulators, and all other evil-self dominated people, invariably, use this notorious assertion as a tool to maintain their dominance to satisfy their monstrous gratification around the world.

Let's see how this assertion works as a tool to dominate, manipulate, and exploit people. We submit the observation that the strength of a person dominated by the evil self is that he or she believes that all or most people are evil. Conversely, the weakness of a good-self-dominated person is that he or she believes that only he or she is the good person in the world in the sense of forming a functional unity. Consequently, we see the abundance of unity among the people dominated by the evil self and the scarcity of unity among the people dominated by the good self and this gives us the false sense that people are evil and they are everywhere.[772] In this milieu, when the law, itself, holds this false sense as real and endorses it accordingly, it causes serious damage to human behaviour in general. It further strengthens the already stronger position of the evil-self-dominated people; they get support and motivation to do the worst. On the other hand, the already weak position of the good- self-dominated people become weaker. Thus, the impact of the assertion can, exactly, be related to the impact of the notorious psychological term 'gaslighting'[773]; to be specific, the false assertion has been one of the most common messages used by the infamous gaslighters. Hitler, Genghis Khan, and Stalin could become what they are infamous for largely because they could succeed in utilizing the maximum benefit of the gaslighting effects.[774] The corrupt people of Bangladesh and India

[772] Jonathan Haidt offers us some explanations of this phenomenon. See generally, Haidt (n 74).

[773] 'Gaslighting as a Manipulation Tactic: What It Is, Who Does It, And Why' (*CounsellingResource.com: Psychology, Therapy & Mental Health Resources*) <https://counsellingresource.com/features/2011/11/08/gaslighting> accessed 4 January 2022; G Alex Sinha, 'Lies, Gaslighting and Propaganda' (2020) 68 Buffalo Law Review 1037.

[774] David Rosenblum, 'Battle for the Minds: Use of Propaganda Films in Stalinist Russia and Nazi Germany' [2019] Senior Honors Projects, 2010-2019 <https://commons.lib.jmu.edu/honors201019/710>; James Chapman, 'Review Article: The Power of Propaganda' (2000) 35 Journal of Contemporary History 679.

use the same technique to justify or reduce the gravity of their actions saying – 'all people are corrupt, so do we'.[775]

Would it have been better had the positivists started with the appreciation ie humans are good, instead of the conviction? Have the lawjon followers ever tried with appreciation before opting for the conviction? From the grounds presented above and the studies conducted on human behaviour, and if the human potential is taken into consideration from a positive perspective, it is likely that the answer to the first question will be positive. Admittedly, to date, there is no conclusive answer to the first question, because they never let it happen. They never try with appreciation despite it being more promising than conviction. This demonstrates how impractical they are; in the absence of any conclusive answer to the first question, it is always practical to go with appreciation instead of conviction. Consequently, it is likely that the conviction-based approach is causing substantial statistical damage we are not aware of. The gaslighting impacts of the conviction support the criminals to do more crimes while forcing the victims to accept it and thus approve of what happens to them.[776]

Gaslighting creates a false scenario everyone becomes part of.[777] In such a circumstance, the 'clear message'[778] the positive law wants to give is, simply, lost because of the impact of the subtle message inferred from the scenario. Although it may seem weird to legal scholars, the fact is people don't learn what they are said to learn, instead they learn what they are meant to learn; people are guided more by subconscious or unconscious milieu than by conscious instructions.[779] Subtility of any message creates a stronger impact on human behaviour than it is usually thought and, by contrast, it is the directness of the message that gives rise to a rebellious effect in humans.[780] The commercial world, artists, and filmmakers are well aware of such nature of humans, while the legal arena is completely out of sight in understanding it. In addition, humans, generally and inevitably, just imitate the pictures they see and pictures they construct as they hear something; positive law's intrusion on Freedom increases the possibility of blind imitation. Thus, it is one of the worst decisions to depict the negative picture that they mean to show the

[775] Fromm (n 214) 160. Stating how repetition of slogans and emphasis on factors mute human critical faculty.
[776] Such effect is reflected and depicted by several political works. For instance, see generally Niccolo Machiavelli and Anthony Grafton, *The Prince* (George Bull tr, Reissue edition, Penguin Classics 2003).
[777] Sinha (n 773); Natascha Rietdijk, 'Post-Truth Politics and Collective Gaslighting' [2021] Episteme 1; Tommy Shane, Tom Willaert and Marc Tuters, 'The Rise of "Gaslighting": Debates about Disinformation on Twitter and 4chan, and the Possibility of a "Good Echo Chamber"' (2022) 20 Popular Communication 178.
[778] One of the prime arguments of the lawjon followers in favour of their approach is that the message of the positive law is clear, and this eliminates all confusion relating to law.
[779] Haidt (n 74); *95 % Of The Day , You Are Not Operating From The Conscious Mind - Bruce Lipton* (Directed by Success Archive, 2021) <https://www.youtube.com/watch?app=desktop&v=ZjZvtrKNvzU> accessed 6 January 2022.
[780] Fromm (n 214) 190; Tocqueville (n 565) 418.

people. In short, this indoctrinates people either to pursue the path of the gaslighters or to become easy prey for gaslighting. It is the curtain that prevents us from seeing what it is not and vice versa. This curtain divides us so badly that we cannot get in touch with the actual sense of law that give rise to a general and shared commitment among the people.[781] This curtain manipulates us so nicely that we accept anything as law, despite it being devoid of the sense of law. This explains why many people do not want (absolute) Freedom, despite humans, by their nature, 'typically wish to be free'[782]. The lure of artificial Freedom that is offered by the lawjon approach in exchange for natural Freedom is so dear to the gaslighted people that, as Tocqueville states, '[t]here is no need to take away from such citizens the rights that they possess; they willingly allow them to escape'[783].

We should remember as it is harmful to be too much pessimistic, it is equally harmful to be too much optimistic. We must not forget the genocide committed by the Nazi regime by using the shield of positive law without the morality of law.[784] If it is thought that the things that are being done by the Belarussian dictator in the name of law will not be done by another dictator in another country in recent future, this will be a great mistake for which a high price to be paid in the expense of losing more Freedom.[785] Therefore, an approach without foundation, as in the case of lawjon approach, always carries the risk of using the law as a tool of oppression. The approach, in its basket, has all the elements to be afraid of, while it does not have any preparation, whatsoever, to guard against the probable negative consequence that the approach itself may generate. The centralization, in the lawjon approach, is an excellent tool to unleash tyranny.[786] Radbruch, one of the chief proponents of the approach in his early life, tries his best to reform the approach through the back door but to fail completely because it is not amendable.[787] The lawjon's danger, Radbruch was afraid of and, thereby his attempt to reform the approach, still exists to this day. Literally, the laws of every country of the world including that of the Western countries can sneak into the personal sphere of

[781] We submit that law is an abstract sense that gives rise to a general and shared commitment among the people. Everyone has this sense and one can get hold of it when he or she plays the evaluative role from the external perspective. Upcoming Chapters focusing on the sense of law explain the sense.
[782] Knight (n 132) 100.
[783] Tocqueville (n 565) 951.
[784] Emma Harries, '"Operative" Natural Rights' (2020) 6 Palgrave Communications 63. Seeing the awful consequence of the positive law, Radbruch was compelled to turn against the positivism devoid of morality; see Pock (n 51) (see generally) .
[785] Matthew Frear, '"Better to Be a Dictator than Gay": Homophobic Discourses in Belarusian Politics' (2021) 73 Europe-Asia Studies 1467.
[786] Frye (n 13) 308–11. To talk about the danger of centralization he cites Lord Acton's statement – 'I believe this sort of concern is at the core of Lord Acton's dictum that power corrupts and absolute power corrupts absolutely'. Jefferson could presume the threat of the lawjon approach many years ago - 'The tyranny of legislators is now and will be for many years to come the most formidable danger'; see Tocqueville (n 565) 426.
[787] Pock (n 51) 66.

anyone and hijack his or her Freedom. Because, as far as we know, there is not a single country that has not dangerous exception provisions like 'state interest', 'maintenance of order', and so on. Just what it needs to find a person who will have the brutal passion for using these provisions to unleash his or her tyranny[788]. There may be a sense of over-assurance among many people as they may find that Europe rarely uses these principles over its citizens. Our point is here - they can continue these many years without implementing these provisions - isn't it conclusive proof that the state can function without these dangerous provisions? This paves the way to adopt the Freejon approach.

Only the Freejon approach can solve this problem because it has a mechanism attached to it that can guard against the rise of dictators. Bromwich points out that the benefit of the Freedom-based system is that 'under it, the ruler cannot pass by the people's minds, and amend their affairs for them without amending them'[789]. Berlin also appreciates pursuing a Freedom-based system because he is also afraid that 'all paternalist governments, however benevolent, cautious, disinterested and rational, have tended, in the end, to treat the majority of men as minors, or as being too often incurably foolish or irresponsible'[790].

5.2 The Confirmation Problem

The central claim of the lawjon approach is that people can enjoy Freedom or liberty only because the law recognises it and protect it.[791] According to Blackstone, the concept of liberty is introduced by 'laws, when prudently framed'.[792] Positivists claim that legal rights cannot exist without a second person or entity having the corresponding duty. Bentham claims that no right exists in the absence of law or social recognition and, to him, natural liberty (or Freedom) is 'nonsense upon stilts'.[793] Martin claims that a full theory of rights must include legal recognition, societal recognition, an institutional setting, power, immunities, etc.[794] He concludes that 'recognition is a characteristic feature of legal rights'[795]; it is not a matter of whether it is moral or not and a morally invalid right is just a 'defective' right.[796] According to these scholars, in the absence of the relevant provisions of law recognizing Freedom, the law owes no obligation to facilitate the Freedom of anyone. We submit that all these misconceptions are due to the conventional and illusory

[788] We suppose some of the European countries already start to face the situation.
[789] Bromwich (n 144) 26.
[790] Berlin, *Liberty* (n 49) 169.
[791] Frye (n 13) 300. He states that the weak thesis holds that 'we have less freedom without law relative to a condition of lawfulness'.
[792] Blackstone (n 92).
[793] Philip Schofield, 'Jeremy Bentham's "Nonsense upon Stilts"' (2003) 15 Utilitas 1.
[794] Emma Harries, '"Operative" Natural Rights' (2020) 6 Palgrave Communications 1, 2.
[795] As it is restated by Harries. See Harries (n 794) 2.
[796] Harries (n 794) 3.

conceptions about the justifications of the legal claims. The following points demonstrate how fragile and misleading these contentions are.

5.2.1 Right is Created by the Virtue of the Law, not by the Virtue of the Provisions of Law

Hart states 'freedom (the absence of coercion) can be valueless to those victims of unrestricted competition too poor to make use of it'[797]. Valentini states, 'I grant that there exist some natural duties but argue that all moral rights require positive norms—e.g., legal or conventional norms—as necessary existence conditions'.[798] She further states, what other positivists state, '[r]ights…presuppose duties…It involves putting pressure on the duty-bearer…by insisting that the duty be acted on, by threatening sanctions…by using physical compulsion'[799]. To the lawjon followers, no legal right can exist where there is no corresponding positive duty and the positive duty is prescribed by the positive law. 'To elucidate the notion of a right, one must first characterize the related notion of a duty.'[800] As Hart states 'I have a right to be paid what you promised for my services' because there is a contract and by virtue of the contract, I have the right to be paid.[801] He asks – on what basis someone can demand that his or her Freedom must be protected by law if there is no positive law? Valentini asks, 'where does that right come from?'[802] She answers, 'the right comes from the positive (i.e., de facto) norm…that norm, to which they both committed, that confers on Becky the standing to demand the performance of Anna's duty'.[803] To them, recognition of the positive law is the precondition of legally enforceable Freedom.

To start with the statement of Valentini in relation to Anna's commitment to Becky to cook every other day, we submit that the commitment that both of them will cook on every alternative day is not a norm; the norm is something more significant. The agreement itself is not a norm of any sort; it is just a specific incident or, in the language of Hohfeld, just evidence of the event.[804] Then, in response to her question as to the source of the right, we submit that Becky's right to demand performance has not originated by virtue of their agreement. Instead, the source of the right is the underlying morality of law or 'the general and shared commitment among the people'[805] that requires that we should stick to our words or we should not

[797] Hart, 'Are There Any Natural Rights?' (n 13) 175 (footnote).
[798] Valentini (n 13) 1.
[799] Valentini (n 13) 4. See also AD Woozley, 'Legal Duties, Offences, and Sanctions' (1968) 77 Mind 461; Austin and Campbell (n 60); Kelsen (n 18).
[800] Valentini (n 13) 4.
[801] Hart, 'Are There Any Natural Rights?' (n 13) 183.
[802] Valentini (n 13) 13.
[803] Valentini (n 13) 13.
[804] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24) 25.
[805] This point is elaborated in the discussion sense of law.

break our promise when the promise or words are supported by 'prescriptive value'[806]. As Hohfeld says, the fact that they have exchanged their commitment, oral or documentary, is just an evidentiary fact; there is nothing substantial and, hence, it does not give rise to the commitment.[807] Similarly, Hart has the right to be paid not because of the contract he is in with the duty holder but because of the moral justification attached to the contract.

To further clarify the point, suppose a contract is signed between a boy of 10-year-old and a mature person of 21-year-old. The contract is not valid. The positivists will say that the contract is not valid because it is written in the statute that a contract signed with a minor is not valid. Now the question is – why does the statute provide so? The answer lies in the original meaning of Freedom – the prospect of the self taking charge of action. The boy is yet to attain the prospect to relate this act of executing a contract with his Freedom. Positivists, including Hart, fail to see the underlying justification as they confine themselves to the blackletter laws. Their failure is due to their inability to ask questions of a substantial nature. Why do they declare something legal while others are illegal? What is the philosophy of declaring legality or illegality? Why do we consider something bad or illegal? Why is rape bad, while a wide range of sexual activities are not? Why is murder bad or illegal? How do people reach a conclusion to declare these acts bad or illegal? Positivism has a readymade answer that is devoid of any research-led knowledge, philosophical wisdom, practicality, and reasonableness. The answer is limited to the letters of the positive sources; it considers those bad or illegal because such are the provisions of the written legal texts. Why do legal texts consider those bad or illegal? They do not have any answer and what is more noteworthy, they are afraid of going beyond this point as they will confront substantial questions of which they do not have any answer. The 'actual answers'[808] to all these questions are connected to the concept of Freedom.

According to the positivistic version of the Lawjon approach, rules that are incorporated in the statutes, case references, and legal texts are considered laws. On the other hand, jurists (Dworkin, for instance) who take a softer stance are of the opinion that these statutes or texts are not law but laws are deduced from these formal sources. To Dworkin, the law is the result of the rules incorporated in the formal sources. Although disappointing and mistaken, Dworkin, *prima facie*, makes some sense; positivists' position is absurd. These rules are not law in any sense.[809] Nor is the law the result of the rules.[810] These rules are the

[806] This point is elaborated in the discussion sense of law.
[807] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24) 25.
[808] The answers do not lead to any unanswerable questions.
[809] This point is explained in Chapter 8.
[810] If the requirements of the law are fulfilled, these rules may give rise to the sense of law, but these rules themselves are not the law.

tentative provisions of law. Law is substantially different from the provisions of law and, for good reasons, the dividing line between the law and the provisions of law must be maintained.[811] These points and the distinctions will be explained in detail in Chapter 8.

Unfortunately, most of jurists have conventionally missed this crucial line of difference and, hence, the misconception that rights are created by virtue of the legal texts. The lawjon approach prevents one to see the difference and the inability to see the difference pushes one to follow the lawjon approach more. Thus, not only the positivists but also the others are trapped in this vicious cycle. Hart, unlike other positivists, is well aware of the positivistic flaws and limitations. Unfortunately, he fails to get rid of the cloud of confusion caused by the lawjon approach. He, going against the positivistic stance, states that to have rights, general rights (including Freedom) or legal rights, 'is to have a moral justification for determining how another shall act'.[812] How does he distinguish between general rights and legal rights? According to him, legal rights (or special rights), unlike general rights, are contractual rights and the law facilitates these contracts that give rise to the moral justification.[813] Thus he is acknowledging that rights exist by virtue of the morality of law. The morality of law is the shared and general commitment that derives from the sense of law and this sense of law is the ultimate justification of the legal obligation. Therefore, this is a sheer misconception that rights are created by virtue of the provision of the positive law that provides that there is a corresponding duty. Please note that Freedom is the constituent part of the morality of law and, eventually, of the sense of law.

Positivists may ask – why doesn't the law consider all moral claims? There are different ways to answer the question. First, for which the positivists are to be blamed, the short-sighted positivists preached that the law is distinct from morality. They preached that law does not have any connection with the normative force on which law stands; it is like denying the existence of oxygen living in the ocean of oxygen. Second, impractical formalism - looking for someone to be blamed and this ground will be explained in a later section. Third, many moral justifications are not in fact morals in nature. For example, Lord Devlin was against homosexuality claiming that homosexuality is against the moral value of the society.[814] Dworkin refutes Devlin showing that the majoritarian distaste and disgust cannot be counted as moral justification.[815]

[811] This point will be discussed in detailed in the upcoming article explaining the shortcomings of the theories and methodology of Dworkin.
[812] Hart, 'Are There Any Natural Rights?' (n 13) 188.
[813] Hart, 'Are There Any Natural Rights?' (n 13) 186.
[814] Dworkin, 'Lord Devlin and the Enforcement of Morals' (n 1) 988.
[815] Dworkin, 'Lord Devlin and the Enforcement of Morals' (n 1) 1002 However, it should be mentioned that Dworkin himself was confused about the morality of law. He finds political morality is connected to the morality of law. Unfortunately, this does not make any different sense than that of Lord Devlin. .

Fourth, and the most important point, the morality of law is completely different from the common morality or contextual morality.

At this point, Hart seems the most confused jurist. Despite his stance in favour of moral justifications as the source of right, he is concerned that mere moral justifications (or all types of moral justifications) should not be considered enough for exercising the rights to their fullest sense or enjoying Freedom. He is afraid because in that case, anyone can do anything. He states with concern:

> It would, for example, be possible to adopt the principle and then assert that some characteristic or behavior of some human beings (that they are improvident, or atheists, or Jews, or Negroes) constitutes a moral justification for interfering with their freedom; any differences between men could, so far as my argument has yet gone, be treated as a moral justification for interference and so constitute a right.[816]

Luckily, 'any differences between men' cannot make a moral justification. Here are the flaws of the positivists - they are confused about the morality of law; they are messing up the morality of law with street morality, contextual morality or mere social tastes. For example, Valentini says 'duty is a moral ought … Not all duties, of course, correlate to rights. For example, I may have a duty to help an elderly lady cross the street, without the lady having a right'.[817] Like Hart and Devlin, (even Dworkin) she is also confusing the morality of law with the daily-life morality. This incident is in no way part of juridical facts.[818] The law should not even come here. This is the moral that is better served by the family, schools, and local community. Thus, their inability to distinguish between the morality of law and other contextual morals leads them to be dependent exclusively on the blackletter law to decide what is legal and what is not. Thus, their denial of moral justification is because of their weakness, not because of their strength; their weakness - not being able to identify or understand 'what constitutes moral justification'. The point is like - I cannot differentiate between apparent moral justification and correct moral justification, so let's stop working with it. The law will not develop in this way. We have to take the challenge to define it, discover it and we have to increase our capacity to identify these. Unfortunately, yet there are some positivists like Martin who will keep continuing to state that morality is not an issue for the validity of the positive law.[819] Talking about such an illusory position of the positivists about morality, Dworkin correctly posits:

[816] Hart, 'Are There Any Natural Rights?' (n 13) 189.
[817] Valentini (n 13) 5.
[818] This point is explained in Chapter 8.
[819] Martin (n 66).

> They ignored the crucial fact that jurisprudential issues are at their core issues of moral principle, not legal fact or strategy. They buried these issues by insisting on a conventional legal approach. But if jurisprudence is to succeed, it must expose these issues and attack them as issues of moral theory.[820]

Let's consider three instances –

1. X did not help a blind man cross the road although he could = immoral but not against the law.

2. X has committed theft = immoral and against the law

3. X has violated the speed limit = amoral but against the law.

For incident 1, which is immoral, the law does not impose any legal obligation, but, for incident 2, the law does. On the other hand, traditional legal discourses posit that although X does not do anything immoral in incident 3, he or she can be held legally responsible.[821] Apparently, the enormous confusion associated with the reference of morality to these three incidents keeps us haunted. These apparently random associations and disassociation of morality in different kinds of cases create enormous confusion in the legal arena on the question of the role of morality in law. They see cases where morality is connected while in other cases this is not the case. They become confused. To avoid this confusion everyone takes shortcuts: they conclude that there is no necessary connection between law and morals, while others, including some positivists, assume that there must be a moral connection. Nevertheless, they are divided as to the types of moralities involved. The morality of law is the morality that originates from the shared and general commitment of the people and all these three incidents can be explained with reference to the morality of law and the Freejon approach.[822] The morality of law is obviously distinct and of its own kind.[823]

Admittedly, many laws acknowledge or recognise that human is born free. However, it does not necessarily mean that Freedom is protected by virtue of the positive law; nor by virtue of other laws such as natural law. I am acknowledging that X has died. This acknowledgement is not permission or approval; this is corroborating with the fact and the fact is in no way dependent on whether I am corroborating with it or not. However, as a responsible person, I must acknowledge it for my own interest. It would be a pity, shameful and outrageous act if America says that black people get Freedom from slavery by virtue of the

[820] Dworkin, *Taking Rights Seriously* (n 1) 23 (ebook page number).
[821] Dworkin, *Taking Rights Seriously* (n 1) 25-26 (ebook page number); Richard A Wasserstrom, 'H. L. A. Hart and the Doctrines of Mens Rea and Criminal Responsibility' (1967) 35 The University of Chicago Law Review 92, 95.
[822] Chapter 8 explains it in detail.
[823] A complete and conclusive discussion as to the difference is made in Chapter 8.

13th Amendment to the US Constitution.[824] Their Freedom was not recognised by virtue of the Amendment but by virtue of their birth as free. Black people had this entitlement before the Amendment to the Constitution, have this after this Amendment and will remain so even if a positive law provides the contrary. The fact is, before the amendment their entitlement was illegally snatched away by some illegal laws passed by some subhuman who are supposed to be punished posthumous.[825] Constitution or Court has just accepted the fact that black people have Freedom; it is not an approval or permission. Unfortunately, the positivists become confused as they mingled the meaning of recognition. Blackstone, himself, acknowledges that personal and social liberty is pre-existing the liberty given by law.[826] However, he denies to accept the pre-existing liberty because, as he claims, the liberty was unfair.[827] Now the general question is - how do the positivists measure fairness? However, to be specific, the interpretation of Freedom does not leave any scope of unfairness.

5.2.2 Is it Inevitable to Have Someone with Positive Duty?

According to Hayek, we can enjoy liberty only because the law cut down the freedom of another; if the law had not imposed limitations on the liberty of others, we would not be able to enjoy our own liberty.[828] A very general question - why do we think that a right in order to be right there must be someone to be blamed? Freedom is self-executing and it does not, in its original sense, need a person or institution to have a corresponding duty. Lawjon followers ask – what will happen when Freedom is violated by another person? There is more than one option to rebut the question. A right cannot be denied only on the reason that an accident may happen and then we will not find a person to blame. Isn't the matter like saying X does not have sickness as his sickness does not fall under any listed sickness of the medical science or because his sickness does not have any medicine? Thus, the right is not a right because we will not get a remedy if the right is violated. Even the positive law does contain many provisions recognizing rights in cases where

[824] Unfortunately, there are countless judges and legal scholars who genuinely believe that the Blacks American are free by virtue of the 13th Amendment. See Peter Wallenstein, 'Slavery Under the Thirteenth Amendment: Race and the Law of Crime and Punishment in the Post-Civil War South' (2016) 77 Louisiana Law Review 1; Randy Barnett, 'Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner's Theory of Interpretation' [1997] Georgetown Law Faculty Publications and Other Works <https://scholarship.law.georgetown.edu/facpub/1238>.

[825] Chin (n 83).

[826] Stephen C Hicks, 'The Politics of Jurisprudence: Liberty and Equality in Rawls and Dworkin' (2017) 25 The Catholic Lawyer 106, 121.

[827] Hicks (n 826) 121.

[828] Hayek (n 59). Berlin in the same vein states – 'So long as there is not this notion of prevention by persons, the notion of liberty does not arise. Liberty is being free from the intervention, from the interference, of other persons'; see Berlin, *Freedom and Its Betrayal* (n 52) 57. Denning states – ' The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief'; see Denning (n 168) 5.

there is no person having a corresponding duty or there are no means to availing the remedy, for example, the act of God, frustration of contract, bankruptcy issues, and other many cases of this sort.

Now positivists may classify Freedom as an imperfect right, a right recognized but not enforceable.[829] When is a right considered imperfect? When the law has intention or reason to act but cannot act as it is impossible to act.[830] This is not the case, in the case of Freedom; the law can act. Reference to a second person may have a relationship with the violation of Freedom but not with the concept of Freedom itself. Interpretation of the ship has nothing to do with the ocean storms. Admittedly, at the time of making a ship, its maker must take care to keep measure against probable ocean storms, but the storms have nothing to do with the explanation of the ship. Pettit[831] or Arendtian[832] forms of explanations of Freedom, which validate Freedom based on its associated external force, are responsible for such confusion that Freedom necessarily needs someone else. Freedom is about the relations with self not with anyone else. According to Bekrycht, the idea of law essentially involves two elements – claim and obligation and both need carriers and hence need at least two persons.[833] We have already explained that Freedom combines both and the self is both, at the same time.

[829] For discussion about perfect rights and imperfect rights and their corresponding duties, see Joseph W Bingham, 'The Nature of Legal Rights and Duties' (1913) 12 Michigan Law Review 1; Simon Hope, 'Perfect and Imperfect Duty: Unpacking Kant's Complex Distinction' (2023) 28 Kantian Review 63; Jonathan Law and Elizabeth A Martin, 'Perfect and Imperfect Rights', *A Dictionary of Law* (Oxford University Press) <https://www.oxfordreference.com/display/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2844> accessed 29 May 2023; 'Francis Hutcheson on the Difference between "Perfect" and "Imperfect" Rights (1725) | Online Library of Liberty', , *Online Library of Liberty* <https://oll.libertyfund.org/quote/francis-hutcheson-on-the-difference-between-perfect-and-imperfect-rights-1725> accessed 29 May 2023; Helga Varden, 'Duties, Perfect and Imperfect' in Deen K Chatterjee (ed), *Encyclopedia of Global Justice* (Springer Netherlands 2011) <https://doi.org/10.1007/978-1-4020-9160-5_38> accessed 29 May 2023; Simon Hope, 'Subsistence Needs, Human Rights, and Imperfect Duties' (2013) 30 Journal of Applied Philosophy 88.

[830] Bingham (n 829) 16; Law and Martin (n 829); 'Francis Hutcheson on the Difference between "Perfect" and "Imperfect" Rights (1725) | Online Library of Liberty' (n 829).

[831] For example, let's see how Pettit is taking Freedom. He considers Freedom as – 'being able to look the other in the eye, confident in the shared knowledge that it is not by their … leave that you pursue your innocent, noninterfering choices; you pursue those choices by publicly recognized right … The noninterference you enjoy at the hands of others is not enjoyed by their grace, and you do not live at their mercy … You are a person in your own legal and social right'; see Pettit (n 150) 594–95. He suggests that we should see Freedom through the eyes of others. This is all a mess, and it is so because he is considering Freedom as a kind of power. Power necessarily requires the necessity of a second person no matter whether we define power from its usual notorious sense or Foucault's reasonably innocent sense, it requires the existence of a second party.

[832] Arendt (n 162) (See generally).

[833] Bekrycht, 'Positive Law and the Idea of Freedom' (n 740) 69–71.

5.2.3 Why Should Law Take 'Positive Action' to Uphold Freedom?

As long as a person is enjoying his or her Freedom it does not constitute any jural fact, but the moment one interferes in his or her Freedom, it constitutes a jural fact. This is not an unprecedented event; positive law has precedents. For example, in commercial law, the payment obligation of the issuing bank of the documentary credit is a jural fact whereas the facts that give rise to the payment obligation may not be a jural fact.[834] Freedom being an existential constituting part of the human is not generally subjected to law but the law is bound to enforce it when it is under threat as that is the moment when the law gets the authority to act.[835] Please note that what the law is supposed to do here is just facilitate Freedom. But unfortunately, the lawjon followers take this facilitation, mistakenly, from a pessimistic perspective.[836] They consider it as an interference or restriction on the freedom of the person alleged and this creates further confusion.

Rights or entitlements, whatever we call them from the legal perspective, all are post-Freedom phenomena. Therefore, naturally and logically, legal requirements attached to these concepts do not apply to the question of Freedom, at all. Again, we may have a look at the health and disease rhetoric. Health is already out there and for this, we do not need any recognition of law. The question of rights and entitlements will arise when the issue will be dragged into the plot of law.[837] When will it be brought into the plot of law? When health is threatened. However, please note that health may be threatened by different causes such as diseases, nature, or by the subject of law ie people. The matter relating to health will be brought under the plot only in the last cases when it is threatened by the subject of law. Similarly, the matter concerning Freedom may be taken under the plot of law, automatically when Freedom is threatened by the subject of law. It should further be clarified that a person as long as he or she is within his or her premises of Freedom, he or she is not the subject of the law. He or she may become the subject of law when he or she crosses the premise of his or her Freedom. As a subject of law, he or she is bound to abide by the law and he or she has a duty of care.[838] Interference in one's Freedom is certainly a breach of legal duty as Freedom is the foundation of the law. Therefore, for two reasons the law is to take the action to uphold Freedom: 1. to protect the foundation it is based on; and 2. To make sure that the breach of the legal duty does not go on unnoticed.

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[834] Liton Chandra Biswas, 'Letters of Credit: A Theory on the Legal Basis of the Payment Obligation of Issuing Bank' (Social Science Research Network 2011) SSRN Scholarly Paper ID 2043174 <https://papers.ssrn.com/abstract=2043174> accessed 11 January 2022.

[835] This point is discussed in detail in Chapter 8 determining the boundaries of Freedom, law, and politics in facilitating human life.

[836] Joseph William Singer, 'Anti Anti-Paternalism' (2016) 50 New England Law Review 101.

[837] A point discussed in Chapter 8.

[838] Gibbons (n 558).

Therefore, we find it illogical even to accept that this is a positive action of the law; it is the duty of the law to act towards upholding Freedom. At this point, we find Humboldt on our side, 'it must be still more fine and uplifting to see a prince himself losing the bonds and granting freedom to his people-not as an act of grace, but as the fulfilment of his first and most indispensable duty'[839]. He further holds that the 'maintenance of security' is 'the true and proper concern of the State' and please note that the Freedom itself is the true concern for him for the maintenance of security.[840]

5.2.4 How will State or Law Act when Curtailment of Freedom is not Possible?

Majority of the legal scholars, if not all, like to claim that the legal sanction and the curtailment of Freedom are the two sides of the same coin; sanction inevitably limits or diminishes Freedom.[841] Now the critics can ask – does this mean the person serving the legal sanction accepts the curtailment of his or her freedom, as the freejon approach claims that the sanction is not imposed, but accepted? If the answer is yes, are not we endorsing the same misconception that the sanction is correlative to the curtailment of Freedom? We submit that the answer is negative; even in this case, X's Freedom has not been curtailed. Sanction has no connection with the curtailment of Freedom in any sense. In fact, it should not have any such connection as we submit that Freedom is inalienable, and the law has no authority to limit or diminish one's Freedom because the law's legality or authority ceases to exist at the moment it contradicts Freedom. However, as it is mentioned above, the law has the authority and obligation to act when X takes steps to limit or diminish the Freedom of Y and here is the beauty of law – facilitating Freedom without interfering in one's Freedom. Therefore, whether we answer from the mistaken conception of Freedom or from the correct conception of Freedom, in both cases, our submission stands firm. Let's start with the mistaken conception – Freedom entails only enjoyment without its necessary corresponding responsibility. In this sense, one may by his or her choice can definitely waive his or her Freedom. Waiving freedom is part of his or her Freedom; one may prefer to lead a life without taking the opportunity to enjoy some aspects of his or her personal life - this is the exercise of his or her Freedom. Thus, it is not appropriate to conclude that someone's freedom has been curtailed only because he or she chooses not to enjoy a part of his or her personal life.

We get stronger support when the appropriate conception of Freedom is taken into consideration. Under this conception, in addition to the reason mentioned above, there is another reason that substantiates that

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[839] Humboldt (n 214) 11.

[840] Humboldt (n 214) 43–44. He further clarifies- 'In order to promote the spirit which it engenders, and to diffuse it throughout the whole body of the nation, freedom must be guaranteed'.

[841] Bekrycht, 'Positive Law and the Idea of Freedom' (n 740) 77; Berlin, *Liberty* (n 49) 41, 171; Waldron, 'Why Law - Efficacy, Freedom, or Fidelity?' (n 43) 271. Bruegger states, 'sanction for robbing banks is a severe curtailment of freedom'; see Bruegger (n 58) 88.

legal sanction has nothing to do with the curtailment of Freedom. As we have mentioned earlier, Freedom is a right to take responsibility. Thus, Freedom does not entail just the positives; it entails the combination of the positives ie enjoyment and the negatives ie restrictions or responsibilities Thus, the concept of Freedom inevitably includes the idea of duty and right where the same person is the holder of both.[842] It is the inbuilt right of every human, be he or she is a newborn, or adult, or a convicted criminal. One can be mistaken and think that an immature person holds Freedom in its limited sense as he or she is not mature enough to take charge of his or her all personal affairs.[843] By the same token, one can mistakenly hold that an incarcerated convicted criminal also holds partial Freedom as he or she cannot take decisions in many matters relating to his or her personal life – for example, he or she cannot decide where or with whom he or she will live.[844] This gives rise to the mistaken idea that the sanction curtails Freedom. This mistaken idea is due to the fact that Freedom is, necessarily, considered as a list of activities one can do without facing opposition. However, the fact is Freedom is neither a concept of activities nor of a list of activities. Instead, if it is anyway (remotely) connected to anything of this sort, it is the concept of proportion, and the proportion is not anyway denominator of the extent of Freedom one has; everyone has it. However, the audacity to measure the extent of Freedom is as absurd as nothing. The proportion we are talking about is connected to the extent of activities one can possibly relate to his or her Freedom. Neither is it a concept of numbers; it is a concept that may be linked to possibility or prospects instead; however, the link is a positive link, not a restrictive link. Let's explain the point:

Postulate: Freedom is the Sovereign Virtue. All People are Entitled to Freedom by Birth and the Entitlement is Inalienable under Any Circumstance.

Equation 1: Freedom is a state to take responsibility to the extent I am entitled to. I am entitled to the extent, I have the prospects or possibility to undertake my duty. 'Interference to Freedom or the violation of Freedom'[845] means I am not allowed to involve in the activities to the extent I have the prospects to take

[842] Here the two legal words right and duty are used only for general convenience of our discussion. However, please note that we do not have any intention to call the positives and the negatives of Freedom in the legal terms like right and duty. We do not need to do so.

[843] Nico Brando, 'Children's Abilities, Freedom, and the Process of Capability-Formation' (2020) 21 Journal of Human Development and Capabilities 249. Like many other scholars Brando also believe that the Freedom of the children is limited.

[844] Robert C Hughes, 'Imprisonment and the Right to Freedom of Movement', *Rethinking Punishment in the Era of Mass Incarceration* (Routledge 2017).

[845] Again, we should reemphasise the point that there is no chance to take the phrase 'Interference to Freedom or the violation of Freedom' from its literal meaning does not make any sense as Freedom is inviolable. However, by this phrase, we mean a restriction or interference on the activities one has the prospect to relate with the phenomenon of Freedom. Our explanation now should clarify what Rawls wants to mean by stating 'Greater

care of. As long as I am allowed to take the responsibilities of my life to the extent of my entitlement, I have Freedom.

Equation 2: Entitlement includes the option of opting for disentitlement.

Equation 3: I may not take responsibility to the extent I am entitled to for two reasons:

3.a: opting for disentitlement. (Freedom)

3.b: constrained by another. (No Freedom or Curtailment of Freedom)

Suppose I am entitled to take 100% responsibility for myself. However, due to a legal sanction, I can take 80% of my responsibilities; the rest (20%) of my personal life will be decided as per the decision of the court. Does this mean I have partial (80%) Freedom as my 20% Freedom has been curtailed? Or can I simply say that my 20% Freedom has been curtailed? From the dominant and mistaken list concept of Freedom, the answer is yes as it is, obviously, seen that I have lost my rights to take decisions in 20% of my personal matters. From the perspective of the list concept of Freedom, a newborn, or an insane person has no Freedom at all as they cannot take any responsibility for their life; they have the prospect of taking 'almost' 0% responsibility. This also challenges our postulates - all people ie newborn, mature, insane or anyone have Freedom by birth.

Now let's see the correct concept of Freedom ie the proportion concept. Please note that in the three equations, there is a common element – entitlement. Freedom is the right to take responsibility to the extent one is entitled. Therefore, the equation is: Right to take responsibility (proportional to) extent of the entitlement. What is the extent of one's entitlement? According to the concept of Freedom, the possibility or prospects[846] one has as a human being in his or her natural state; the factual possibility of taking responsibility. Or we can say that the extent of entitlement $\propto$ the possibility or prospect of taking responsibility. Thus, the whole equation is:

Right to take responsibility the extent of the entitlement the prospects or the possibility of taking the responsibility.

Therefore:

economic and social benefits are not a sufficient reason for accepting less than an equal liberty'; see Rawls (n 132) 186.

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[846] One may ask the question who determines who has the possibility of what? The answer is very simple – the crude fact or facticity. If there is any confusion as to the fact, the person himself or herself. Now, if a child says he or she can afford a livelihood of his or her own? Let him explore his or her possibility and face the crude fact.

The possibility or the prospects of taking the responsibility the right to take the responsibility [Possibility Right]

---------- **Equation 4.**

To explain the equation, Freedom is a concept where one must have the right to take responsibility for his or her personal life proportional to the possibility he or she has. According to equation 1, generally, one has Freedom when his or her right to take responsibility is equivalent to the possibility of taking responsibility. Therefore, Freedom refers to possibility = Right. However, as per equation 2, one can still have Freedom even if the equation is: possibility > Right. In summary, the point is - to determine whether one has Freedom or not we do not need to see how many decisions or what percentage of decisions of one's life, one can take without opposition; instead, we have to see the proportion between one's possibility or prospect to take responsibility and his or her right to take the responsibility.

Although there is no way of measuring the possibility one has, we can reach a general consensus as to the possibilities of people based on the stages, they are in.[847] For example, none will disagree that a newborn has 'almost' no possibility to take responsibility for his or her life. Accordingly, he or she has Freedom, although he or she does not have 'almost' any prospects to take responsibility. A child's possibility is higher than a newborn but less than a teenager whereas a teenager has less possibility than a mature adult. As their possibility varies so does their possibility to take responsibility.

Why should we accept this possibility rank? Because this is a fact and we do not need to defend the rank as it is 'almost' not challengeable.[848] The rank is not something new that we are proposing here; it is already generally accepted and also accepted by the existing laws, although may be unwarily. Existing laws endorse that a teenager has more possibility than a child but not as much as a teenager. For example, if a teenager wants to make a contract, the law provides that the contract will be a supervised contract since the teenager does not have the prospect of taking responsibility for the contract. Thus, the teenager's personal decision relating to the contract is dependent on the decision of his or her legal guardians. On the other hand, in the question of friend selection, the law accepts his or her such prospects, and hence, the parents cannot force

[847] Humboldt also talks about the stages of life based on which it will be determined person of what age will have what portion of Freedom. But the stages we are talking about are in no way directly connected to the extent or amount of Freedom one has. Rather, it is about the extent of the activities one can factually relate to his or her Freedom in different stages or situations of his or her life.

[848] Sartre's statement is relevant here – 'Can I choose to be tall if I am short? … the fact of not being able not to be free is the facticity of freedom …To exist as the fact of freedom or to have to be, a being in the midst of the world are one and the same thing, and this means that freedom is originally a relation to the given'; see Sartre (n 182) 481, 487.

him or her in this regard. A child may claim his or her Freedom is violated as he or she is not allowed to drive a car. He or she does not have the prospect to take the responsibility of riding the car. Eventually, his or her Freedom does not extend to driving a car. His or her limitation as to drive a car is not because the law says so but because of the facticity; if one can demonstrate he has the possibility to drive a car, let him do it – why should there be any barrier whatsoever? Thus, everyone, be he or she is immature, mature, insane, bankrupt, or convicted, has Freedom despite the fact he or she may not have the right to take responsibility for everything in his or her personal life. The convicted incarcerated person loses the right to take the decision in some of his or her personal affairs because he or she lacks the prospects thereto.

Since there is no way of measuring the comparative prospect of mature people, all mature people, for practical and theoretical reasons, must be considered as having the prospects of taking on all the responsibilities of their personal life. Therefore, one can argue that convicted incarcerated people must have the same prospects as that other mature people. Nevertheless, his or her right has been curtailed. Is not it breaking the proportionality of Freedom and hence, can't we say that his or her Freedom has been curtailed? Our answer is negative; this is not the curtailment of Freedom. The first three equations mentioned above led us to the following two incidents:

Incident 1: Equation 3.a
I am entitled to take 100% responsibility, but I have opted for surrendering 20% of my responsibility. The moment I surrender 20% responsibility, I lost my 20% right to take decisions in my personal matter. Under the equations of 1 and 2, it is certain that I have my Freedom intact as the disentitlement is part of my right or entitlement.

Incident 2: Equation 3.b
I am entitled to take 100% responsibility for my life but I am restrained by a person. I am not being able to undertake my responsibility in 20% of my personal matters. In this case, I have not surrendered my rights to take decisions in my personal matters, but I am being restrained. Clearly, it is an incident where my Freedom seems to have been violated or, to be specific, curtailed to 80%.

If the incident of legal sanction is relatable to incident no 1, Freedom is not curtailed whereas the relation with incident no 2 supports the curtailment of Freedom. Although traditionally it is related to incident no 2, we submit that the incident of sanction is, necessarily, relatable to incident no 1; under no circumstance incident 2 is the relatable incident. It is a misconception that the law imposes sanctions on anyone; in a

democratic society law does not have the authority to do so.[849] Further, in doing so the law will lose its acceptability, legality, and dignity.[850] As it has been stated in the postulates – Freedom is the sovereign virtue of law, and it is the inalienable claim for humans. In every circumstance, the law has to make sure that Freedom is not being infringed by it as Freedom is the foundation upon which the legality of the law is dependent. It is the very incarcerated person who opts for the disentitlement option of equation 3.a by his or her actions or words and thereby submits himself or herself to the supervision of the law. Admittedly, one can criticise the provision of law that provides for incarceration, but there is no problem with the law itself. Hohfeld's & Gibbon's illustrations also corroborate this position.[851]

We submit that when the court acts against the accused person, it is in no way a curtailment of the Freedom of the accused (Freedom invader). To defend our submission, first, we can start presenting an illustration provided by Hohfeld in our own language:

> [X and Y both have a duty not to apply force against each other…but when X tries to use force against Y, Y gets the option to defend it by using force. To be specific, the court gets the option to use force on behalf of Y against X. Thus, Y's duty not to use force is extinguished because of the operative facts committed by X.] (Paraphrased)[852]

By the same token, it can be said that X, by his or her actions or words, chooses to invite the law to use force against him or her; X chooses the sanction. Further, as per equation no 4, it is demonstrable with certainty that the Freedom of the incarcerated convict remains intact (however the expression of Freedom is limited); the proportionality between the prospects and the right is maintained. We hold that generally, all mature people have complete control over their personal life. Consequently, all mature people are supposed to have the right to take all the responsibilities of their personal life. However, it does not necessarily mean that always this is the case. Our inability is that we do not know when it is the case and when it is not until someone crosses the boundary of his or her personal sphere. When one crosses the boundary, it is conclusive proof that he or she lacks the possibility to take all the responsibilities of his or her personal life. The proportional principle of Freedom requires that his or her right to make decisions

[849]This point will be elaborated in the next Chapter explaining the sense of law.
[850] This point will be elaborated in the next Chapter explaining the sense of law.
[851] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24) 26. Gibbons states – 'The person who would diminish the freedom of another person is simply breaching the duty of care. If he uses the law to prefer his own freedom over others, he is using the law itself as the medium for breaching the duty, unless it is the case that the other has brought it upon herself by breaching a duty'; see Gibbons (n 558). The last portion of the statement 'other has brought it upon herself by breaching a duty' is the answer.
[852] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 24) 26.

about his or her personal life be reduced to match his or her reduced prospects and, thereby ensuring his or her Freedom while protecting the Freedom of the victim.

5.2.5 What is the Extent of the State's Duty?

Whenever people discuss the extent of the duty of the state action with reference to Freedom the most common framework that is cited - positive duty and negative duty concerns respectively to 'freedom to' and 'freedom from'.[853] Our concept of Freedom rejects such classification of Freedom, and hence, does not support this framework. However, as we have seen from the previous discussion that the law and the state have duties towards upholding Freedom, we need to be precise as to the extent of the duty of the state. A more acceptable account in this regard is that of Humboldt. According to him, the scope of the state extends to the maintenance of security and to nothing else.[854] To Humboldt, the term maintenance of security is very precise – it is limited by the Freedom of the individual and his or her property. According to him, security includes state interest, but the state interest must not be the interest of the state itself, rather it is the state's interest to the extent it is essential to ensure the Freedom of the individual and the protection of his or her property.

As far as the concept of Freedom is concerned, we reject Humboldt's account too, as the central to the concept of Freedom is the self ie the person and not the property; property is beyond the exclusive sphere of Freedom. Fundamental and genuine concern for Freedom is the existence of the self, preservation of the self and the expression of the self. This clarifies the extent of the state's duty. While the state has the option to take many positive actions to improve the condition of the individual, its duty is to make sure that the existence, preservation, and expression of the self are not being restricted by itself or by anybody else. In this connection, the state is under the duty to preserve and protect the resources essential for the existence, preservation, and expression of the self. We name these resources Freedom Resources (FR) and, as we have explained in the previous Chapter, these resources have nothing to do with one's property or goods.

[853] Berlin, *Liberty* (n 49).
[854] Humboldt (n 214) 43.

Chapter 6: Dworkin's Scepticism About Philosophy, Sense of Law, and Political Morality (Or Prospective Political Morality)

In the last four chapters, we have laid down a detailed account of the concept of Freedom and Freedom based freejon approach. Dworkin's work, although incidentally gives us some hints as to how he looks at the concept of Freedom, the conceptualisation of Freedom is not the primary objective of his work. Given the fact that he unwarily follows the lawjon approach, conceptualising Freedom is not an essential precondition for the concept of law he conceives, and for his quest for the authority of law, although he struggles throughout his journey on the question of Freedom. Dworkin challenges the status quo of legal positivism that holds that the question of law is settled ie there is no theoretical disagreement about what is law.[855] However, he holds that the root cause of all problems is connected to this question and deserves a coherent answer to effectively deal with such problems.[856] Positivists solve the question - what is law – by ignoring it and replacing it with another question ie 'what is the source or authority of law'.[857] They name the political institutions in response to the question relating to the sources and the authority of law.[858] Dworkin's disagreement is at this point. He holds that towards the flourishing of a legal system to its best[859], legality or authority of law cannot be and should not be determined solely by these sources; the law itself must have intrinsic features or merits that will be the denominators of the legality and practical authority of law.[860] According to him, such a law must have morality, but this morality is not contextual or general morality. This morality is intrinsic to the internal legal practice of a particular legal system.[861] To

[855] Dworkin, *Law's Empire* (n 1) 5–7.

[856] Dworkin, *Taking Rights Seriously* (n 1) 33 (ebook page number).

[857] Dworkin, *Taking Rights Seriously* (n 1) 33 (ebook page number). Not only the positivists but also many natural law theorists find comfort in focusing on the sources of law instead of making an attempt to define what sense law is associated with let alone focusing on what is law. Austin, Fuller, Garner, Hart, Martin, Raz, and many other scholars end up giving the meaning of law with reference to the sources a particular rule is being originated from. See generally Raz, 'Authority, Law and Morality' (n 105); WJ Waluchow, 'The Many Faces of Legal Positivism' (1998) 48 The University of Toronto Law Journal 387; John Deight, 'Rights and the Authority of Law' The University of Chicago Law Review 32; George Duke, 'Hobbes on Political Authority, Practical Reason and Truth' (2014) 33 Law and Philosophy 605; Laurence S Moss, 'Thomas Hobbes's Influence on David Hume: The Emergence of a Public Choice Tradition' (2010) 69 The American Journal of Economics and Sociology 398; Hart and others (n 20); Fuller, *The Morality of Law* (n 20); Gardner, 'Legal Positivism' (n 19).

[858] Duke (n 857). See also Austin (n 19); Hart and others (n 20).

[859] Best in the sense, in Dworkin's opinion' the system will not generate 'bad law' as that of the Nazi law, racial segregation law or law prohibiting political speech; see Dworkin, *Law's Empire* (n 1) 102, 388; Dworkin, *Taking Rights Seriously* (n 1) 313 (ebook page number). However, we hold the view that law is intrinsically law and it cannot be classified as bad or good and we hold the view because this is the exact narrative that the freejon approach support. As we will proceed further the point will be clarified.

[860] Dworkin, *Law's Empire* (n 1) 102–105.

[861] Dworkin, *Law's Empire* (n 1) 102–104.

understand what constitutes legal practice and to get the sense of such morality we must have the sense of law.

What is the sense of law like to Dworkin? There is no specific account to this end. Instead, we find his idea of law under the captions like the concept of law, grounds of law, proposition of law, etc. Dworkin's idea about law does not support a 'semantic theory about all uses of the word "law"'[862]. Nor he supports an 'incoherent philosophy of law' as that of Nixon who argues in favour of a theory combining constitutional law and moral theory.[863] Does he then support a coherent philosophical theory of law? Does he think that such a theory is possible? What can be a relevant philosophical theory from the freejon's perspective? Can such a theory of sense of law be related to the questions, queries, and expectations central to the concept of law of Dworkin? Can Dworkin, ignoring the importance of such a theory about the sense of law, move to propose political morality as the practical authority of law? Does he really mean political morality as his answer to the question he has always been haunted by? If not the political morality as such, what is it then? We try to answer all these questions in this chapter.

6.1 Dworkin's Philosophical Concept of Law and Freeman's Sense of Law

One of the fundamental features that distinguishes Dworkin from most positivists is that, as he posits, the proposition of law must not be limited to formal sources like statutes, precedents, etc.[864] Eventually, in the philosophical quest of knowing what is law, one of his conditions is that the philosopher who is in pursuit of such a quest must consider sources beyond these formal sources of law.[865] This condition is apparently, an outcome of his dislike of the semantic sting and lifelong concern with the meritless and tyrannical legal system, and, on the positive side, his hope is that this would allow the judges to do more things apart from what he or she is allowed to do following the 'rule-book' conception. He hopes that the judges will be able to go beyond the "four corners" of the formal documents.[866] His second condition is that the meaning that would be attached to the concept of law and to a particular legal practice must not be the personal view of the philosopher but a conceptual view reflecting the meaning and understanding of all concerned.[867] A third condition for the philosopher is that his or her theory must be 'neutral about our day-to-day controversies'; instead the theory about the proposition of law should have the ability to explain such

[862] Dworkin, *Law's Empire* (n 1) 103.
[863] Dworkin, *Taking Rights Seriously* (n 1) 187 (e-book page number).
[864] Dworkin, *Law's Empire* (n 1); Dworkin, *Taking Rights Seriously* (n 1).
[865] Dworkin, *A Matter of Principle* (n 1) 23, 36; Dworkin, *Law's Empire* (n 1) 68–69.
[866] Dworkin, *A Matter of Principle* (n 1) 23–36.
[867] Dworkin, *Law's Empire* (n 1) 68.

controversies.[868] The fourth condition, the theory must include internal rather than external views about the law and its practice.[869] It should include only the 'the internal participant's point of view'[870]. It is obvious that the second condition and the fourth condition together create an, apparently, unresolvable twist.[871] For future reference, we will name it a role-switching twist that will be discussed in length in chapter seven. Fifth, he or she must not have discretion when dealing with a marginal case, for example, to decide whether a large pamphlet can be treated as a book or not.[872] The philosopher, being a defender of positivism, cannot follow the alternative paths that the natural law theory, for example, could afford him or her.[873] For further reference, we will consider this as Dworkin's sixth condition set for the philosopher.

Now, if the philosopher is asked to make a philosophical account of a law or of any legal practice, the philosopher, as Dworkin claims, will never be able to make a helpful theory. Dworkin depicts the situation of the philosopher as – '[h]e is like a man at the North Pole who is told to go any way but south'[874]. Dworkin's philosophical exploration to have a concept of law is badly halted. Like many other positivists, he, bypassing the central question ie what is law, is rather interested to see what happens in the name of the law – what he calls the propositions of law - and also what may or should happen, given the present convention and structure is kept intact.[875] In this circumstance, to assist the philosopher, he instructs the

[868] Dworkin, *Law's Empire* (n 1) 68.
[869] Dworkin, *Law's Empire* (n 1) 14; Dworkin, *Taking Rights Seriously* (n 1) 72 (ebook page number).
[870] Dworkin, *Law's Empire* (n 1) 14.
[871] The second condition requires that a philosopher must not report his or her personal view about a particular legal practice. Instead, he must play a sort of a reporter's (or as he terms critic's view) role as a neutral observer. On the other hand, the fourth condition requires that his report must reflect the internal point of view of the practice, and, hence this role requires more of the view of the participants in the practice. Dworkin expressly mentions that the philosopher cannot play this role as one cannot at the same time play the role of both neutral observer (or critic) and participant. See Dworkin, *A Matter of Principle* (n 1) 135–156.
[872] Dworkin, *Law's Empire* (n 1) 68.
[873] Although Dworkin strongly criticises many features of dominant versions of positivism, he can never be called a supporter of natural law theory. Instead, at times, he can be considered a more serious positivist than many known positivists.
[874] Dworkin, *Law's Empire* (n 1) 69.
[875] In the question – what is law, the most common answer is – there is no precise definition of law or law cannot be defined. With this background agreement, they proceed to rather focus on all other associated questions and inquiries. We can keep listing such scholarly accounts that just ignore the very fundamental question and keep providing us with the 'propositions about law'. For instance, see Vilhelm Aubert, 'The Concept of "Law"' (1963) 52 Kentucky Law Journal 363; Hart and others (n 20); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1983); John P Humphrey, 'On the Definition and Nature of Laws' (1945) 8 The Modern Law Review 194; Surya Prakash Sinha, 'Why Has It Not Been Possible to Define Law' (1989) 75 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 1; Kenneth Ng'ang'a Njiri, 'Definition of Law' <https://papers.ssrn.com/abstract=3658011> accessed 13 May 2023; Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) <https://www.cambridge.org/core/books/law-as-a-means-to-an-end/57871234E49665D361DF2B2FACC46FDC> accessed 13 May 2023.

philosopher to tell us - why, how, and on what basis the activities conducted in the name of law vary. He further instructs the philosopher to identify the unique and core features in the practice that remain constant always and throughout the spectrum of the variety. There must be such a core worthy of calling it the bearer of the identifier of law and hence we can assume that this is the law, although we may not ever be able to say, for sure, what it is.[876] In this case, Dworkin's pessimistic claim is that philosopher's explanation may provide some explanations to enable us to have some sort of sense of law but the 'explanation of the sense … will not appeal to any "defining feature"[877]. Thus, as is submitted by Dworkin, even a coherent philosophical account will not give us any demonstrable sense of law and, further, such accounts will give us different senses of law in different times and places.[878]

The lawjon approach prevents Dworkin from availing the opportunity of taking note of the independent and general evaluative roles that every human play in a general situation. Rejecting the concept of law, as it is prima facie appeared in Dworkin's narration, the freejon approach suggests a more appropriate and practical way of looking at humans where each human consists of two parts of the self – the evaluative part of the self and the executive part of the self.[879] Human insight is split over two dimensions – inward and outward and this significantly differentiate human from other animals.[880] These two dimensions led every human to

[876] Dworkin, *Law's Empire* (n 1) 69. We reconstruct the discussion that Dworkin made with his prudent philosopher in connection to preparing a philosophical account specifically of courtesy. He states –'There must therefore be some feature all these different practices have in common in virtue of which they are all versions of courtesy. This feature is surely neutral in the way we want, since it is shared by people with such different ideas of what courtesy actually requires. Please tell us what it is'.

[877] Dworkin, *Law's Empire* (n 1) 69.

[878] Dworkin, *Law's Empire* (n 1) 69–70.

[879] Five pairs of moral foundations prescribed by the moral foundation theory are indicative of the two parts of the self. For details see Colin Prince, 'Moral Foundation Theory and the Law' (2010) 33 Seattle University Law Review 1293; Haidt (n 74). The two parts of the self is also comparable to Danile and Jason experiencing self and remembering and evaluative self; see Daniel Kahneman and Jason Riis, 'Living, and Thinking about It: Two Perspectives on Life' in Felicia A Huppert, Nick Baylis and Barry Keverne (eds), *The Science of Well-Being* (Oxford University Press 2005) <https://academic.oup.com/book/10278/chapter/158004957> accessed 13 May 2023. The economic theory of self-control also sheds light about two parts of the self; see Richard H Thaler and HM Shefrin, 'An Economic Theory of Self-Control' (1981) 89 Journal of Political Economy 392.

[880] We do not have exact evidence indicating whether other animals also have a divided self like humans do. However, it is certain that humans have this division and it is a profound one, which sets humans apart from other animal. Our claim is supported by these articles - Michael Vlerick, 'Explaining Human Altruism' (2021) 199 Synthese 2395; Robert Kurzban, Maxwell N Burton-Chellew and Stuart A West, 'The Evolution of Altruism in Humans' (2015) 66 Annual Review of Psychology 575; Joan B Silk and Bailey R House, 'Evolutionary Foundations of Human Prosocial Sentiments', *In the Light of Evolution: Volume V: Cooperation and Conflict* (National Academies Press (US) 2011) <https://www.ncbi.nlm.nih.gov/books/NBK424875/> accessed 13 May 2023; Daniel J Povinelli and Jennifer Vonk, 'We Don't Need a Microscope to Explore the Chimpanzee's Mind' (2004) 19 Mind & Language 1.

play two roles in his or her life - a. executive or action role, as an actor or participant[881] and b. evaluative role, as an independent observer or judge or critic. The outward insight, which has a 'distancing'[882] and 'impersonality'[883] effect, causes every human to be neutral, and rational and act as an observer or judge, giving rise to some general and shared commitments. These general and shared commitments generate the sense of law that is generally shared among humans. Nerhot's judge who exercises reasoning of teleological nature also shares this sense of the law based on which he or she, at first, sets the goal he or she wishes to reach even before the identification of the possible legal rules.[884] To Nerhot the goal is the precondition to the identification of the legal rules.[885] To us, this is the sense of law that works in the judge's mind in setting the goal. Although judge's sense of law can be constrained by his or her knowledge of legal provisions, the sense of law in general is to be triumphant.

A person when he or she plays the role of judge, he or she plays it very well. People may take many wrong decisions in their personal life, but when they take the decision as an external observer, their decision is more acceptable. People may be evil, but when they judge others, they judge well because when they judge others all the prejudicial factors of decision making such as confirmation bias, generalization, self-interest, endowment effect, the evolutionary urge to defend ourselves, fallibility, and many others distorting factors remain silent or dormant.[886] There are people who torture their house servants, but their opinion, when they

[881] It is true that as an actor he or she does evaluate or judge, but that evaluation or judgement is prone to be biased and affected by subjective considerations and interests. Therefore, this judgement or evaluation is not appropriate in maintaining the interpersonal legal space and hence not part of legal discourse. Things inwards create force inwards; things outwards create force outwards. Things inwards are not supposed to create force outwards and vice versa. Things personally important create inward force and are maintained by inward force. In order to impose force outwards, the focus must be detached from the inward consideration.

[882] Stated by Bourdieu cited by Nerhot, 'Interpretation in Legal Science' (n 22) 222.

[883] Stated by Bourdieu cited in Nerhot, 'Interpretation in Legal Science' (n 22) 222.

[884] Patrick Nerhot, 'The Law and Its Reality' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Netherlands 1990). There are other scholars and philosophers who report the teleological approach of judicial reasoning. See Žaklina Harašić, 'More about Teleological Argumentation in Law' (2015) 31 Pravni vjesnik : časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku 23; Stephen Brittain, 'Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal' (2016) 55 Irish Jurist 134; Tim Clark, 'The Teleological Turn in The Law of International Organizations' (2021) 70 International & Comparative Law Quarterly 533; Lewis A Kornhauser, 'Choosing Ends and Choosing Means: Teleological Reasoning in Law' in Giorgio Bongiovanni and others (eds), *Handbook of Legal Reasoning and Argumentation* (Springer Netherlands 2018) <https://doi.org/10.1007/978-90-481-9452-0_14> accessed 13 May 2023.

[885] Nerhot, 'The Law and Its Reality' (n 884) 60.

[886] When the decision is about us or about a case where our stake is involved all these distorting factors affect our decision. An obvious example may be in the difference in our decisions when we make our choice for ourselves and for others. For example, when we need to take a decision that out of 100 shirts, we need to purchase one, we find it very difficult to choose one shirt. However, if we are asked to choose one shirt for our friend who is looking for purchasing a shirt for hours in the market, we find it easier for us to choose a shirt for him.

deliver it generally, supports the cause of human rights. Usually, these kinds of traits of humans are commonly considered hypocritic, but in most cases, they are not; they just play different roles and most of them are not aware of this.[887] When people need to take a general decision, they take it one way and when they need to take a personal decision, they take it a different way.[888] For example, 'one must not kill another' – irrespective of one's identity, everyone generally holds this judgement and generally commit to this. A distinguished feature of this commitment is that it transcends internality and subjectivity. For example, many people commit it, but all people, when acting as an observer & evaluating generally, hold that theft is not good. Similarly, persons, who personally hold the belief that X religion is blameworthy, hold that there should not be any discrimination based on one's religious identity. This trend is generally seen everywhere where the law is in force.[889]

[887] When we take a decision from the participant's perspective, numerous factors make our decision self-contradictory, biased, and prejudicial, although most of the time we may not be aware of such factors. Such factors include among others confirmation bias, generalization, self-interest, endowment effect, the evolutionary urge to defend ourselves, fallibility, etc. See generally Martin Jones and Robert Sugden, 'Positive Confirmation Bias in the Acquisition of Information' (2001) 50 Theory and Decision 59; Andreas Kappes and others, 'Confirmation Bias in the Utilization of Others' Opinion Strength' (2020) 23 Nature Neuroscience 130; Joshua Klayman, 'Varieties of Confirmation Bias' in Jerome Busemeyer, Reid Hastie and Douglas L Medin (eds), *Psychology of Learning and Motivation*, vol 32 (Academic Press 1995) <https://www.sciencedirect.com/science/article/pii/S0079742108603151> accessed 5 May 2023; Konrad Bocian and Bogdan Wojciszke, 'Self-Interest Bias in Moral Judgments of Others' Actions' (2014) 40 Personality and Social Psychology Bulletin 898; Sivan Frenkel, Yuval Heller and Roee Teper, 'The Endowment Effect as Blessing' (2018) 59 International Economic Review 1159; Annette Hofmann, 'Endowment Effect and Status-Quo Bias: Why We Stick with Bad Decisions' in Annette Hofmann (ed), *The Ten Commandments of Risk Leadership: A Behavioral Guide on Strategic Risk Management* (Springer International Publishing 2022) <https://doi.org/10.1007/978-3-030-88797-1_7> accessed 5 May 2023; Itiel E Dror, 'Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias' (2020) 92 Analytical Chemistry 7998; Greta Olson, 'Reconsidering Unreliability: Fallible and Untrustworthy Narrators' (2003) 11 Narrative 93.

[888] See generally Troy Jollimore, 'Impartiality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2022, Metaphysics Research Lab, Stanford University 2022) <https://plato.stanford.edu/archives/sum2022/entries/impartiality/> accessed 5 May 2023; Hanna Brycz, 'Perception Accuracy of Biases in Self and in Others' (2011) 1 Journal of Psychology Research <http://www.davidpublisher.org/index.php/Home/Article/index?id=24452.html> accessed 5 May 2023; Dror (n 887); Cindy Dietrich, 'Decision Making: Factors That Influence Decision Making, Heuristics Used, and Decision Outcomes' (2010) 2 Inquiries Journal <http://www.inquiriesjournal.com/articles/180/decision-making-factors-that-influence-decision-making-heuristics-used-and-decision-outcomes> accessed 5 May 2023.

[889] For instance, in countries where the rules of law are followed or promised to follow the rules of law, we see generally see this trend and the trend is generally shared beyond the national boundary of the countries. In Bangladesh, for instance, the majority of the people believe that idol worshipping is a sin, but, still by the law of Bangladesh, it is not prohibited on the ground that the minority people must not be discriminated in practising their religious rules ie idol worshiping. However, if we take note of some Islamic countries or countries ruled by the dictators we may, *prima facie*, think that our submission is not applicable to these countries. However, we submit the trend is general and shared everywhere. For instance, Saudi Arabia prohibits religious practices of the people other than Muslim in the public places. The discrimination that we see in this incident is not an outcome of the act of the sense of law; it is purely an outcome that has its origin in the religious rules of that country. It is as precise as

This commitment is, more connected to the human in general and not, necessarily, connected to other micro identities like culture, religion, politics, nationality, and so on. Thus, the sense of law is so pronounced and profound a sense that transcends society, culture, religion, politics, and so on. Let's take an example – in the contemporary world, all people are, generally, committed to making sure that there should not be discrimination between men and women. The holy Quran, the religious book that has the strongest influence on its followers, has a provision of inheritance that a daughter inherits half the share that of a son[890]; or a Muslim man can keep up to four wives at the same time while a woman cannot[891]. Will the Muslim people in general accept that Quran discriminates against women? The certain answer is negative, although the apparent discrimination is obvious. Intellectually sound Muslim people will try to justify that, even though the provisions apparently seem discriminatory, Quran does not discriminate; still, he or she will not deny the existence of such commitment.[892] The sense that there should not be any discrimination between men and women is so profound that even the strongest belief be it of religion, society, or politics starts losing its ground or is compromised.[893] Now, for sure, we will find some fundamentalists ie hard-core believers of

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that the rule that prohibits religious practice of the minority people of the Country is not a law; the rule has no connection with the law.

[890] Muneer Abduroaf, 'An Analysis of the Rationale behind the Distribution of Shares in Terms of the Islamic Law of Intestate Succession' (2020) 53 De Jure Law Journal 115.

[891] Rachel Jones, 'Polygyny in Islam' (2006) 1 Macalester Islam Journal 63. Cited Quranic verse: ' And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess'.

[892]Muenster International Peace Prize Fellow Dr. Orakzai, for instance, states – 'In Islam, although the inherent dignity of all human beings (which calls for worth and value of each human) has been respected, the concept of equality of sexes, and social and political equality of Muslim and non-Muslims as human beings enshrined in the UDHR is absent. Nevertheless, spiritual equality of sexes have been recognized in Islam' See Saira Bano Orakzai, 'The Rights of Women in Islam: The Question of "Public" and "Private" Spheres for Women's Rights and Empowerment in Muslim Societies' (2014) 2 Journal of Human Rights in the Commonwealth 45 <http://journals.sas.ac.uk/jhrc/article/view/2100> accessed 5 May 2023. Three Indonesian professors claim that 'Misrepresentations of verses that honour women, or erroneous reading of said verses, have caused women to be disadvantaged in public discourse, in social practice, and in policy'; see Erwati Aziz, Irwan Abdullah and Zaenuddin H Prasojo, 'Why Are Women Subordinated? The Misrepresentation of the Qur'an in Indonesian Discourse and Practice' (2020) 21 Journal of International Women's Studies, 235, 235. Visiting Fellow at Lauterpacht Research Centre for International Law, Faculty of Law, University of Cambridge, Dr Shah states – 'This is very true of the statutory Islamic laws in Muslim states where men and women are treated unequally. These laws are often based on a fundamentalist and out of context interpretation of the divine text (the Koran)'; see Niaz A Shah, 'Women's Human Rights in the Koran: An Interpretive Approach' (2006) 28 Human Rights Quarterly 868, 869. Professor Manjur Hossain Patoari states – ' Islam has ensured gender equality and women's rights in every sphere of their life. Islam has guaranteed rights of men and women in an equal degree and there is no discrimination between men and women. But due to the prevailing socio-cultural norms and practices in Bangladesh sometimes the guarantee of Islam do not get translated into tangible actions'; see Manjur Hossain Patoari, 'The Rights of Women in Islam and Some Misconceptions: An Analysis from Bangladesh Perspective' (2019) 10 Beijing Law Review 1211..

[893] Eshanzada's research projects on Muslim American's opinions about Quran's apparent discrimination against women reveal that the participants defend Quran on the ground that Quran 'has given women rights more

the Quran who will say that the Quran is the only denominator of good or bad and that everything is justified in accordance with the provisions of the Quran. They may say – there is no such commitment, or the commitment is of no value for the Quran approves such discrimination and, hence discrimination is good when the Quran permits it. Here, it seems that the sense of law from which the commitment is derived gets denied by a religious rule. Let's not stop here. Let's be more general and ask them another question – how can they support a religious book that patronizes discrimination, and they insist that discrimination is good? What will be their answer like? The common answer we can expect is – 'we are humans and we do not have the capacity to understand the grand design or plan of Allah; the discrimination made by the almighty must have a reason and the apparent discrimination is to make sure that there is no discrimination between man and women'[894]. Thus, the commitment generated by the sense of law persists. The nature, integrity, and significance of the commitment will further be revealed throughout the discussion to be made henceforth.

6.2 Evaluative Self as Dworkin's Philosopher

Could the evaluative self succeed in doing what Dworkin's philosopher even could not imagine doing? Can we say that that sense of law revealed by the evaluative self constitutes a coherent philosophical account of law, while the coherence must be meant in the sense Dworkin means? The answer to the question depends on the positive answer to the related question - can the evaluative self as taken in the context and conditions set by Dworkin succeed in accomplishing the task assigned by Dworkin? The task is accomplished; at least theoretically, we have the sense of law, and it is the general and shared commitment of the evaluative self (GSEC). Dworkin's first condition requires that the meaning must not be personal but conceptual. Of course, the voice of the evaluative self is the personal voice of the self and, we will submit that it has to be personal. Dworkin's condition itself is erroneous and needs to be corrected. We will see in the next chapter, that Dworkin, himself understands the error and instead, the condition is rather be rephrased as – the meaning must be conceptual rather than personal[895]. Thus, the condition that remains intact is that the

than any other world religion and nation'; see Riba Khaleda Eshanzada, 'Muslim American's Understanding of Women's Rights in Accordance to the Islamic Traditions' (2018) Electronic Theses, Projects, and Dissertations iii.

[894] Such common belief originates from the reading of the Quranic Verses. For instance, take Chapter 2 Verse 255 providing – ' Allah! … He ˹fully˺ knows what is ahead of them and what is behind them, but no one can grasp any of His knowledge—except what He wills ˹to reveal˺'; see *The Holy Quran (Surah Al-Baqarah - 255)* <https://quran.com/al-baqarah/255> accessed 13 May 2023. Undoubtedly, religious texts of other major religions also provide us the same message.

[895] As the next Chapter shows that Dworkin's confusion on this point is fueled by so-called subjectivity and objectivity of law and legal conviction. However, the Chapter shows that the sense of law is not subject to such an issue because the concept of the self blurs the line between subjectivity and objectivity.

meaning must be conceptual ie including voices of all evaluative selves. We have already, shown that the voice of the evaluative self goes beyond the boundary of age, culture, religion, legal system, and so on.[896]

It fulfils the second condition – not biased by the controversies, instead, it has the ability to explain the existing controversies.[897] By the design of nature, the position and the context of the evaluative self are neutral and devoid of all the factors responsible for biased decisions; the slightest biasness in the decision is indicative of the switching over of the evaluative self to the executive self.[898] As we will proceed further, we will see that the evaluative self and its conception explain the logical controversies out there in relation to the concept of law including the controversies sparked by different convictions of Dworkin himself. It also fulfils the condition of internality, and we will elaborate on this point in the next chapter. Similarly, it fulfils not only the other three conditions as set above but also other conditions that the theory of Dworkin will set before us as we will proceed. In due course of the discussion, we will respond to these conditions and further conditions.

The interesting fact is Dworkin himself is not completely unaware of the sense of law that the evaluative self reflects or holds; on several occasions, he is too close to this sense, but to take a U-turn in the next moment.[899] For example, Dworkin's emphasis and prioritization of the critical interest over the volitional interest in the discussion about the proposition of law can be demonstrated as an indication that he is, unconsciously, touched by this sense however to be detached by a conscious, although mistaken, explanation generated by the broader version of the utilitarianism.[900] He states:

> I myself, for example, consider some of the things I want very much as falling under my volitional interests… good food [for instance] … I do not think that having a close relationship with my children is important just because [for that volitional interest]; on

[896] See the discussion made in Chapters 3 and 4 about the self, division of self, and the existence of the self. Further, Chapter 8 shows that by the very essence of the sense of law, the voice of the evaluative self must be general, shared, and common, otherwise the conviction of the evaluative self does not qualify to be considered as law.
[897] It has explanations and answers to questions and complexities that are not only faced by Dworkin but also faced by other jurists.
[898] For explanation, see Chapter 3.
[899] Dworkin, *Taking Rights Seriously* (n 1) 305. He talks about pornography. People are used to it; many people like it and they are the consumer of it. However, the same people are busy criminalizing it. He states – 'It is precisely that possibility which makes it imperative that we enforce our standards while we still have them. This is an example – it is not the only one – of our wishing the law to protect us from ourselves'.
[900] Dworkin, *Sovereign Virtue* (n 1) 216 (emphasis added).

> the contrary, I want it *because I believe* a life without such relationships is *impoverished* [and then he expresses that such duality is a general case].[901]

To show a resemblance in the sense that we do have the existence of a general evaluative pattern that goes beyond our material self-interest, we may relate this volitional interest with the interest of the action self and the critical interest with the interest of the evaluative self. Further, we must refer to a point, which will be elaborated in the eighth chapter, that although the word 'interest' has been used with the evaluative self to match the wordings of Dworkin, the sense of interest neither for us and nor for Dworkin is relevant in this occasion. Although the word '*impoverished*' seemingly, refers to a sort of utility for life, attribution of this sort of apparently utilitarian or evaluative sense is mistaken. We, instead want to submit that utilitarianism has nothing to do with it. Neither the critical interest nor the interest of the evaluative self is an interest, in its utilitarian sense.[902] We find a similar and more relatable sense of Dworkin in his discussion of the envy test.[903] The instance of initial envy of other immigrants to Adrian's accumulated bundle of resources and the subsequent cessation of the envy of the immigrant demonstrably shows us that Dworkin is aware of the competence of the evaluative self.[904] Unfortunately, his scepticism of metaphysics forces him not to explore further into the prospects of the critical interest as he fear that the critical interest would be considered a 'cosmic illusion'.[905]

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[901] Dworkin, *Sovereign Virtue* (n 1) 216.

[902] Chapter 8 clarifies that the conviction, which the evaluative self makes, has nothing to do with utilitarianism. All utilitarianism is inevitably associated with the process of evaluation. The legal conviction of the evaluated self is an outcome of the state where there is no scope for the evaluation.

[903] Dworkin, *Sovereign Virtue* (n 1) 83.

[904] Dworkin, *Sovereign Virtue* (n 1). He states – 'Adrian chooses resources and works them with the single-minded ambition of producing as much of what others value as possible …Each of the other immigrants would now prefer Adrian's stock to his own; but by hypothesis none of them would have been willing to lead his life so as to produce them…But if we look at envy differently, as a matter of resources over an entire life, and we include a person's occupation as part of the bundle of his goods, then no one envies Adrian's bundle, and the distribution cannot be said to be unequal on that account'. Here it is not a matter whether the hypothesis that Dworkin thinks about would have proved to be correct or not. Neither does it matter whether people have any idea about the envy test or not or whether people could look at envy in the sense of material resources or not. The point that is matter here is the fact that he takes the hypothesis as proven and he is convinced that no one, irrespective of their expertise enough to understand his theory or envy test, will envy the bundle of Adrian. It indicates that, somehow and strongly, he is driven by the assumption of the existence of the evaluative self and driven by this assumption that this evaluative self takes a neutral and reasonable stance when it judges a particular instance, and, hence no one will envy the bundle of Adrian, and, thereby, his envy test fulfils the minimum requirement to be accepted as a standard test.

[905] In Dworkin's language, the problem and fear associated with the critical interest are, as he states, - 'most of us are also aware how problematic and obscure the idea of critical interests is, and many fear that it is a cosmic illusion'; see Dworkin, *Sovereign Virtue* (n 1) 246–247. How could Dworkin be so confused when Adrian's instance expressly shows that Dworkin has enough trust in the concept of critical interest? As we have promised earlier that explanations and answers to confusion and questions associated with the concept of law lie in the understanding of the role of the evaluative self. The answer lies in the ability to distinguish the evaluative self from the action self. All

Even closer and more engaging confrontation with the sense of law is demonstrated by his extended interest in Rawls' theory of 'original position'[906].[907] Original position, a position that Rawls considers the most justifiable and secure position with reference to what we can have, in our term, the sense of law for in this position one cannot 'know his special interests, he cannot negotiate to favor them'[908]. Dworkin defines this original position as 'a schematic representation of a particular mental process of at least some, and perhaps most, human beings, just as depth grammar…the principles of this deeper theory are constitutive of our moral capacity'[909]. Rawls believes that the sense extractable in the original position is neutral and most acceptable as there are no internal biases that we term as internal regression effect. Dworkin, on a positive note about it, explains the morality or principle or sense that can be extractable by accepting the original position:

> It may mean, at its least profound, that the principles that support the original position as a device for reasoning about *justice* are so widely shared and so little questioned within a

these disagreements or variations are due to putting too much focus on the action self and the conflicts of the action self and the conflicts, eventually, land the jurists including Dworkin to the conflicts in their theory. They miss the opportunity to see the static and, relatively, unified nature of the convictions of the evaluative self. To explain it in a little bit different manner, the well-known Bengali proverb worth noting - 'joto mot toto poth' – The more the varieties of the concepts the higher the number of paths one can choose from; the destination is meant to be united. In terms of its 'static convictions' (as opposed to the running or interim conviction that we make in daily life in our day-to-day activities that are mostly regulated by our action self) are, more or less, similar, if not the same. Dworkin himself has the same conviction expressed to explain why no one will envy, in the long run, Adrian bundle, although momentarily everyone else may envy. People follow different paths with the hope to comply with the same or similar conviction based on their instant, running, and subjective experience (although there is a pattern in the subjective experience too) they take different paths based on their running conviction and following the running conviction gives them a sense of attachment and satisfaction about that conviction and this is why they value, momentarily, a life following their respective convictions. The most important point that needs to be remembered is that this running conviction is not strong enough to become a normative force because these running convictions are based on the experience or reaction or response to single (or a few) random incidents of life that give a very narrow, incomplete, and restricted view about the life, its environment, and so on. In the long run, when they are more driven by the static conviction or normative conviction of the evaluative self, they become convinced that given the hard work, Adrin did and the challenging choices he made, he deserves the bundle of outcomes that he has achieved, and hence, they do not find any basis for envying Adrian anymore. The basis of the critical conviction is as precise, predictable, and concrete as this. Why on earth we should consider it a 'cosmic illusion'?

[906] Rawls (n 132); Ronald Dworkin, 'The Original Position' (1973) 40 The University of Chicago Law Review 500; Timothy Hinton, 'Introduction: The Original Position and The Original Position – an Overview' in Timothy Hinton (ed), *The Original Position* (Cambridge University Press 2015).

[907] Although latter he quit it, it, apparently, has a demonstratable influence in the construction of his political theory in the quest of the practical authority of law.

[908] Dworkin, *Taking Rights Seriously* (n 1) 193 (ebook page number). Dworkin explains it is position when '[m]en who do not know to which class they belong cannot design institutions, consciously or unconsciously, to favor their own class. Men who have no idea of their own conception of the good cannot act to favor those who hold one ideal over those who hold another'; see Dworkin, *Taking Rights Seriously* (n 1) 222 (ebook page number) .

[909] Dworkin, *Taking Rights Seriously* (n 1) 197–198 (ebook page number).

> particular community…that the community could not abandon these principles *without fundamentally changing its patterns of reasoning and arguing about political morality*. It may mean, at its most profound, that these principles are innate categories of morality common to all men, imprinted in their neural structure, so that man could not deny these principles short of abandoning the power to reason about morality at all.[910]

Although, Dworkin on several occasions, expressly distinguishes justice from law, on many other occasions, the word justice is used to give a sense of law.[911] Apparently, here he uses the word *justice* as a synonym for law.[912] Whether the word is used to mean exactly the concept of justice or as a synonym for law or as a similar idea as law, our point of concern is how he takes the sense associated with the word. We see that Dworkin finds it logical and philosophically sound to take the principles or theories extracted using the idea of the original position as denominators of assessing the validity of our familiar 'conviction' or 'intuition' about justice (or law) and it requires that the familiar morality should comply with the denominators.[913] If we take the word justice as a synonym of law and omit the emphasised portion of the paragraph ie '*without fundamentally changing its patterns of reasoning and arguing about political morality*', which is automatically sneaked into the paragraph because of the political nature of his theory, the sense we get about the law is exactly the sense that we have about law from our freejon perspective. If the word is meant to indicate the concept of justice (instead of the concept of law or propositions of law), even in that case it is certain that the sense of law that we are referring to has significance to Dworkin, although in the name of justice. However, we have reason to hold that whether the word justice is taken as a synonym of law or not, his concept of law or the proposition of law is inevitably inferred from the discussion as the discussion is an inevitable part of his discussion about the proposition of law.[914] Further,

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[910] Dworkin, *Taking Rights Seriously* (n 1) 198–199 (ebook page number) (emphasis added).

[911] To see the instances where Dworkin takes justice as synonym of law, see Dworkin, *A Matter of Principle* (n 1) 276; Dworkin, *Law's Empire* (n 1) 193; Dworkin, *Taking Rights Seriously* (n 1) 189–223 (ebook page number).

[912] To talk about the relationship between law and justice Borrello states – 'The relation between law and justice is a very struggled one'. See Borrello (n 11) 92 (footnote). Eventually, we do not know yet what is the exact, relationship between justice and law, nor do we need to know for the purpose of this thesis.

[913] Dworkin, *Taking Rights Seriously* (n 1) 199 (ebook page number). Dworkin states - We test general theories about justice against our own institutions, and we try to confound those who disagree with us by showing how their own intuitions embarrass their own theories.

[914] As we will proceed further, we will see his prime objective of exploring the theory of original position is driven by his incessant interest to find a practical authority of law. Although, for Rawls, the phrase 'original position' is inevitably linked with the discussion of justice, Dworkin's reference to the phrase is always connected to the proposition of law, the validity of the law or the law in general, and justice is, impliedly, taken as a synonym of law . His reference to the phrase in *A Matter of Principle* is in association with the significance of a counterfactual consent given in 'original position' in deciding the merit of the law backed by such consent; see Dworkin, *A Matter of Principle* (n 1) 276. His reference to either justice or original position is motivated by the same consideration in *Law's Empire*. He states - 'Rawls argues that people in his original position would recognize a natural duty to support institutions

since there is neither a comprehensive sense of law nor a comprehensive sense of justice, it is likely that he confuses law with justice in this paragraph.[915]

Dworkin tries to propose a "coherent" theory of morality by setting a connection between the original position based moral theory (henceforth, moral theory) with the individual 'conviction' or 'intuition' about justice or 'about our moral lives'. Thus, his objective is to connect the original position based moral theory and the familiar or day-to-day morality. Exactly here, he starts a wrong journey. When his objective is in the quest for a practical authority of law, he is correct for reasons to be explained in the next chapter, that the moral theory must have a connection with the individual personal life. However, he is wrong as he expects an inevitable connection of moral theory (that he hypothesises as a practical authority or, in our terms, legal morality) with the familiar morality or day-to-day morality.[916] This journey is not only unnecessary but also misleading. We will show in chapter eight that there is no necessity of connecting these two moralities. Instead, the task is to do the opposite ie disconnecting. Further, it is noteworthy that the philosophical journey of connecting these moralities is incompatible with the scheme of conditions Dworkin lays down; the common morality fails to fulfil the minimum requirement to be a subject matter of his philosophical discussion. There is no doubt that most of the common moralities may comply with the moral theory (in fact, they do), but the context and dimension of discussion of each type of morality are factually and necessarily different and this point will be elaborated in chapter eight. Meanwhile, it is sufficient to submit that the distinction of moralities may, roughly, be related to the distinctions of moralities

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that meet the tests of abstract justice and that they would extend this duty to the support of institutions … That duty, however, does not provide a good explanation of legitimacy'; see Dworkin, *Law's Empire* (n 1) 193. Finally, in *Taking Rights Seriously*, wherefrom the paragraph is taken, the complete discussion of the chapter where the word justice and phrase appear is an inevitable part of the discussion of the propositions of law and discussion in the chapter does not gives us any sense in support of the distinction between justice and law, instead, the discussion is more about resembling justice with law. See Dworkin, *Taking Rights Seriously* (n 1) 189–223 (ebook page number) .

[915] Another important point is that to Dworkin, the law can be bad or good. From this perspective to him, justice is an inevitable element that distinguishes good law from bad laws. But we submit that law is law; it cannot have such classification. Consequently, it is apparent that what is law to us is an inevitable feature of law (justice) to Dworkin.

[916] Many others do the same mistake ie looking at contextual or day-to-day morality to find a moral basis of law. See Willy Moka-Mubelo, 'Law and Morality' in Willy Moka-Mubelo (ed), *Reconciling Law and Morality in Human Rights Discourse: Beyond the Habermasian Account of Human Rights* (Springer International Publishing 2017); Arthur Scheller, 'Law and Morality' (1953) 36 Marquette Law Review 319; Peter Koller, 'On the Connection between Law and Morality: Some Doubts about Robert Alexy's View' (2020) 33 Ratio Juris 24; Satoshi Kodama, 'Bentham's Distinction between Law and Morality and Its Contemporary Significance' [2019] Revue d'études benthamiennes <https://journals.openedition.org/etudes-benthamiennes/6378> accessed 13 May 2023; Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey, *The Limits of Law* (Stanford University Press 2005); Hart and Hart (n 350). They try to connect legal morality with contextual morality. See reference from chapter 8.

of action self and evaluative self, while the former is relatable to familiar morality and the latter is, randomly[917], relatable to moral theory.

Although, we know that henceforth Dworkin's philosophical journey is directed to the wrong path, we need to follow him to see what he suggests to correct the theory of Rawls so that we can trace Dworkin's sense about law and to have a sense of his objectives he wants to pursue and what led him to the position where he is now. We need to follow further to know what contributes to availing him of further misconceptions about the law and its source of practical authority. It will help us understand his attitude towards metaphysics. Understanding the attitude is important because it is one of the most decisive factors that motivates him, on the one hand, to rely on political morality and, on the other hand, pushes further away from the sense of law.

He tries to connect moral theory with the familiar morality from two philosophical positions – the natural model and the constructive model.[918] The natural model, like Rawls' two principles, presupposes an objective moral reality, a natural condition to be discovered in the way laws of physics are discovered.[919] Dworkin goes as –

> *The main instrument of this discovery is a moral faculty* possessed by at least some men, which produces concrete intuitions of *political morality* in particular situations, like the intuition that slavery is wrong. These intuitions are clues to the nature and existence of more abstract and fundamental moral principles, as physical observations are clues to the existence and nature of fundamental physical laws.[920]

The emphasised portion of the paragraph ie '*The main instrument of this discovery is a moral faculty'* is very important for us as our sense of law has a connection with it and Dworkin's hatred of metaphysics is seemed to be connected to it. We will come back to this point along with other related points in a while. The second philosophical position ie constructive model, on the other hand, presupposes that the intuitions are not the products of moral faculty as such, instead, they are the stipulated features of a general theory to be constructed in the same way as a sculptor construct an imaginary animal with the piles of bones he or she has been provided with.[921] Dworkin posits that the model is familiar to lawyers and a positive point of

[917] The relevance is merely structural not substantial.
[918] Dworkin, *Taking Rights Seriously* (n 1) 200–219 (ebook page number).
[919] Dworkin, *Taking Rights Seriously* (n 1) 199 (ebook page number).
[920] Dworkin, *Taking Rights Seriously* (n 1) 199–200 (ebook page number) (emphasis added).
[921] Dworkin, *Taking Rights Seriously* (n 1) 200 (ebook page number).

this model is that it does not hold that principles set through intuition have any particular objectives. [922] All it needs, as per Dworkin, is the consistency and the consistency maintained in the constructive model is of higher standard than that of the natural model.[923] Dworkin explains to us how it is so:

> The natural model insists on consistency with conviction, on *the assumption that moral intuitions are accurate observations*; the requirement of consistency follows from that assumption. The constructive model insists on consistency with conviction as an independent requirement, flowing…from … the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and *not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases*. The constructive model requires coherence, then, for independent reasons of political morality; it is a model that someone might propose for the governance of a community each of whose members has strong convictions that differ, though not too greatly, from the convictions of others …be said to be the *theory of a community rather than of particular individuals, and this is an enterprise that is important, for example, in adjudication*.[924]

From the quotes describing his two philosophical positions, we can get the contexts and considerations that drive Dworkin to run away from exploring the source of morality in the individual.[925] Instead, searching for it somewhere outside and ends up discovering an artificial and absurd concept of political morality[926]. Central to his detachment from the philosophical inquiry about the practical authority of law and eventual dependence on political theory is his extreme scepticism of metaphysics.[927] Undoubtedly, he takes the

[922] Dworkin, *Taking Rights Seriously* (n 1) 200 (ebook page number).
[923] Dworkin, *Taking Rights Seriously* (n 1) 202 (ebook page number) .
[924] Dworkin, *Taking Rights Seriously* (n 1) 202-203 (ebook page number) (emphasis added) .
[925] His source of insecurity is clear here; he is bound to choose the constructive model because he is afraid that the natural model is subjective and therefore controversial and not reliable and further, will not be supported by the legislative supremacy bias and this led to his leaning towards political morality doctrine.
[926] Apart from Dworkin, a few other scholars have attempted to provide or generate an artificial morality or basis for law. While Dworkin relies on artificial political morality, Finnis, Fuller and others rely on artificial natural morality. For instance, Kelsen's pure theory is a glaring example of such an attempt, and it ultimately fails. See generally Kelsen (n 18); John Finnis and John Finnis, *Natural Law and Natural Rights* (Second Edition, Second Edition, Oxford University Press 2011); Fuller, *The Morality of Law* (n 20). See also Liam Murphy, 'The Artificial Morality of Private Law: The Persistence of an Illusion' (2020) 70 University of Toronto Law Journal 453 (see generally).
[927] He expressly expresses his conviction against metaphysics on several occasions. He does not mind, instead, working with hypotheses; metaphysical ambition has no sense to him. He states – 'on the constructive model, at least, the assumption of natural rights is not a metaphysically ambitious one. It requires no more than the hypothesis...'; see Dworkin, *Taking Rights Seriously* (n 1) 217.

moral faculty of humans as a metaphysical element.[928] Eventually and logically, it is expected that some intuitions derived from a metaphysical element as 'moral faculty' will not be of any interest to Dworkin. Further, since he is not aware of the different roles the self can play, he has no reason to give a second thought to such institutive judgements that can, as he thinks, never be safe and sound enough to act as a practical authority of law.[929] Dworkin believes that even if an individual is honest and his or her intention is good, his or her judgement will never be devoid of the distorting factors we have already discussed at the beginning of this chapter and, consequently, this will make the judgement below the standard it needs for our purpose.[930] He claims that even with the help of Rawls' original position theory, the moral judgement cannot make any sense as long as Rawls is following the philosophical position of the natural model; it will, as he says, inevitably, lead to a theory of particular individuals rather than that of the community and such theory is of no worth as longs as the adjudication is concerned.[931]

Will the problem be solved if Rawls follows the philosophical positions of Dworkin's constructive model? Dworkin's answer is negative. He expressly endorses and appreciates the theory of original position, specially if it is taken from the light of his philosophical position of the constructive model and avoids the

[928] Dworkin, *Taking Rights Seriously* (n 1) 202-217 (Read generally) (ebook page number).
[929] Dworkin, *Taking Rights Seriously* (n 1) 204 (ebook page number).
[930] Dworkin, *Taking Rights Seriously* (n 1) 204-206 (ebook page number). He states – 'If my convictions otherwise support a principle of utility, but I feel that slavery would be unjust even if utility were improved, I might think about slavery again, in a calmer way, and this time my intuitions might be different and consistent with that principle. In this case, the initial inconsistency is used as an occasion for reconsidering the intuition, but not as a reason for abandoning it … I might continue to receive the former intuition [ie slavery is unjust], no matter how firmly I steeled myself against it'. This explains what drives him to misconception. Admittedly, as Dworkin states, we may continue to receive the same intuition ie slavery is unjust, if there is change at all (however, Dworkin thinks the change is usual ie to resolve the initial inconsistency we will change our intuition to believe that slavery is just when it ensures higher utility). We submit that if there is a change in intuition ('slavery is unjust' to 'slavery is just when utility attached'), it is only because of the influence of the action self; the change is temporary, instant, and reactive and the change is not static or evaluative in the sense evaluation means in the eyes of the evaluative self. For instance, I know very well that all humans are equal. Still, I may develop a conviction over time against the African people that they are uncivilized only because I have seen on several occasions that they committed riot for simple reasons ie results of the football matches (although my biological programme often tricks me not to take note of the incidents committed by the people of my own race). Or I have such intuition about the Africans simply because the African who lives by my house speaks loudly. Now, we believe, If I consciously go through some concrete evidence that shows a comparison of such incidents committed by the Africans and my race, my intuition might be changed and in my static intuition, I may reject such biased conviction. Alternatively, if I am asked - do we believe this justifies your conviction as general for all Africans? We hope that I will then be able to identify the fact that the conviction about my neighbour is not true for all African in general. Dworkin further states that – 'But principles of justice selected in this spirit are compromises with infirmity, and are contingent in the sense that they will change as the general condition and education of people change'; see Dworkin, *Taking Rights Seriously* (n 1) 205 (ebook page number). We hope Dworkin's position would change were he aware of what distracted him.
[931] Dworkin, *Taking Rights Seriously* (n 1) 205 (ebook page number). Dworkin criticizes such position stating - It is hard to see, on the natural model, why they then should have any authority at all.

metaphysical jargon. In fact, it seems to us that this theory of original position, by providing some insights about the context and conditions, inspires Dworkin to proceed to his next stage towards developing a political theory about the authority of law. Dworkin states that '[t]he original position is well designed to enforce the abstract right'[932]. This explains why Dworkin does not have enough trust in this theory; its force is not enough to enforce the concrete rights that, as Dworkin claims, are essentially political rights. Dworkin explains the grounds that clarify why the original position lacks the forces it needs:

a. Original position is not among the ordinary political convictions that we find we have.[933]
b. It is certainly not part of our established political traditions or ordinary moral understanding that principles are acceptable only if they would be chosen by men in the particular predicament of the original position.[934]
c. If the original position is to play any role in a structure of principles and convictions in reflective equilibrium, it must be by virtue of assumptions we have not yet identified.[935]
d. The moral position is supposed to justify the emotional reaction, and not vice versa. If a man is unable to produce such reasons, we do not deny the fact of his emotional involvement, which may have important social or political consequences, but we do not take this involvement as demonstrating his moral conviction.[936]

Neither do we have any reason to accept the theory of the original position. Nevertheless, we do not think that the first two justifications could be logical justifications against the theory of the original position. However, these two arguments are of much significance as we will see Dworkin's own theory contradicts these justifications. The 4th point can be better explained with reference to our division of the self. While Dworkin is in darkness about the two roles of the self, while Rawls's original position is completely devoid of the action self. Neither can we relate the original position, substantially, with the evaluative self as well. Instead, it can be considered as a pre-action self in the sense that it does not have the experience of the world yet.[937] On the other hand, our evaluative self has already in touch with the action self and hence, goes

[932] Dworkin, *Taking Rights Seriously* (n 1) 221 (ebook page number).
[933] Dworkin, *Taking Rights Seriously* (n 1) 196 (ebook page number).
[934] Dworkin, *Taking Rights Seriously* (n 1) 196 (ebook page number). We do not have any reason to accept the original position. However, indicating a flaw of Dworkin we should submit that neither the rejection of the political tradition nor of the ordinary morality affects the acceptability and weight of the original position.
[935] Dworkin, *Taking Rights Seriously* (n 1) 196 (ebook page number).
[936] Dworkin, *Taking Rights Seriously* (n 1) 298 (ebook page number).
[937] Many scholars highly appreciate Rawls thought experiment and its associated hypothetical position ie 'original position. Many of them even go on to say - 'John Rawls's Veil of Ignorance is probably one of the most influential philosophical ideas of the 20th century'. See Ben Davies, 'John Rawls and the "Veil of Ignorance"', *Introduction to Ethics: An Open educational Resource* (Golden West College, NGE Far Press, 2019 2022)

through the experience that the action self has already gone through. Personal experience has a substantial role for one when he or she generally evaluates the incidents he or she is not personally connected to.[938] We accept the third argument partially, ie to the extent it accepts justification apart from Dworkin's political morality. However, relating to the theory of original position our stance remains unchanged and, seems, Dworkin would also maintain the same stance specially for the reason he shows in the 4th point. Further, we should further clarify that we do not agree with Dworkin's claim that the rights essentially need to be political. Why is it the case that the rights need to be essentially political? Because, as Dworkin reasons, its enforcement needs practical authority that philosophy, always, lacks.[939] And until philosophy can provide us with a virtue or value forceful enough to match the requirements of practical authority, we have no other way out but to depend on political morality. Eventually, this is how Dworkin lands on political morality. Before going to his theory of political morality, we should inevitably explain, in the next section, why Dworkin affords neither scepticism to metaphysics nor the consequential omission of concrete philosophical account about the law.

6.3 Dworkin's Scepticism to Metaphysics and Moral Faculty

In the last section, we have seen to what extent Dworkin is terrified by the so-called metaphysics. He denies exploring the critical self as the sense associated with the critical self (or the evaluative self) seems to him relatable to 'cosmic illusion'. He rejects the philosophical position based on the natural model because he

<https://open.library.okstate.edu/introphilosophy/chapter/john-rawls-and-the-veil-of-ignorance/> accessed 14 May 2023; Karen Huang, Joshua D Greene and Max Bazerman, 'Veil-of-Ignorance Reasoning Favors the Greater Good' (2019) 116 Proceedings of the National Academy of Sciences 23989; Jeppe Von Platz, 'The Veil of Ignorance in Rawlsian Theory' in Fathali M Moghaddam (ed), *The SAGE Encyclopedia of Political Behavior* (2017) 889. However, we do not see any relevance or importance of the original position in casting the cloud of sol called veil of ignorance away. In fact, the term veil of ignorance is a complete misnomer.

[938] In the process of making a decision or conviction and reasoning role of the personal experience is fundamental – although the decision can be a running decision or reaction or instant response or be a part of the denominator of the evaluative self in the form of the static decision. To understand more about the role, effect and side-effect of experience in decision making see Johannes Buckenmaier and Eugen Dimant, 'The Experience Is (Not) Everything: Sequential Outcomes and Social Decision-Making' (2021) 205 Economics Letters 109916; Ben R Newell and Tim Rakow, 'The Role of Experience in Decisions from Description' (2007) 14 Psychonomic Bulletin & Review 1133; W Steven Perkins and Ram C Rao, 'The Role of Experience in Information Use and Decision Making by Marketing Managers' (1990) 27 Journal of Marketing Research 1; Thais Spiegel, 'Influences of Personal Experience in Decision-Making', *Exploring the influence of personal values and cultures in the workplace* (Business Science Reference/IGI Global 2017). It should be noted that we are not in a position to determine the exact impact of personal experience on the development of an evaluative self's convictions. What is important to acknowledge, however, is that personal experience plays a role in forming convictions. Therefore, we cannot accept convictions that are entirely devoid of personal experience.

[939] Almost all the political philosophers and the majority of the political-legal philosophers take a similar stance – scepticism to philosophical authority. See Arendt (n 162); Hart and others (n 20); Kelsen (n 18); Raz, 'Authority, Law and Morality' (n 105); Fuller, *The Morality of Law* (n 20). There is, however, different opinion; see Simon Glendinning, 'Derrida and the Philosophy of Law and Justice' (2016) 27 Law and Critique 187.

denies the natural moral faculty in which we have a substantial interest, at the least, we cannot directly reject it, because the foundation of the freejon approach, to a large extent, depends on it. Central to the foundation of the freejon approach is the division of the self. Apparently and, as far as the conventional discussion goes on, anyone may take the self, the division of the self, and the moral faculty of the self as a metaphysical element from its 'ghostly' or illusory sense.[940] We have already shown that the self and the divisions of the self are not metaphysical entities in the sense that weirdly claim that metaphysics is the study of the unreal thing or phenomenon.[941] Therefore, this section of discussion is, specifically, intended to resolve the confusion associated with the moral faculty of the self. We submit that it may have a metaphysical nature and only because of this reason it does not lose its practical significance or relevance; metaphysical nature does not, necessarily, render something impractical or illusory.[942] However, our main purpose here is not to decide what is metaphysics and what is not; neither do we want to assess the importance of metaphysics. What we want to submit is that Dworkin's scepticism of metaphysics is not attributable to moral faculty, self or division of self. His direct rejection of the moral faculty is too quick a decision and this is, largely, because of his general hatred of metaphysics, and misconceptions about it.

[940] Philosophers and scholars are prone to take the self and any concept associated with the self, by default, from a mystical perspective; we just do not know what makes the philosophers, readily, drawn to or subscribe to some illusory, unworldly, mysterious phenomenon when they discuss about the self. See Economic Times, 'The Self Is a Mystery' *The Economic Times* (10 June 2020) <https://economictimes.indiatimes.com/blogs/the-speaking-tree/the-self-is-a-mystery/> accessed 14 May 2023. Citing the concept of self from Gita – 'One sees the Self as a wonder. Another speaks of it as a wonder. Yet, having heard, none understands it at all." The ultimate experience is non-dual and is, therefore, inexpressible'. Other religious texts have a similar mysterious idea about the self. Hence philosophers influenced by such religious texts take self from such mysterious perspective. In addition, a flat understanding of many philosophers' philosophical submission led to a misconception that philosophy is about the discussion of self from a 'ghostly' perspective. For instance, Hegel, Kant, or Schopenhaue's self is understood as a 'ghostly' phenomenon or 'spirit'; see John Russon, *The Self and Its Body in Hegel's Phenomenology of Spirit* (University of Toronto Press 1997) <https://www.jstor.org/stable/10.3138/9781442682344> accessed 14 May 2023; Arati Barua, *Schopenhauer on Self, World and Morality: Vedantic and Non-Vedantic Perspectives* (1st ed. 2017 edizione, Springer Verlag 2017); Luís de Sousa and Marta Faustino, 'Nietzsche and Schopenhauer on the "Self" and the "Subject"', *Nietzsche and Schopenhauer on the 'Self' and the 'Subject'* (De Gruyter 2015) <https://www.degruyter.com/document/doi/10.1515/9783110408201-008/html> accessed 14 May 2023. Dennett is disturbed by such self that he calls a 'miracle-working Self or Soul'; see Dennett (n 99) 306.

[941] See Chapters 3 and 4.

[942] Jaegwon Kim, *Mind in a Physical World: An Essay on the Mind-Body Problem and Mental Causation* (Reprint edizione, Bradford Books 2000); John R Searle, *The Rediscovery of the Mind* (Bradford Books 1992); Cláudia Ribeiro, 'Unjustified Criticism of Metaphysics' (2015) 2 Lato Sensu, Revue de la Société de philosophie des sciences 1; Matteo Morganti, 'Science-based Metaphysics: On Some Recent Anti-metaphysical Claims' (2015) 19–1 Philosophia Scientiæ 57; Daniël P Veldsman, 'The Place of Metaphysics in the Science-Religion Debate' (2017) 73 HTS Theological Studies 1; Donald A Crosby, 'Metaphysics and Value' (2002) 23 American Journal of Theology & Philosophy 38; Andrew J (Andrew John) Graham, 'The Significance of Metaphysics' (Thesis, Massachusetts Institute of Technology 2011) <https://dspace.mit.edu/handle/1721.1/68914> accessed 14 May 2023; Andrea Strollo, 'Metaphysics as Logic' [2018] Rivista di estetica 7; Guy Kahane, 'The Value Question in Metaphysics' (2012) 85 Philosophy and Phenomenological Research 27.

Interestingly, however, his own standard that his theory represents would not have rejected metaphysics as quickly and decisively as he did, had he taken the standard into consideration.[943] Apparently, his ultimate objective, which is shaped by the lawjon approach, to justify political morality plays a decisive role to detach him from something, that has prima facie a gesture of natural law theory.[944]

We do not know (and, apparently, nor is it possible to know) what does it mean by metaphysics to Dworkin.[945] We, along the line with his discussion about the practical authority of law, find that by metaphysics he has in mind the metaphysical account of Hegel and an internal and superficial sense of metaphysics that is unable to exert external effect, an effect, he thinks, inevitable to claim the practical authority of law.[946] If metaphysics is taken from the Hegelian perspective or in 'any ghostly' or 'cosmic illusion' senses we find that it is not difficult to ignore such metaphysical discourses. We do not disagree that many philosophers present metaphysics from such a weird and absurd perspective that we may be terms as the studies of 'unreal things' or things to which even the method of narrative consistency cannot be applied.[947] However, that can never justify Dworkin's general rejection of metaphysics. If he does so, in fact on several occasions he does, that would be a too quick, heuristic and not logical conclusion about metaphysics as a whole.

We hope Dworkin's general scepticism that is appeared in his theory is accidental or a consequence of his needless rush to reach a concrete conclusion about the practical authority of law. In fact, we have reasons[948] to presume that those instances of scepticism, although may seem the consequences of general scepticism

[943] We will come back to the standard in a while.

[944] In the legal arena dominated by positivism, it is a common trend to label anything moral as an element of natural law theory. Additionally, the inherent nature of the moral faculty is likely to reinforce that conviction.

[945] His narrative shows, on certain occasions, he expressly rejects metaphysics while on other occasions, he, impliedly, embraces metaphysical elements. The nature of the elements he accepted and rejected is, by and large, similar. Therefore, it is confusing what metaphysics means to him; or for what nature of it he finds metaphysics acceptable on one occasion while rejectable on other occasions.

[946] Dworkin, *Taking Rights Seriously* (n 1) 12; Dworkin, *Law's Empire* (n 1) 167. His example of considering individual rights in 'any ghostly forms' as metaphysical or his example of considering the personification of the state or community gives us a sense of what he might have meant about metaphysics.

[947] For instance, criticizing the metaphysics shaped by continental rationalism, Angere states 'there may be another world behind the veil of appearance may be an intriguing thought, but perhaps more so for science fiction and theology than for science and philosophy'; see Staffan Angere, 'Theory and Reality : Metaphysics as Second Science | Lund University' (Lund University 2010) xi–xii <https://www.lunduniversity.lu.se/lup/publication/0aece99b-a732-4053-8941-7a1c19161812> accessed 14 May 2023. We roughly agree on what he has submitted. For a such misconceived account of metaphysics, read generally Erazim V Kohak, 'Physics, Meta-Physics, and Metaphysics: A Modest Demarcation Proposal' (1974) 5 Metaphilosophy 18; Lewis E Hahn, 'Metaphysical Interpretation' (1952) 61 The Philosophical Review 176.

[948] To be discussed in a while.

of metaphysics, are the contributions of other reasons ie lawjon approach, his general scepticism of natural law theory, insecurity about the external force of such morals, etc. If, by any chance, the scepticism is conscious and deliberate, we have enough evidence to reject his position. We submit that metaphysics, in general, and its subject matters, some subject matters in particulars as the self, mind, etc, which are the elements of this thesis, are not as worthless or futile as Dworkin and many other political theorists might misconceive of; for sure, these are not ghostly things and their relevance to the discussion of law is effectively demonstratable.[949]

We consider the briefest and the most precise way to talk about metaphysics with reference to physics, the branch of natural sciences with reference to which metaphysics is criticised most.[950] From this point of view, taking the term metaphysics from its literal sense ie 'after physics'[951] or 'beyond the physics'[952] denotes that it is beyond the area of physics in the sense that it is something, among many other similar things, the existence of which cannot be demonstrated in the traditional setup of laboratories of the physicists following their conventional protocol.[953] Even the natural sciences, specially physics and chemistry, which follow the strictest protocol of all disciplines to accept the existence and/or effect of things or phenomena, accept that there are things the existence of which are not 'practically proved in its literal sense'[954], instead presumed by empirical data and theoretical coherence.[955] These things are demonstrated to be existed based on some presumption associated with these elements. For example, the existence of the

[949] Searle (n 942) (see generally); Kim (n 942).

[950] We are discussing the term with reference to physics because the strongest form of argument against metaphysics is raised with reference to the physical nature of the subject matter, although the arguments against metaphysics are not always from natural scientists. The positive point is this even Dworkin himself does not accept this strongest form of argument. Therefore, once it is proved that our subject matters ie the self, divisions of self or moral faculty are survived against the strongest version of opposition, Dworkin must not have any doubt whatsoever about the existence of these elements in our discussion. Once the existence is proved we will get the ground to prove the relevance and practical effects of these elements.

[951] Peter van Inwagen and Meghan Sullivan, 'Metaphysics' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/win2021/entries/metaphysics/> accessed 2 March 2023.

[952] van Inwagen and Sullivan (n 951).

[953] van Inwagen and Sullivan (n 951).

[954] To mean the proof in the practical sense as the common people understand it. From its general sense, the existence of the physical elements is said to be proved when the elements are perceived by the five concrete senses of humans. For example, the existence of iron is proved as we can see it while the existence of oxygen is proved as scientists can measure it or see the result of its reaction of it with other chemicals. However, when it is the question of the existence of, for instance, electrons, or photons, the existence cannot be proved in those common methods. These elements exist more on the presumption based on the existence of the effects that can be logically associated with their existence.

[955] Richard P Feynman, *The Feynman Lectures on Physics. Volume 1: Mainly Mechanics, Radiation, and Heat* (The new millennium edition, paperback first published, Basic Books 2011) See Chapter 2 (to get the idea about the standard of proof Physics requires).

electron has not been proven yet, in its literal sense. Its existence is presumed from the specific effect we see in practice through different scientific devices, for example through the existence of electricity or light bulb.[956] Had not the scientific innovation been so marvellous and, thereby, they could invent the relevant devices and link the practical effect to the imagined source of reason of that effect ie electron, it would have been considered as still a metaphysical element in the sense Dworkin takes metaphysics as unreal things. The same goes for light. Until recently it was considered a photon and is now assumed an electromagnetic wave; whatever the name or nature it is of, its existence is presumed.[957] The effect of DNA or 'junk DNA'[958] could have been considered ghostly or metaphysical in the sense of Dworkin, were not the gene technology developed. Hence, we cannot just ignore the existence and effect of anything or any phenomenon just because it is of metaphysical nature.

However, just to make sure that the matter or phenomenon in question is not something 'ghostly' or 'cosmic illusion', we could easily adopt the standard that the natural sciences disciplines adopt; the standard of presumption of existence through the observation of effect using an appropriate device or programme or mechanism.[959] To avoid any sort of misconception, we must declare that this standard we can follow only

[956] The example has been verified through ChatGPT. It answers – 'It is true that scientific concepts such as electrons are not directly observable with the naked eye, and their existence is often inferred from their effects on other observable phenomena…So while electrons themselves are not directly observable, their existence is supported by a large body of experimental evidence and theoretical models that have been validated through numerous experiments and observations over the years. In this sense, the existence of electrons is presumed from their observable effects, but this presumption is backed up by a wealth of empirical data and theoretical understanding'. To get the supporting argument in favour of our example of scientific standard see also Bas C van Fraassen, *The Scientific Image* (1st edition, Clarendon Press 1980); Gabriele Contessa, 'Constructive Empiricism, Observability and Three Kinds of Ontological Commitment' (2006) 37 Studies in History and Philosophy of Science Part A 454.
In fact, Dworkin himself is aware of such a standard that the proponents of the demonstrability thesis subscribe to. Dworkin himself, acknowledges that for metaphysical elements such a high standard is too ambitious. See Dworkin, *A Matter of Principle* (n 1) 138. The thesis, as Dworkin explains, goes as – 'The proposition could rationally be believed to be true, even though its truth is not demonstrated when all the hard facts are known or stipulated, only if there were something else in the world in virtue of which it could possibly be true. But if there is nothing else, then the proposition cannot rationally be believed to be true'.

[957] The statement has been verified through ChatGPT and the response it returns is - 'It is true that the nature of light has been a subject of debate and study for a long time. In classical physics, light was considered as a stream of particles, known as photons, while in modern physics, it is considered as both a particle and a wave, known as wave-particle duality. The existence of light is not directly observable, but it is presumed to exist based on its effects on other physical systems, such as its ability to illuminate objects and cause photochemical reactions. The nature of light is studied and understood through a combination of empirical observations, theoretical models, and experimental verification'.

[958] Nelson JR Fagundes and others, 'What We Talk About When We Talk About "Junk DNA"' (2022) 14 Genome Biology and Evolution evac055; Joyce C Havstad and Alexander F Palazzo, 'Not Functional yet a Difference Maker: Junk DNA as a Case Study' (2022) 37 Biology & Philosophy 29.

[959] This is our personal observation and knowledge we have gathered as students of science majors at the school and high school levels. The standard is verified through ChatGPT and it affirms our statement – 'Yes, the natural sciences generally follow the standard of presumption of existence through the observation of effect using an

to demonstrate the existence of these elements or phenomena, not to demonstrate the effect or relevance of these elements in the discussion of law.[960] Relevance and the effect will be demonstrated in the due courses following the standard of coherence, a relevant standard for the studies of the social sciences.[961]

Legal science can get courage and inspiration by taking note of the fact that this standard is already in use, consciously or unconsciously, in many disciplines other than the natural sciences. Music, arts, economics and other disciplines, using the standard, identify and make use of countless elements or phenomenon of such 'apparently ghostly nature', that shapes and affects our life and existence. Let's take the example of the musician who plays with the sense of sound.[962] The same sound can be extremely annoying, destructive and, again, pleasing, soothing, refreshing and so on. A successful musician is an expert in using pitch, rhythm, tempo, beats, meter, accent, syncopation, and many more senses of sound and, thus, produces the sound in an order that attracts millions of people. Just for a moment, let's think that human has not discovered that musical sense of sound yet. Anyone would consider it as a superficial or metaphysical phenomenon associated with the sound of the musician when the metaphysics is taken in the sense as Dworkin takes it.[963] Now let's cast our eyes to a more impressive phenomenon to which the sense of law

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appropriate device or program or mechanism. This is commonly known as the scientific method, which involves making observations, formulating hypotheses, testing those hypotheses through experiments and observations, and then drawing conclusions based on the results. The use of appropriate devices and mechanisms is essential for gathering reliable and accurate data, which is then used to support or refute hypotheses about the existence and behavior of natural phenomena'. For documentary reference please see Stephen S Carey, *A Beginner's Guide to Scientific Method* (4th edition, Cengage Learning 2011); Brian Hepburn and Hanne Andersen, 'Scientific Method' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/sum2021/entries/scientific-method/> accessed 14 May 2023; 'Scientific Method', , *Britannica* (2023) <https://www.britannica.com/science/scientific-method> accessed 14 May 2023.

[960] Since in this section of our discussion existence of the metaphysical elements ie mind, self is the prime question, the section will deal with the existence issue to demonstrate that the elements are not 'ghostly' as Dworkin, mistakenly, thinks. If the existence is proven and accepted even by the rigid standard of the natural sciences, Dworkin cannot have any logical stance to consider these as 'ghostly' elements. Once this task is done, the relevance and effect of these elements with the sense of law will be demonstrated in due courses with reference to the discipline of law. His denial of metaphysics is indicative of his reliance on incomplete understanding of the standard that the natural sciences follow to justify the existence of any element or phenomenon.

[961] Nerhot, *Law, Interpretation and Reality* (n 26) 6.

[962] Stephen Malloch and Colwyn Trevarthen, 'The Human Nature of Music' (2018) 9 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.01680> accessed 14 May 2023; Mark Reybrouck, Piotr Podlipniak and David Welch, 'Music and Noise: Same or Different? What Our Body Tells Us' (2019) 10 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.01153> accessed 14 May 2023.

[963] For instance, see how the primitive people took thunderstorms as the rage of god. See David Brand, 'Secrets of Whales' Long-Distance Songs Are Being Unveiled by U.S. Navy's Undersea Microphones -- but Sound Pollution Threatens' [2005] *Cornell Chronicle* <https://news.cornell.edu/stories/2005/02/secrets-whales-long-distance-songs-are-unveiled> accessed 4 May 2023; Lawrence English, 'The Sound of Fear: The History of Noise as a Weapon' (*Fact Magazine*, 9 October 2016) <https://www.factmag.com/2016/10/09/sound-fear-room40-boss-lawrence-english-history-noise-weapon/> accessed 14 May 2023.

is connected. The majority of these millions of people whose senses are captivated by the sense of sound produced by the music of the musicians are not conscious of the different complex calculations and senses of sound. However, they can distinguish the music from other random music composed without following the basic rules of music.[964] Admittedly, their evaluation is not at the level of identifying the lack of consistency in the pitch, tempo, and so on, but the point of significance is this, they can distinguish between musical sound and non-musical sound.[965] How is it possible? Isn't it a demonstration of the fact that the sense of music is already with the people? We do not see any other possible and demonstrable explanation for this phenomenon. We see a 'similar'[966] phenomenon in the case of the sense of language[967], sense of art, sense of love, sense of reputation, sense of guilt, and in many other senses. Therefore, cannot we consider the activity of the evaluative self as the demonstration of the sense intrinsic to all humans?[968] If the answer is yes, how can we, as Dworkin does, reject the possibility of the existence of a faculty of law or a faculty of the morality of law?

The pitch, tempo, beats etc of the music has to be in such order and rhythm that will be aligned with the sense (although unconscious) of pitch, tempo, beats, etc of the audience. Otherwise, the music will be just random sounds that will be displeasing and annoying for the audience. If the audiences are forced to listen

[964] Aditya Shukla, 'Why Did Humans Evolve Pattern Recognition Abilities?' (*Cognition Today*, 6 October 2019) <https://cognitiontoday.com/why-did-humans-evolve-pattern-recognition-abilities/> accessed 15 May 2023; Jens Brauer, 'The Brain and Language: How Our Brains Communicate' *Frontiers for Young Minds* <https://kids.frontiersin.org/articles/10.3389/frym.2014.00014> accessed 15 May 2023; Mark Reybrouck and others, 'Music and Brain Plasticity: How Sounds Trigger Neurogenerative Adaptations', *Neuroplasticity - Insights of Neural Reorganization* (IntechOpen 2018) <https://www.intechopen.com/chapters/59437> accessed 15 May 2023; Michael H Thaut, Pietro Davide Trimarchi and Lawrence M Parsons, 'Human Brain Basis of Musical Rhythm Perception: Common and Distinct Neural Substrates for Meter, Tempo, and Pattern' (2014) 4 Brain Sciences 428; Paulo Estévão Andrade and Joydeep Bhattacharya, 'Brain Tuned to Music' (2003) 96 Journal of the Royal Society of Medicine 284; Norman M Weinberger, 'Music And The Brain' [2006] *Scientific American* <https://www.scientificamerican.com/article/music-and-the-brain-2006-09/> accessed 15 May 2023.

[965] We may face a counterargument that in practice we see instances where music without a minimum level of musical sense gets popularity. How can we explain this? We will explain this phenomenon in chapter eight.

[966] We must distinguish the senses in terms of intensity, externality, internality, sensibility, importance, longevity, frequency, and so on. Therefore, based on these distinguishing features we may see differences in the degree of intensity, externality, and so on with which the respective phenomenon is intrinsic to the human.

[967] We see that based on culture, region, etc languages are immensely diversified. This diversification is not our point of concern because this is an external feature of languages. Our concern is relating to more internal, subtle, and static features of the languages. We will find that these internal features have many elements that are not as diversified as the external feature. To get a sense of idea about such internal aspects of language see Brauer (n 964).

[968] Gibbons seems to have a similar observation as that of us. Although he sees it completely from a biological perspective, still it supports our position that we cannot deny the existence of such a sense of legal faculty. He states – 'The sense of justice is postulated as that mental capacity that allows humans to know, without formal thought, when they are the victims of injustice. This sense accounts for the dramatic difference that people perceive between a misfortune, such as discovering cancer, and an injustice, such as discovering cancer too late because of the negligence of the examining doctor; see Gibbons (n 558) 26.

to that music, this will be nothing but torture. Exactly, similar but worse consequences are likely to be produced when some rules devoid of the sense of law are treated as law; the rules not having sufficient consistency with the sense of the evaluative self will neither be general and shared nor be worthy of considering law.[969] Many things or phenomenon, for sure exists, although their existence has not been demonstrated because we, until now, have failed to discover a device or program through which the existence of it could be presumed.[970] Archaic and closed characters of the lawjon approach and lack of imagination of the legal arena have always been reluctant to explore and make use of the things and phenomena essentially connected to the law.

Are we claiming that law is natural or static faculty that will be more compatible with the natural law theory? This is likely to be the inevitable question we will have to face. Our answer is negative. Neither do we claim that the faculty of law or sense of law is natural nor do we accept the natural law theory for a solid reason. We don't find a reason to accept that normativity is a natural concept; in nature, there is nothing as good or bad.[971] Instead, we find that it is human activity and imagination whence the normativity gets its source. As the sense of music changes over time, as the tone and tempo create varied responses along the line of different generations, so is the case for the sense of the law that evolves over time. However, the change in law, compared to music, is much more stable and general along the lines of culture society, environment, generation and so on.[972] In the same vein, it can logically be concluded that the sense of law

[969] Dworkin, himself, states – 'it is dangerous for our philosopher to claim that he speaks of objective legal reality whose truth conditions are independent of human convention'; Dworkin, *Taking Rights Seriously* (n 1) 341 (ebook page number). We do not have any option to accept that the human convention is detached from the sense of law one holds.

[970] For specialised discussion in this regard see generally Bill Brewer, 'Perception of Continued Existence Unperceived' (2020) 30 Philosophical Issues 24; Joseph Margolis, 'How Do We Know That Anything Continues to Exist When It Is Unperceived?' (1961) 21 Analysis 105.

[971] Our position is supported by countless scholars and philosophers who, throughout the history of humans, have revealed the truth that there is nothing intrinsically bad or good. See Jacqueline Taylor, 'Hume on the Importance of Humanity' (2013) 263 Revue internationale de philosophie 81; William Edward Morris and Charlotte R Brown, 'David Hume' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2022, Metaphysics Research Lab, Stanford University 2022) <https://plato.stanford.edu/archives/sum2022/entries/hume/> accessed 15 May 2023; Diogenes Laërtius and others, *Stoic Six Pack 4: The Sceptics* (Lulu.com 2015) 107; Wolfgang Bartuschat, Stephan Kirste and Manfred Walther, *Naturalism and Democracy: A Commentary on Spinoza's 'Political Treatise' in the Context of His System* (BRILL 2019) 33; Osho, *Tantra, the Supreme Understanding: Talks on Tilopa's Song of Mahamudra* (Rajneesh Foundation 1975) 180.

[972] Why is this difference? At this moment, we do not know exactly. Probably because the sense of law is less stimulating and pronounced than the tone and tempo of the music. Another important fact is that the sound receivable by one of the five sense organs, the organs, people and animals alike use most and the uses of these organs are profoundly active. Why do we get the rhythm of music so well while the rhythm of law is more subtle? We may consider the organs that receive five common types of senses as concrete devices ie skin, eyes, nose, ears, and tongue. We all are aware of these devices and their actions. Other uncountable numbers of senses are not so

we are talking about does not get its source from nature.[973] In nature, we see big fishes eat the small fishes – a law of nature. Humans, in their evaluator role, do not authorise the powerful people to inflict harm on the weak. Alternatively, let's think about taking revenge by own hand – a trend although omnipresent in nature but generally discouraged in almost all jurisdictions.[974] Some may claim that the growing prohibition of cruel treatment against animals is a contribution of natural law.[975] We strongly disagree; this is the consequence of the growing human commitment sparked by the sense of law.[976] In future, there may be a general and shared commitment amongst humans that the robots be given proper respect.[977] Thus, the concept of law is a stable concept that can be evolved and hence, the human commitments can, whereas the naturalist concept of law is constant and in the language of Nerhot, 'take form around some hard core of immutable principles'[978]. The nature of these commitments is not natural but rather more connected to the human nature developed as a consequence of the exercise of Freedom. Since the nature of the legal commitment has not been developed as a consequence of the deterministic cycle of nature, this concept of

easily extractable, and their devices are not so localized, and concrete. Among these other senses, there are as subtle and abstract senses as the sense of law.

[973] Undoubtedly, some elements of natural law have originated from this sense but the proponents of the natural law theories just could not understand and distinguish it and just went in the wrong direction to attribute those as natural and messed things up.

[974] If there is any jurisdiction where such practice is allowed, we believe that practice is due to rules other than that of the law itself. For instance, we can consider the rule of revenge killing in Yemen. Such practice is purely a tribal practice of a particular part of Yemen; see United Nations High Commissioner for Refugees, 'Refworld | Yemen: Revenge Killings as a Manifestation of Tribal Law' <https://www.refworld.org/docid/3ae6ad801e.html> accessed 7 May 2023.

[975] Joshua Jowitt, 'Legal Rights for Animals: Aspiration or Logical Necessity?' (2020) 11 Journal of Human Rights and the Environment 173; Kristen Stilt, 'Rights of Nature, Rights of Animals' (2021) 134 Harvard Law Review <https://harvardlawreview.org/forum/vol-134/rights-of-nature-rights-of-animals/> accessed 15 May 2023; Gary Chartier, 'Natural Law and Animal Rights' (2010) 23 Canadian Journal of Law & Jurisprudence 33.

[976] In fact, there are countless pieces of evidence that support the opposite view ie the shield of the natural law has been often used to inflict cruel treatment on the animals. See Gary Steiner and Marc Lucht, 'Law and Nature: Human, Non-Human, and Ecosystem Rights' in Brian Swartz and Brent D Mishler (eds), *Speciesism in Biology and Culture: How Human Exceptionalism is Pushing Planetary Boundaries* (Springer International Publishing 2022) <https://doi.org/10.1007/978-3-030-99031-2_7> accessed 15 May 2023; Steve F Sapontzis, 'Moral Community and Animal Rights' (1985) 22 American Philosophical Quarterly 251.

[977] Discussion to this end has already started. See Daniel Akst, 'Should Robots With Artificial Intelligence Have Moral or Legal Rights?' *Wall Street Journal* (10 April 2023) <https://www.wsj.com/articles/robots-ai-legal-rights-3c47ef40> accessed 16 May 2023; Maartje MA De Graaf, Frank A Hindriks and Koen V Hindriks, 'Who Wants to Grant Robots Rights?' (2022) 8 Frontiers in Robotics and AI <https://www.frontiersin.org/articles/10.3389/frobt.2021.781985> accessed 16 May 2023; Joshua C Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law (Edition 1)* (Routledge 2020) <https://library.oapen.org/handle/20.500.12657/43332> accessed 16 May 2023; Wolfgang M Schröder, 'Robots and Rights: Reviewing Recent Positions in Legal Philosophy and Ethics' in Joachim von Braun and others (eds), *Robotics, AI, and Humanity: Science, Ethics, and Policy* (Springer International Publishing 2021) <https://doi.org/10.1007/978-3-030-54173-6_16> accessed 16 May 2023.

[978] Nerhot, 'Interpretation in Legal Science' (n 22) 200.

law cannot be called as new naturalism of Arthur Kaufman.[979] Kaufman's version of natural law is not absolute and unchangeable.[980] According to Kaufman natural principles by transforming in few stages evolved as natural law; the natural law, as Kaufman submits, is founded on the natural principles but the principles themselves are not the natural law.[981] By contrast, the commitment of the evaluative self has no essential connection with the natural principle, let alone accepting those principles as the foundation of the commitment.

Now if we cast our eyes to the very standard Dworkin follows, we will see the standard is more flexible than the standard that the demonstrability thesis requires, and our metaphysical entities and phenomenon successfully survive. Dworkin thinks that to assess the justifiability of a proposition of law, it is not necessary that the proposition needs to be supported by the hard facts; he claims there might have moral facts apart from the physical facts and these moral facts, for example, slavery is unjust – is true of its own.[982] To him, narrative consistency is sufficient to justify such facts used in legal reasoning.[983] When this is the case for him, how could he ignore and reject the importance of the moral faculty just because, as he thinks, it is a product of metaphysics? He can never ignore it without further complicating his position.

Unfortunately, he ignores the metaphysical elements and, consequently, he confuses or, to be precise, he has to be confused about the very nature of consistency he has to follow in the legal reasoning. Although he considers narrative consistency as an effective tool for legal reasoning, he points out that narrative consistency is not 'the same sort of thing as the weight of iron'[984]. He, further, clarifies that the idea of consistency used in legal reasoning is different from 'the idea of narrative consistency used in the literary exercise' and the consistency that is used in legal reasoning is the 'normative consistency'.[985] Why is all this complication? The complication makes Nerhot state - '[t]hough he uses the term narrative coherence, Dworkin's notion of coherence seems to us to be linked more with a question of normative than of narrative type'[986]. Exactly, the point should be as simple as it is; he has to follow the normative consistency for the

[979] Nerhot, *Law, Interpretation and Reality* (n 26) 6.
[980] Arthur Kaufmann, 'The Ontological Structure of Law' [1963] Natural Law Forum 79, 93.
[981] Kaufmann (n 980) 93–94.
[982] Dworkin, *A Matter of Principle* (n 1) 138. It should be clarified that, here he does not confirm that there are facts as moral facts. He states that he is not claiming that there are, for sure, moral facts, but he is claiming that there are facts of this category which are not physical hard facts. However, we will see latter on several occasion accepts the existence of such moral facts. We have extreme opposition against his 'valid of its own position'
[983] Dworkin, *Taking Rights Seriously* (n 1) 140 (ebook page number).
[984] Dworkin, *A Matter of Principle* (n 1) 141.
[985] Dworkin, *Taking Rights Seriously* (n 1) 141.
[986] Nerhot, 'Interpretation in Legal Science' (n 22) 206.

very purpose of coherence in legal reasoning.[987] Criticising the position that distinguishes between narrative coherence from normative coherence, Nerhot posits that in legal reasoning such classification is futile[988]. We also find that Nerhot's position exactly reflects the sense of law; the sense of law does not allow any such distinction in legal reasoning.[989] Then, what might inspire Dworkin to reach to normative consistency through the application of the narrative consistency, instead of directly taking resort to the normative consistency?

The answer lies in his scepticism of metaphysics. Defending his anti-metaphysical position through narrative consistency, he further clarifies his position to make it more coherent by introducing a similar concept ie normative consistency that he finds more in line with the law. He knows that the law is not a concrete phenomenon; it is something abstract. However, turning directly to the abstract positional narratives may seem his position is not distinguishable from other metaphysical accounts associated with things that do not exist ie illusory or 'cosmic illusion'. This makes it clear why he takes this indirect approach. His main problem is with the metaphysics associated with non-existing or mythical components. If we carefully look at the sentences expressly rejecting the metaphysics, we find that the things he is sceptic like 'ghost', 'transcendent', 'platonic' 'spooky, all-embracing mind' 'cosmic illusion', 'romanticism' ie things having no reliable narration of, etc.[990] Eventually, it is apparent that he is enough open to accept any entity or phenomenon having consistent narratives.[991] The self and its role differentiate phenomenon are easily demonstratable through ordinary narratives as how diversly a person behaves in different situations and with different people; one's behaviour with his or her teacher is dramatically different from his or her behaviour with his or her friend, for instance.[992]

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[987] Dworkins himself, is aware of the fact that legal reasoning is essentially normative. He states - jurisprudential issues are at their core issues of moral principle, not legal fact or strategy; see Dworkin, *Taking Rights Seriously* (n 1) 23.

[988] Nerhot, 'Interpretation in Legal Science' (n 22) 204–205.

[989] By the very nature of the sense of law the coherence is inevitably normative while the narrative coherence is the facticity of the sense of law. Therefore, in the discourse of the sense of law such distinction is futile.

[990] Dworkin, *Law's Empire* (n 1) 168. He, for example, states – 'I do not suppose that the ultimate mental component of the universe is some spooky, all-embracing mind that is more real than fleshand-blood people'. To criticize some concepts of law that lack narratives, he states – 'in less guarded moments they tell a different and more romantic story. They say that law is instinct rather than explicit in doctrine…They say … it is too unstructured, too content with the mysteries'; see Dworkin, *Law's Empire* (n 1) 11. We claim and describe the law as instinct, and it is explicit in doctrine. We deny the allegation that it is too unstructured. It does not have anything mysterious, and it is plainer than the positive law.

[991] However, we will see, in a few matters, he is also unnecessarily closed, and such a closed position is due to the lack of philosophical foundation about the sense of law.

[992] Batters (n 302) 17–18. Although it is not completely like our role-differentiate behaviour of self, we can get support from Batters' narrative of a role-differentiated self – 'We are not wholly involved in nature. I may be either

More interestingly, Dworkin, himself, does take resort to metaphysics on numerous occasions. The most prominent and inevitable feature of his imagined political community is that the members of the community share responsibility for each other in the same spirit as that of the German people who were born after 1945 and still feel the guilt and sense of responsibility for the acts of their previous generation done against the Jews during the second world war.[993] Although he claims there is a political connection, we do not see any other connection but a metaphysical connection in its weakest sense compare to a strong metaphysical connection of law we can make to the self, division of self and legal faculty following the very narrative consistency Dworkin talks about. Therefore, it is certain that his scepticism of metaphysics specially to the moral faculty and thereby as a whole to a philosophical foundation of a legal theory a substantial flaw that could never be repaired.

Scepticism to philosophy and the lawjon approach that he follows restrict him from availing the opportunity to have a comprehensive sense of law that the general and shared commitment of the evaluative self offers. Consequently, he misses the very first and the foundational stage of his quest for the practical authority of law.[994] As Dworkin himself states – 'Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about what practices are legal practices'[995], whereas he wants to present us a concept of law, as he claims, in the best light of the legal practice. How can he identify the best legal practice when he lacks a comprehensive sense of law and lacks enough agreement with people about whatever sense of law he has? He himself acknowledges and expresses his disappointment as he thinks it is impossible to have an 'abstract description of the point of law most legal theorists accept'[996]. In such a

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the driftwood in the stream, or Indra in the sky looking down on it. I may be affected by a theatrical exhibition; on the other hand, I may not be affected by an actual event which appears to concern me much more. I only know myself as a human entity; the scene, so to speak, of thoughts and affections; and am sensible of a certain doubleness by which I can stand as remote from myself as from another. However intense my experience, I am conscious of the presence and criticism of a part of me, which, as it were, is not a part of me, but spectator, sharing no experience, but taking note of it, and that is no more I than it is you. When the play, it may be the tragedy, of life is over, the spectator goes his way…The "doubleness" … can reflect the different selves we express and experience under different conditions. This phenomenon can be as simple as the difference between how we speak to an authority figure versus a friend, or as intricate as our own personal relations between internal and external selves'.

[993] Dworkin, *Law's Empire* (n 1) 172–173; Dworkin, *Sovereign Virtue* (n 1) 250; Dworkin, *Taking Rights Seriously* (n 1) 329, 339 (ebook page number); Dworkin, *Freedom's Law* (n 1) 20.

[994] We think that an investigation in a discipline other than a discipline of natural sciences having a philosophical insight is the first stage of the investigation. Investigation in a normative discipline like legal sciences cannot break the ground without a philosophical insight into the law. However, just for clarification, a discipline like economics, although not a discipline of natural sciences, may also afford to skip the first stage as such a discipline has alternative options to compensate for the lack of philosophical insight - empirical discourse, for instance, can carry a demonstratable significance, in economics.

[995] Dworkin, *Law's Empire* (n 1) 90–91.

[996] Dworkin, *Law's Empire* (n 1) 93. In fact, the actual statement is – 'Just as we understood the practice of courtesy better at one stage in its career by finding general agreement about the abstract proposition that courtesy is a matter

circumstance, the lawjon approach tricks him into do double mistakes – 1. ignoring the essential stage starting from the second stage based on some hypothesis[997], a method of the natural scientists who have the option to test their hypothesis in the laboratory; and 2. His decision to follow the narrative and/or normative coherence which proves to be gone in vain as the very stage one with which the coherence had to be made is ignored. This is the grand mistake at the beginning of his quest for the practical authority of law and this mistake gives rise to a wrong result ie political morality. Eventually, Dworkin gives away the place of legal philosophy to 'political philosophy'[998] and states – '[p]olitical philosophy thrives, as I said, in spite of our difficulties in finding any adequate statement of the concept of justice[999]'[1000].

6.4 Dworkin's Political Theory

If we try to outline Dworkin's political theory of practical authority of law in a few words as we understand it, we can say that his main focus is to regulate the interpersonal relationship formally, predictably, and forcefully, when it is necessary. How can we regulate the relationships? We need some rules. Now the main question is where do we get these rules from and who will be entrusted to design these rules with the security that the rules are supported by a concrete moral regime? He does not have any trust in conventional morality, religious rules, or the so-called natural law theory because these regimes do contain some element in the name of rules that do not go with his sense of law Dworkin has in his mind.[1001] He neither supports Hart's rules of recognition nor the social contract theory of Rawls to this end. He has substantial insecurity about the rationality and integrity of the sovereign authority or legislatures as he knows very well that the Nazi rules made to exterminate the Jews were the outcome of this process that never guarantees the merit of law.[1002] He does not want to completely rely on the whim and caprice of the judges either.[1003] Admittedly, he has the maximum trust in the judges, and he believes that judges are the right authority to carry out the

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of respect, we might understand the law better if we could find a similar abstract description of the point of law most legal theorists accept'. Please note that the philosophical answer he gets about courtesy is in no way significant. In fact, the philosophical theory of law we try to reduce from Dworkin's theory at the beginning was based on his philosophical investigation into the meaning of courtesy where he concludes that finding the meaning is impossible.

[997] To be discussed in Chapters 7 and 8.

[998] Should we have the appetite to call it philosophy at all?

[999] It is, for instance, another example where he, seems, to use the word justice as a synonym of law or as an inevitable component of law.

[1000] Dworkin, *Law's Empire* (n 1) 93.

[1001] Other famous scholars have similar scepticism. See Hart, 'Are There Any Natural Rights?' (n 13); Kelsen (n 18).

[1002] Radbruch and Hart were both shaken by the same incident, but with a difference: Radbruch changed his perspective by detaching from positivism and submitting that the law must have merit, i.e. be respectful of human rights. On the other hand, Hart continued to stick to positivism but suggested correction by incorporating the necessity of secondary rules. See Pock (n 51); Hart and others (n 20).

[1003] It is reflected in the detailed narrative elaborating the extended mechanism or procedures that his Hercules follows to adjudicate a case. See Dworkin, *Law's Empire* (n 1) 239–405; Dworkin, *Taking Rights Seriously* (n 1) 137-163 (ebook page number).

increased roles in this regard. However, he wants to make sure, on the one hand, that such increased authority is not taken as a threat by the political authorities, on the other hand, judges themselves do not become dictators. In such a circumstance he needs to be very political in order to devise a solution. Finally, he comes up with a common, confusing, and authoritative term ie political morality. Apparently, he chooses the term following the teleological method, a method, as Nerhot states, where judges take a decision in a case and then gather the legal arguments to suit the decision they have already taken.[1004]

Central to his theory of political morality is the presumption that people will be ruled by the political authorities following a unique version of political morality. The morality is unique in the sense that its authority lies on the principle of equal concern for all. Dworkin claims that when the political authority or the political system shows equal concern for all, it gets legitimate and practical authority that should be abided by all. Dworkin further clarifies that equal concern is not a theoretical or mechanical term; instead, this concern is real, organic, and effective. Genuineness in the equality of concerns ensures that the people have their political rights in a genuine sense and this, eventually, keeps the members of the community committed to the concerned political authority and political morality. Thus, the law gets its practical authority from political morality.

6.4.1 Political Morality – What Dworkin Does Not Mean

It is very difficult to understand what Dworkin means by political morality. We find numerous sheds of his political morality. At times, it leads us to make as radical claim as considering the term 'political morality' as deceiving because his theory talks about something other than political morality itself. If Dworkin claims that the theory is about political morality, then his theory presents nothing significant apart from what we know. If he claims that the theory contributes something significant then it must be a morality other than the political morality itself. As we have mentioned earlier, in Dworkin's own standard, to enquire about the proposition of law, the inquiry must be in light of the internal practice of it; our question and inquiry must concern the very legal practice and nothing external to it.[1005] If we follow the same standard, we are bound to focus on the political practice itself as long as our question is in connection to political morality. Which practices are the practices of politics? What does politics mean in general?[1006] We define politics as a

[1004] Nerhot, 'The Law and Its Reality' (n 884) 60.

[1005] Dworkin, *A Matter of Principle* (n 1) 174.

[1006] Commonly, we find two versions of politics: the dominant and traditional vertical version that refers to a vertical relationship between the ruler and the ruled; less common in practice but most common in expectation is the horizontal version that refers to a system where ruled are themselves the ruler. To mean political morality, while the first version exclusively refers to the morality of the ruler, the second version it should refer to the morality of all concerned. See Stefano Boni, 'Horizontal and Vertical Politics: Strategic Uses of Abajo and Arriba in the Construction of the Venezuelan Socialist State' (2021) 2021 Focaal 93; Heather K Gerken and Ari Holtzblatt, 'The

strategy or an art of instigating or motivating or persuading people to do things that they would not have otherwise done. Dworkin, himself, at least on one occasion, expresses a similar view about politics.[1007] Thus, we may say that politics is a type of strategy to bypass the very fact and from this perspective, we do not think politics may have any morality at all if we take morality as something having intrinsic value. Thankfully, however, Dworkin, on several occasions, clarifies that he does not count on such types of political practices and, in general, politics.[1008] Therefore, can we conclude that the political morality he is talking about is devoid of politics and its practices, themselves? Can we, even if we follow the standard of Dworkin, logically claim such a thing - it is political morality but politics or its practices has nothing to do with it? Does Dworkin, actually, maintain his politics-detached position consistently?

Dworkin clearly takes a position against the dominant, well-established, and traditional political practices and the justification behind such practices. His political morality, as he claims, is different from the political morality incorporated in the 'great classics of political philosophy' and other ordinary politics; utopian and arbitrary political ideals like fair political structure, just distribution of resources and opportunities etc are not the essential features of his political morality.[1009] He explicitly questions the appropriateness of the decisions about legal rights made by the legislatures.[1010] He claims that the decisions about legal rights are more accurate when it is made by the judges instead of the legislatures.[1011] He takes a position against the political morality of traditional right-based practices for being 'old fashioned utilitarian'[1012]. He is

Political Safeguards of Horizontal Federalism' 113 Michigan Law Review; Jacob Torfing and others, '5 Horizontal, Vertical, and Diagonal Governance' in Jacob Torfing and others (eds), *Interactive Governance: Advancing the Paradigm* (Oxford University Press 2012) <https://doi.org/10.1093/acprof:oso/9780199596751.003.0006> accessed 15 May 2023.We do not know which version Dworkin is referring to. Although his theory refers to both versions, eventually his central elements ie equal concern for all, seem, more compatible with the vertical version. Ironically, however, Dworkin himself would not like to accept this conclusion. Instead, he would like to subscribe to the horizontal version of politics, although, on several occasions, he expressly acknowledges the suitability and practical necessity of the vertical version.

[1007] Dworkin, *Law's Empire* (n 1). To explain what the politics of adjudication means he states – 'the compromises judges must sometimes accept, stating the law in a somewhat different way than they think most accurate in order to attract the votes of other judges, for instance'.

[1008] Dworkin, *Law's Empire* (n 1) 12.

[1009] Dworkin, *Law's Empire* (n 1) 164.

[1010] Dworkin, *A Matter of Principle* (n 1) 26–27. He claims that when a legal issue, for example, a constitutional issue, is decided in the court, it 'can and do provoke a widespread public discussion …may have produced a better understanding of the complexity of the moral issues than politics alone would have provided…judicial review may provide a superior kind of republican deliberation'. See Dworkin, *Freedom's Law* (n 1) 31.

[1011] Dworkin, *A Matter of Principle* (n 1) 24–25.

[1012] Dworkin, *A Matter of Principle* (n 1) 144. Dworkin states – 'I cannot imagine what argument might be thought to show that legislative decisions about rights are inherently more likely to be correct than judicial decisions…technique far more developed in judges than in legislators …Politically powerful groups may prefer that political clubs discriminate…"Legislatures are unlikely to reach a decision about rights that will offend some powerful section of the community … judges have no direct fear of popular dissatisfaction'.

criticising political morality that is utilitarian by rejecting the Hobbesian political community that finds its moral force in the mutual benefits of its members.[1013] Can political practices and their morality survive not being necessarily utilitarian?[1014] The morality he is talking about challenges and, at times, rejects the decision backed by the support of the votes of most of the people of a polity.[1015] The morality, as his morality requires, may not be of the people or of the legislature but rather of the judges' 'own sense of what the community's morality provides'[1016]. Can traditional political morality afford that the judges will consider what should be the morality of people instead of what is the morality of people? Again, by contrast, he does not find enough justification to ignore the importance of the political morality of the majority and morality of the ordinary politics altogether as he is well aware of the fact that the constitutional protection of the rights of the minority is too fragile to support such acts of the judges.[1017] Dworkin criticises the traditional political theories of impractical political morality that expect that the majority will volunteer to sacrifice their own benefit for the benefit of the minority.[1018]

He is rejecting the fundamental promise of modern democracy that presupposes the equality of political power.[1019] Eventually, the equality of political power is not an essential feature of the morality he is talking about; to him, the equal contribution of the people in the political process is not an essential element of that morality.[1020] Nor does it, inevitably, require that the legislatures should have exclusive authority in making political decisions.[1021] This morality is not only, necessarily, relatable to the 'practical politics of

[1013] Dworkin, *Sovereign Virtue* (n 1).

[1014] There are scholars who answer positively while there are other authors who answer negatively to this question. See AJH Murray, 'The Moral Politics of Hans Morgenthau' (1996) 58 The Review of Politics 81; HLA Hart, 'Between Utility and Rights' (1979) 79 Columbia Law Review 828. Chapter 7 explains in detail why the answer can never be positive; the answer is always negative ie political morality is bound to be utilitarian.

[1015] Dworkin, *Law's Empire* (n 1) 340.

[1016] Dworkin, *Taking Rights Seriously* (n 1) 162 (ebook number page).

[1017] Dworkin, *Taking Rights Seriously* (n 1) 228 (ebook page number). He states – 'Nixon's Supreme Court nominations showed, a President is entitled to appoint judges of his own persuasion… So, though the constitutional system adds something to the protection of moral rights against the Government, it falls far short of guaranteeing these rights, or even establishing what they are'. In *Freedom's Law*, he states – 'Of course we should aim to ordinary politics, because braod-based political activity is essential to justice as well as dignity'; see Dworkin, *Freedom's Law* (n 1) 31.

[1018] Dworkin, *Sovereign Virtue* (n 1) 295. He states – 'We" apparently refers to a political majority that adopts a system of redistribution whose premises would be rejected as abhorrent by those it is designed to benefit'.

[1019] Dworkin, *A Matter of Principle* (n 1) 25–27. To see the importance of the equal political power as democratic virtue see Steven Klein, 'Democracy Requires Organized Collective Power*' (2022) 30 Journal of Political Philosophy 26; Sidney Verba, 'Democratic Participation' (1967) 373 The Annals of the American Academy of Political and Social Science 53; Steven Wall, 'Democracy and Equality' (2007) 57 The Philosophical Quarterly (1950-) 416.

[1020] Dworkin, 'Equality, Democracy, and Constitution' (n 1) (see generally).

[1021] Judges are expected to play a decisive role.

adjudication'[1022] but also independent of the political activities of the politicians. To Dworkin, the content of the televised speech of an important politician might be more relevant to the concept of political morality than the content of the 'fine print of a committee report'[1023]. More strikingly, Dworkin claims that political morality does not necessarily requires politically neutral decisions, as he claims, all decisions are, anyway, subject to the political morality of the judges.[1024] He claims that we all are any way subscribe to any form of political wing and whatever we argue, we argue from our own political landscape.[1025] Thus, it is sort of saying - we live by politics. But the paradox is that the political morality he is talking about must keep a distance from ordinary politics.

On the question of the influence of the political parties in the construction of the morality, initially, he rejects the factual possibility of any such influence in the construction of political morality referring to the judgements where the judges appointed by the liberal honouring the conservative political morality and vice versa.[1026] Later on, he acknowledges such influence, but, as he claims, the influence is not as straight-forward as it is usually claimed.[1027] Thus, the morality of the political parties may or may not contribute to the shaping of the political morality he is talking about. Instead, as Dworkin claims, the scenario is more complicated and, he seems, to classify political morality into four classes instead of the traditional two classifications ie biased and unbiased morality.[1028] Paradoxically, we do not know whether his version of

[1022] Dworkin, *Law's Empire* (n 1) 12.
[1023] Dworkin, *Law's Empire* (n 1) 349.
[1024] Dworkin, *Law's Empire* (n 1) 257–260, 263, 271, 334–335. Dworkin further states – 'Lawyers and judges cannot avoid politics in the broad sense of political theory'; see Dworkin, *A Matter of Principle* (n 1) 146. On the other hand, neutrality is considered as a precondition of the contemporary political philosophy. See Steven Wall, 'Neutrality and Responsibility' (2001) 98 The Journal of Philosophy 389.
[1025] Dworkin, *Law's Empire* (n 1) 257–260, 263, 271, 334–335.
[1026] Dworkin, *Law's Empire* (n 1) 358–359.
[1027] Dworkin, *Law's Empire* (n 1) 358–359.
[1028] Dworkin, *Law's Empire* (n 1) 358–359. For traditional political biases in the judgement see Eric A Posner, 'Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform' (2008) 75 University of Chicago Law Review 853; David Orentlicher, 'Politics and the Supreme Court: The Need for Ideological Balance' (2018) 79 University of Pittsburgh Law Review <http://lawreview.law.pitt.edu/ojs/lawreview/article/view/565> accessed 16 May 2023; Stephen Jessee, Neil Malhotra and Maya Sen, 'A Decade-Long Longitudinal Survey Shows That the Supreme Court Is Now Much More Conservative than the Public' (2022) 119 Proceedings of the National Academy of Sciences e2120284119; 'Analyzing Ideological Bias on the Supreme Court' (24 May 2021) <https://stanforddaily.com/2021/05/24/analyzing-ideological-bias-on-the-supreme-court/> accessed 16 May 2023; Allison P Harris and Maya Sen, 'Bias and Judging' (2019) 22 Annual Review of Political Science 241; Elena Kantorowicz-Reznichenko, Jarosław Kantorowicz and Keren Weinshall, 'Ideological Bias in Constitutional Judgments: Experimental Analysis and Potential Solutions' (2022) 19 Journal of Empirical Legal Studies 716.

political morality has these four features or not. If not, which features are more related to his versions of political morality?

Dworkin claims that law requires political judgement based on 'a justification drawn from the most philosophical reaches of political theory'[1029]. If we could understand him correctly does this mean his political morality also take note of the political wisdom of the theories as that of the prominent political philosophers like Machiavelli, Kautilya, or Hobbes?[1030] We think it should not be the case, and we have reason to believe that Dworkin might not have thought that. His political morality, as he expressly mentions, requires a substantial synchronization of the community ambition, law, legislature, and the concept of justice so that there remains no conflict among these.[1031] We think none of us is familiar with such a scenario hence it is a completely unique and unprecedented type of political landscape than the landscape we know. Therefore, will it be an exaggeration to claim that his political morality is something that deserves a new name just to make sure we are not confused? We think we do not need to submit more evidence that the political morality of Dworkin, in fact, is not political morality as such. Since he has been always reproving the political process including the legislative process and the morals associated with the process, his political molality seems to be fundamentally different from the political morality we are aware of.[1032] To avoid confusion, from now on we call this morality 'prospective political morality' **(PPM)**, while the acronym 'PM' will be used to refer to political morality.

6.4.2 Prospective Political Morality (PPM) – Morality in the Best Light of the Theory of Dworkin

It is a very difficult task to understand what Dworkin means by prospective political morality (PPM). If we understand it enough, the sense it gives us is connected to the result of three types of integrity ie political

[1029] Dworkin, *Law's Empire* (n 1) 379–380.
[1030] Kautilya, *The Arthashastra* (Penguin UK 2000); Machiavelli and Grafton (n 776).
[1031] Dworkin, *Law's Empire* (n 1) 406.
[1032] However, his shift from political morality to prospective political morality is not supported by any understanding of the main problem for which he thinks the shift is essential. He states – 'Although the political process that leads to a legislative decision may be of very high quality, it very often is not, as the recent debate in the United States about health care reform and gun control show. Even when the debate is illuminating, moreover, the majoritarian process encourages compromises that may subordinate important issues of principles'. See Dworkin, *Freedom's Law* (n 1) 30. He shifts his trust to the court from the legislature. Unfortunately, the court has a similar problem although not as serious as that of the legislature but substantial enough to distort the law and unleash the reign of terror in the disguise of law. For example, see the US Supreme Court judgements on the homosexuality issue that put unnecessary emphasis on political morality. See *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44); *Bowers v. Hardwick* (n 299); *Obergefell v. Hodges* (n 410). Also see *Dudgeon v The United Kingdom* [1981] ECHR 7525/76, A45; *Lee v Ashers Baking Company Ltd and others* [2018] Supreme Court of the United Kingdom [2018] UKSC 49. Chapter 8 clarifies that the issue of Homosexual practice is neither an issue of the political plot nor an issue of the legal plot; instead, it is purely an issue facilitated by the Freedom plot.

integrity (supposed)[1033], legislative integrity, and adjudicative integrity. Thus, the PPM is not an out-there concept instead it is rather a result of activity conducted by the judges while considering three types of integrity, and principles like fairness, justice etc. The sense of PPM can be extracted by the interpretation of the normative or prescriptive commitment (or command) of a supposed community with political integrity and reporting of two (supposed or actual)[1034] political institutions one of which with legislative integrity while another with adjudicative integrity. We can get a reasonably comprehensive idea about PPM when a political official, preferably a judge[1035], effectively interprets the normative or prescriptive commitment and the reporting of either or both political institutions.[1036] However, it should be mentioned that the political integrity of the supposed community plays the central role in this regard in the sense that if the commitment (or command) of such community is certain and undisputed we may not need to ensure the other two types of integrity. Political integrity set the standards and conditions required to be maintained to be considered as a genuine community while adjudicative integrity refers to the principles and requirements that must be taken into consideration by the judges at the time of having a sense of the PPM subject to which he or she will interpret a provision of positive law and adjudicate the case before him or her.[1037] To have a reasonably comprehensive idea as to what genuine community means to Dworkin, we have to have a comprehensive idea about the hypothetical political community that is the only parameter and prism with reference to which we can get the most accurate idea about what Dworkin might mean by political integrity and commitment of such a genuine community.

Dworkin clarifies that the genuine community as distinguished from the bare community is neither a natural nor default community nor a 'rulebook' community, instead the community is the community of specific principles and conditions.[1038] A genuine community must have three principles. First, is the principle of participation which provides that each person in the community will have a meaningful role in making the

[1033] It is supposed because it is unlikely to happen in practice. Dworkin himself has this opinion that in practice we can never expect that it will happen.
[1034] The condition set for the political institutions may be fulfilled or may not be, hence, the institutions can be supposed or actual.
[1035] It is true that Dworkin does talk about other political officials ie legislature, but the narrative of his theory clearly demonstrates that it should, generally, be done by the judges since they have more expertise and a politically safer position for being not at risk of feeling pressure from the majority people of the community.
[1036] Dworkin, *A Matter of Principle* (n 1) 18.
[1037] We do not find sufficient discussion about legislative integrity in Dworkin's discussion. He seems, logically finds that legislative integrity plays the least role or ignorable role in the formulation of the PPM. Further, his emphasis on the judges playing the role of general and default interpreters justifies his omission of discussion about legislative integrity. This corroborates our claim that Dworkin's PPM is not political morality as such for it is demonstrated that he prefers maintaining a distance from the major political institution ie legislature.
[1038] Dworkin, *Law's Empire* (n 1) 209–216.

political decisions for the community in the sense that he has the force to make a difference in the decision of the community.[1039] Further, his role or such capacity is not structurally fixed or limited.[1040] As a participant in the community, each member has the ability to make a difference if he or she wants.[1041] Second, is the principle of stake which provides that the process of being a member of such a community is not a passive process.[1042] Instead, the process is sound and active; one is not a member of such a community unless he or she is treated as such by others.[1043] In this sense the community is reciprocal; one is subject to the other's approval.[1044] Third, is the principle of independence which provides that each member of the community is not only independent but also a distinct entity in terms of their moral and ethical judgement.[1045] Further, the principle requires that the state will not only be prevented from dictating the individual decisions of the member but also be responsible for making sure that each member of the community is getting enough incentives to develop their own thought and judgements.[1046]

The essential condition that a community must fulfil is that the community needs to be taken as a moral agent and it must 'act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are'[1047]. The community has equal concerns for all its members and because of this virtue, the community has the moral authority to enjoy a monopoly in inflicting coercion on its members, when necessary.[1048] Such a monopoly of the community is justified by the fact that all members will have the right to get equal treatment.[1049] The equal treatment by the community is demonstrated by the fact that all members have a stake in making the decision the community is enforcing and none will eventually lose anything substantially by such a decision.[1050] The community will be so deeply personified that it will be considered as a separate moral person, however, the person is not like a Hegelian super-person.[1051] This is neither a statistical community in the sense of Canadian people or

[1039] Dworkin, *Freedom's Law* (n 1) 24–26. Dworkin States – 'We do not engage in politics as moral agents unless we sense that what we do can make a difference'; see Dworkin, *Sovereign Virtue* (n 1) 202.
[1040] Dworkin, *Freedom's Law* (n 1) 24–26.
[1041] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 337–338.
[1042] Dworkin, *Freedom's Law* (n 1) 24–26.
[1043] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 339.
[1044] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 339.
[1045] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 340.
[1046] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 340; Dworkin, *Freedom's Law* (n 1) 24–26.
[1047] Dworkin, *Law's Empire* (n 1) 167.
[1048] Dworkin, *Law's Empire* (n 1) 188, 200.
[1049] Dworkin, *Taking Rights Seriously* (n 1) 334.
[1050] Dworkin, *Freedom's Law* (n 1) 24–25. To explain the point Dworkin refers to the incident of Orchestra and states – 'No musician sacrifices anything essential to his control over his own life'.
[1051] Dworkin, *Law's Empire* (n 1) 167–172.

American people nor a communal community in the 'monolithic' sense; it is a communal community in the 'integrated' sense where 'the unit of judgment resides in the individual' and the unit of responsibility is collective.[1052] All members of the community are committed to the interest of all other members of the community.[1053] All bear the responsibility for the acts of other members of the community while all will have their own responsibility for their respective judgements.[1054] This is an organic community, a community as Dworkin explains:

> each citizen respects the principles of fairness and justice … no one be left out, that we are all in politics together for better or worse … The *concern it expresses is not shallow,* like the crocodile concern of the rulebook model, but genuine and pervasive…*a deep and constant commitment commanding sacrifice, not just by losers but also by the powerful who would gain*…that obligations of fraternity need not be fully voluntary… of course the conditions will not be met unless *most members recognize and honor these obligations.*[1055]

He states that each member of the community is integrated into the community in a complex way to form an organic union that is united not based on a weak bond as the Hobbesian reciprocal and utilitarian bond, nor is it united with romantic bonds as love, affection, paternalism, fraternity, and so on. The bond is the bond by which the Germans born after 1945 feel connected and responsible for the acts of the massacre committed during the second world war by the Germans of their previous generation.[1056] Dworkin states that the 'actions were not theirs as individuals, but they believe themselves in some complex way' connected and responsible for.[1057] Will our conclusion be illogical if we conclude that the nature of the bond is sort of transcendental as the bond binds people beyond the generation?[1058]

[1052] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 324.
[1053] Dworkin, *Taking Rights Seriously* (n 1) 334.
[1054] Dworkin, *Taking Rights Seriously* (n 1) 334.
[1055] Dworkin, *Law's Empire* (n 1) 201, 213 (emphasis added).
[1056] Dworkin, 'Equality, Democracy, and Constitution' (n 1).
[1057] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 334.
[1058] We have enough reason to submit that our conclusion will not be illogical. We asked the question to ChatGPt - does a transcendental bond binds people beyond the generation?'. It returns – 'Transcendental bond refers to a spiritual or metaphysical connection between individuals that goes beyond physical or temporal boundaries. It can be interpreted in various ways, depending on the context in which it is used.
If we take the perspective that a transcendental bond is a deep, spiritual connection between individuals that transcends the limitations of time and space, then it is possible that such a bond could bind people beyond generations. For example, some people might feel a strong connection to their ancestors, even if they never knew them in person'. For further support please see Rosi Braidotti, 'A Theoretical Framework for the Critical Posthumanities' (2019) 36 Theory, Culture & Society 31; Howard M Bahr and Kathleen Slaugh Bahr, 'A Paradigm of

Along the line of both legislative integrity and political integrity is the requirement that the community members will have a 'roughly equal share of control over the decisions made by Parliament'[1059] and legislature must take note of it while legislating. The legislative integrity requires that the judges will interpret the legislative materials not in the light of the intention of the legislature but in the light of the special political theory the PPM is part of and that theory must be based on the sovereign virtue of the law that requires one 'to be treated with the same respect and concern as anyone else'.[1060] Such integrity supposes that the legislature has an obligation to 'refuses to take popular indignation, intolerance and disgust as the moral conviction' of any political community by virtue of the 'substantive theory of representation'[1061] .[1062]

On the point of adjudicative integrity, Dworkin provides a complex and prolonged list of requirements, precautions, and privileges that judges need to take note of when adjudicating. To ensure adjudicative integrity, the judge will pick up and prioritise a narrative that will show the community in the best light from the standpoint of the PPM.[1063] Judges, while adjudicating, will take note of the principles of fairness and justice and, when necessary, they will prioritise one over another in the light of the integrity of the law. To this end, a judge will see the law as a whole, not as a compartmentalised discipline. Please note that such integrity does not necessarily means pervasive consistency; judges may deviate as much as the deviation is essential to maintain the overall integrity of the law. Further, whenever it is essential, he or she will accept the compartmentalisation of law, and take note of the local priority principles.[1064] Associating the interpretive activity of the judges to the chain novel method of the novelists, judges are also instructed to play a similar role where they themselves are the same time critics and authors of their work.[1065] Their rule as adjudicators is neither identical to judicial activism nor to judicial pessimism. They will neither follow the model of pragmatism nor conventionalism, instead, they will follow the law as integrity. In such a role, the judges are expected to 'strike down racially discriminatory laws even if they benefit the community as a whole'[1066]

Family Transcendence' (1996) 58 Journal of Marriage and Family 541; Celina Timoszyk-Tomczak and Beata Bugajska, 'Transcendent and Transcendental Time Perspective Inventory' (2019) 9 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.02677> accessed 16 May 2023.

[1059] Dworkin, *Law's Empire* (n 1) 178.

[1060] Dworkin, *Taking Rights Seriously* (n 1) 140, 274.

[1061] Dworkin, *A Matter of Principle* (n 1) 69.

[1062] Dworkin, *Taking Rights Seriously* (n 1) 303.

[1063] Dworkin, *Law's Empire* (n 1) 2249.

[1064] Dworkin, *Law's Empire* (n 1) 250.

[1065] Dworkin, *Law's Empire* (n 1) 201.

[1066] Dworkin, *A Matter of Principle* (n 1) 66.

Chapter 7: Inoculating Dworkin to the Sting of the Lawjon Approach

We have wrapped up the previous chapter sketching Dworkin's thoughts about PPM in the best light of Dworkin's account to avoid contradiction as much as possible and to make sure that the PPM makes sense as much as possible. We have tried to avoid the obvious contradictions that his relevant theory offers. His unawareness of the approach he follows eventually deprives him to be vigilant in avoiding the stings that the lawjon approach, inevitably attributes of its own in any legal discourse. His lack of awareness of the alternative freejon approach restrains him to take the privilege of evaluating the contents of his political theory of PPM. The objective of this chapter is to evaluate the justifiability of PPM as a practical authority of law with reference to his own narrative of PPM and the concept of law and the sense of law. We present this chapter in two parts. The first part explains how the PPM is choked by its own narrative and the concept of law. The second part explains how Dworkin's narrative of PPM and the concept of law is substantially incompatible with the legal discourses reflecting the sense of law.

7.1 Failure of PPM by its Own Narrative

This section of the discussion points out the flaws of the PPM theory by virtue of its own context, conditions, and requirements. It lacks narrative consistency on different counts.

7.1.1 The Genuine Community of Dworkin – A Narrative Misnomer

The sense of PPM is inevitably dependent on the sense of the genuine community proposed by Dworkin. The description of the genuine community will eventually draw many critics to some obvious and empirical questions: does such a community exist? Can there be any such community at all? Dworkin has a logical defence against such questions that the genuine community needs not to be a practical or empirical community; in fact, he acknowledges that such a community is possible only in idea or thought.[1067] As long as the concern is to set some normative standard with reference to which a community's interpersonal activities will be facilitated, we do not need the practical existence of such a community; it is sufficient to extract the supposed standard that such a community could have produced.[1068] Therefore, our criticism against the theory of Dworkin is not drawn from the empirical perspective, but from the perspective of coherence. The narrative of such a community must be consistent and the related PPM, as per Nerhot's

[1067] Dworkin, *Sovereign Virtue* (n 1) 234. He states – 'Of course, all this is utopian. We can scarcely hope that a thoroughly integrated political society will ever be realized. It will not be realized in the coming decades. But we are now exploring utopia, an ideal of community we can define, defend, and perhaps even grope our way toward, in good moral and metaphysical conscience'.

[1068] Kelsen's 'Grundnorm', and Rawls' 'original position' are examples of such a strategy. None of the theories requires the practical existence of those ideas or states. See Kelsen (n 18); Rawls (n 132).

'rules of acceptability'[1069], must follow the normative consistency. Dworkin's narrative of the genuine community fails to comply with consistency because it contradicts his own narrative or because it fails to provide us with enough narration. Consequently, such inconsistency in his political theory either comes up with inconsistent law or renders the necessity of law, as a whole, irrelevant.

For a moment, we have to go back to the previous chapter where Dworkin presents 4 points against the theory of the original position of Rawls. Our point of interest is on the first two points presented in favour of his rejection of the original position: 1. Ordinary political conviction does not support it, and 2. 'our established political traditions or ordinary moral understanding' does not support that the acceptance of a certain principle has to be made in a 'particular predicament of the original position'. Point 1 requires that ordinary political conviction must support the idea of Dworkin's genuine community and the associated sense of PPM. According to point no 2, the community and the PPM may be logically rejected as 'our established political traditions or ordinary moral understanding' has no compelling reason to accept PPM that is proposed to be extracted from a different context and arrangement than the established political tradition and morality accept. Therefore, it is certain that the genuine community and the related PPM that the community gives rise to fail to comply with Dworkin's own conditions.

We find no reason to accept the political and moral conditions of Dworkin, nor do we support that new reality and consequential new principles can be introduced without a complete and comprehensive narrative of the system or context in which the reality and the principles are introduced. Dworkin reminds us about the contemporary philosophy of science that claims - 'our belief about the world and about everything is based on the particular theoretical structure we are in ...our belief is liable to be altered as we change the theoretical framework'[1070] . Although Dworkin is critical about applying the strict standard of scientific discipline in the interpretation of artistic, political, or legal materials, he defends his creative constructive interpretation model with the assurance that the constraints created by the internal theoretical coherence are no way less stringent than that of the scientific model.[1071] Eventually, it is apparent that Dworkin himself presumes a comprehensive theoretical framework that will guide his activity of the construction and interpretation of the community. More precisely, we may expect that he presumes the same or similar thought as that of Nerhot who posits that 'all interpretation is located within a philosophy that guides and determines it[1072]. This is exactly what we want to say – Dworkin needs a philosophy or a theoretical

[1069] Nerhot, 'Interpretation in Legal Science' (n 22) 202. He states that the validating principle must comply with the 'rules of acceptability'.
[1070] Dworkin, *A Matter of Principle* (n 1) 169.
[1071] Dworkin, *A Matter of Principle* (n 1) 169–173.
[1072] Nerhot, 'Interpretation in Legal Science' (n 22) 194. See Humboldt (n 214) 134.

framework that will guide interpreting his genuine community and the derived morality ie PPM. He introduces an unprecedented type of community in place of the 'bare' community, and thus, there is a drastic shift in the context. He shifts substantially from existing political morality to a whole new brand of prospective political morality (PPM). He must be backed and guided by a philosophy or theoretical framework.[1073] Unfortunately, as we have seen in the previous chapter, he rejects any such philosophy.[1074] It is noteworthy that the freejon approach neither needs any shift in the community nor needs to invent a new source of or type of contingent morality. Freejon approach is for the community as it is and the morality it considers is the morality of law already in practice. The morality associated with the freejon, however, unwarily, has been shaping the legal landscape; the frequent omission of its application is due to the fact that we are unaware of it and, in some cases, we confuse it with other contemporary moralities like political morality, social morality, personal morality and so on.[1075]

[1073] On the question of the inevitability of such philosophy, Humboldt states – 'Whoever, then, would attempt the difficult task of ingeniously introducing a new state of affairs and grafting it to what already exists…He must wait, therefore, in the first place, for the full working out of the present in men's minds...Now, without directly altering the existing state of things, it is possible to work upon the human mind and character and give them a direction incompatible with it; and this is precisely what the wise man will attempt to do. Only in this way is it possible to reproduce the new system in reality, just as it has been conceived in idea; The most general principles of the theory of all reform may therefore be reduced to these -1. We should never attempt to transfer purely theoretical principles into reality, before the latter offers no further obstacles to achieving results to which the principles would always lead in the absence of outside interference. 2. In order to bring about the transition from present circumstances to those which have been planned, every reform should be allowed to proceed as much as possible from men's minds and thoughts; see Humboldt (n 214) 134. Other contemporary scholars also emphasise on the importance of a theoretical or conceptual framework to initiate a concept. See Per Svejvig, 'A Meta-Theoretical Framework for Theory Building in Project Management' (2021) 39 International Journal of Project Management 849; Christopher S Collins and Carrie M Stockton, 'The Central Role of Theory in Qualitative Research' (2018) 17 International Journal of Qualitative Methods 1609406918797475; University of Colorado-Denver and others, 'Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for Your "House"' (2014) 4 Administrative Issues Journal Education Practice and Research <https://aij.scholasticahq.com/article/7-understanding-selecting-and-integrating-a-theoretical-framework-in-dissertation-research-creating-the-blueprint-for-your-house> accessed 16 May 2023; Luis Gonzalo Trigo-Soto, 'Relevance of the Theoretical Framework in Scientific Initiation. An Approach from Political Sciences and the Study of the Development of Historical Institutionalism' (2021) 15 Panorama 52.

[1074] Dworkin may claim that his interpretation is guided by the formal rules as laid down in the statute, other legislative decisions, precedents, and so on. Is not his theory more about when should judges disregard these formal rules to make sure that rules like that of the Nazis do not get recognition? In such a case, as he may claim, the interpretation will be guided by fairness, justice, and integrity of the law. Fundamental question returns, under what authority these will be accepted? In addition, what, exactly, constitutes the integrity of law is seriously disputed. Further, we will show that the very integrity issue may end up requiring the help of the evaluative self.

[1075] There are countless instances where the morality of law is confused with contextual moralities. For confusion with social morality see Duguit (n 46); Coker (n 46); Mathieu Deflem (ed), 'Emile Durkheim on Law and Social Solidarity', *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008) <https://www.cambridge.org/core/books/sociology-of-law/emile-durkheim-on-law-and-social-solidarity/1B9C988107728E9627C66803C777E6D7> accessed 16 May 2023; Alan Hunt, 'Emile Durkheim-Towards A Sociology of Law' in Alan Hunt (ed), *The Sociological Movement in Law* (Palgrave Macmillan UK 1978)

Another genuine flaw of the genuine community is that it suffers serious omission of narrative. Can narrative consistency afford the omission of narrative?[1076] For example, let's take the instance of the German community that feels guilt and responsibility for the acts committed against the Jews by the Germans of its previous generation (hereinafter German relationship).[1077] Dworkin brings this instance in numerous places of his theory to give us a sense of the organic nature and oneness of his genuine community. His theory seriously lacks a narrative explaining the nature of the relationship among the community members. We believe understanding the nature of the relationship is a central requirement for the interpretation of the PPM to make sure that the PPM remains respectful or vigilant to the requirements of the relationship; in fact, we should not be taken as wrong if we say that the nature or sense of the PPM is likely to be shaped by the nature of the relationship. Dworkin does clarify what the relationship is not like. He clarifies that the relationship is not – paternalistic, fraternal, altruistic, utilitarian, romantic, contractual, social, political (ordinary), statistical, communal in a monolithic sense, etc.[1078] Dworkin specifies that the community is not based on reciprocal relationships as that of brotherhood, friendship, love, neighbourhood, colleagues, countrymen, etc.[1079] Unfortunately, his theory fails to clarify exactly what the relationship is like. He does tell us that the relationship is communal in its integrated sense.[1080] Nevertheless, we are afraid that the narrative is not enough because of two reasons – 1. The narrative is not sufficient to understand the nature of the relationship; and 2. It contradicts the German relationship; our belief is that no immigrant duly integrated into the German community will feel the guilt and responsibility for the acts committed by the previous generation of Germans.

<https://doi.org/10.1007/978-1-349-15918-5_4> accessed 16 May 2023; Charles-Louis De S Baron De Montesquieu, *The Spirit of Laws* (Cosimo, Inc 2007); Eugen Ehrlich, 'Montesquieu and Sociological Jurisprudence' (1916) 29 Harvard Law Review 582; James A Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' (1961) 7 Villanova Law Review 1; William L Grossman, 'The Legal Philosophy of Roscoe Pound' (1935) 44 The Yale Law Journal 605. For confusion with religious morality, see Erwin Akhverdiev and Alexander Ponomarev, 'Religion as Factor in Formation of Law: Current Trends' (2018) 50 SHS Web of Conferences 01024; Stefan Hammer, 'Religion Impacting the Concept of Law' (2021) 7 Interdisciplinary Journal for Religion and Transformation in Contemporary Society 3; Mulford Q Sibley, 'Religion and Law: Some Thoughts on Their Intersections' (1984) 2 Journal of Law and Religion 41; John W Morden, 'An Essay on the Connections between Law and Religion' (1984) 2 Journal of Law and Religion 7. For such confusing relationship, see W Bradley Wendel, 'Legal Ethics as Political Moralism or the Morality of Politics' (2008) 93 Cornell Law Review 1413; Christopher F Mooney, 'Public Morality and Law' (1983) 1 Journal of Law and Religion 45; *Law, Politics, and Morality: European Perspectives III.: Ethics and Social Justice.*, vol 215/III (Duncker & Humblot GmbH 2007) <https://www.jstor.org/stable/j.ctv1q6bc9g> accessed 16 May 2023.

[1076] We think no one will respond to this question positively.

[1077] Dworkin, *Freedom's Law* (n 1) 23; Dworkin, *Sovereign Virtue* (n 1) 225.

[1078] Dworkin, *Sovereign Virtue* (n 1) 224. He states – 'The argument from integration does not suppose that the good citizen will be concerned for the well-being of fellow citizens; it argues that he must be concerned for his own well-being …So the integrated citizen differs from the altruistic citizen'.

[1079] Dworkin, *Law's Empire* (n 1) 198.

[1080] Dworkin, *Sovereign Virtue* (n 1) 223–234; Dworkin, 'Equality, Democracy, and Constitution' (n 1) 324–340.

Dworkin clarifies that the relationship is not - metaphysical (ie bond - soul with soul or mind with mind), empirical (ie demonstrable through agreement or contract, for instance), or psychological (ie community members think so).[1081] He claims that the relationship is moral.[1082] Now the question is - what is this moral like? What is the source of morality? Can the possibility of the involvement of GSEC be ruled out altogether in the formulation of such morals; we mean what is the guarantee that this community morality is not in fact the morality associated with the GSEC? X decides to stay with the community C. According to the explanation by Dworkin, the motivation behind X's belonging to C is political, although we do not know exactly if it is in relation to the vertical relationship ie morality of ruling or the horizontal relationship ie morality of being ruled. The most favourable explanation for Dworkin is that X will stay with the members of the community C, no matter what happens and whatever C does, X's support is always there. Why would X like to or love to or committed to being attached to the community C and accept all its responsibilities? What causes X morally so committed to C? Assumably, X might be drawn to C because of some charisma or qualities of C. As per Dworkin, one such criterion and, of course, the most important criterion, is that C has equal concern for X. If this is the case, then it refers more to the morality of ruling ie C rules X. Can we logically agree that C buys this moral authority from X in exchange of its assurance that it will have equal concern for X? We cannot say so because Dworkin posits that the spirit behind such an organic community is not any form of reciprocal promise or utilitarian interests.[1083] Further, the expectation that all will be heard or all will be equally treated is a consequence of a concern of insecurity, or distrust and this completely goes against the very nature of the bond Dworkin's narrative of the genuine community offers. Therefore, it is apparent that such vertical relationships and the associated morality that could, arguably, take the shape of political morality as such do not fit in the narrative of the genuine community.

Most importantly, Dworkin's equal concern does not make any sense when the relationship is horizontal, a relationship central to the formulation of a community; equal concern has almost no force in relation to X's relationship with Y or Z ie other members of the community C. This demonstrates that the morality involved to become a moral member of the community is, for sure, not a political morality; instead, the narrative is more linked to personal morality. If the equal concern has any role to play, it may play in a vertical relationship ie C rules X. To put the same question again - what causes X morally so committed to C? Since the community C is an organ and X is an essential part of the organ, C will by default take care of the

[1081] Dworkin, *Freedom's Law* (n 1) 23.
[1082] Dworkin, *Freedom's Law* (n 1) 23.
[1083] Dworkin, *Law's Empire* (n 1) 198. Dworkin states – 'political community must be more than a Hobbesian association for mutual benefits in which each citizen regards all others as useful means to his or her own ends'.

interest, liberty and well-being of X. Since X's interest is inevitably and in proportional order linked with the interest of C and vice versa one will always take care of others. On the contrary, as Dworkin's narrative provides, X has complete Freedom to make his or her own decision and the ability to take his or her own decision is not structurally fixed. In such an equation, X's moral obligation to abide by the rules and regulations of C can never reject the personal moral commitment of X thereto; in fact, we do not see any other way but the involvement of the moral agency of X himself or herself.[1084] Neither can the very authority of the rules and regulation of C be the source of the moral obligation of X; instead, the case is the opposite.[1085] Thus, if Dworkin denies the intrinsic sense of humans of being intrinsically obliged, he loses it all. Therefore, it must be the personal morality of X who for utilitarian or any other reason accepts that he or she should be obliged to follow the instructions of C. Paradoxically, however, to accept personal morality as the basis of the practical authority of law is to accept what he always rejects; Dworkin's main concern has been always to avoid personal morality.[1086]

Now suppose Dworkin makes this mistake by considering personal morality as political morality. Could Dworkin succeed with the narrative of his genuine community? Even if his community and the relationships among the members are based on personal morality, the community fails to comply with the narrative consistency. We accept that personal morality does allow decisions that may go against X's personal interests. X may make compromises to a certain extent. But the same question re-emerges – why and to what extent one should be ready to make compromises? Inevitably, the question pushes us to the utility

[1084] Apart from the very personal moral obligation what other source of obligation may play roles here? Sources of obligation may be countless social, political, traditional, cultural, professional, situational, and so on. If we accept any of this obligation apart from the very personal obligation, can we, in any consideration submit that X has complete Freedom in making his or her decision if the decision is not of his or her own? We should clarify here that as far as the concept of Freedom is concerned, it is not inevitable that the decision one takes must be free from all sorts of pressure, external forces, internal forces, or situational forces. What is essential is to ensure that one finds himself or herself in such a decision; the decision reflects his very essence. Thus, the force of obligation is exerted by the very person who takes the decision. Does Dworkin's narrative provide any assurance that the force obligation will be asserted by the very person and that the force will not be exerted by other sources mentioned above? Dworkin's narrative never provides such assurance. Thus, his community is never as organic and genuine community as he thinks and here, it is re-confirmed that his theory cannot succeed at all without accepting Freedom as the foundational basis of it.

[1085] If Dworkin claims that the source of the obligation is the rules and regulations of the C itself while denying the personal moral authority of X, then Dworkin's claim is liable to be rejected in two counts – 1. It will reject his own narrative that X has moral authority to take a decision and such rejection will lead to the rejection of his genuine community too. 2. It is, more or less, accepting the very claim of conventional positivism ie the force is in the rules and regulations. Dworkin, himself rejects this claim of positivism.

[1086] Dworkin, *Law's Empire* (n 1) 173–174. Dworkin claims that the 'special and complex responsibility of impartiality' that the law requires cannot be met by 'applying our ordinary convictions about individual responsibility'.

question, or question of objectivity, at the least, in the abstract sense.[1087] When the question is about objectivity, the community objectives must be specific to allow one to calculate his or her sacrifices against the objective benefit. A community with unspecified objectives can never fulfil the inevitable requirement.[1088] Law, as we will see in a while, is not an objective or goal-bound discipline.

Then, what is the bond that keeps people united in the genuine community? Dworkin's theory gives us the narrative of principles. Dworkin claims that such a community will be based on the principles and to make sure that the principles are not applied arbitrarily, principles of integrity will be followed in the application of the principles.[1089] What are these principles? How should we determine these principles? Although Dworkin's narrative is ambiguous in this regard, he does mention some principles like abstract principles of the constitutions, justice, fairness, integrity, restriction in the external preference, omission of the process by one class against another class, etc.[1090] The principles themselves bring more questions: why should we consider the abstract principles of the constitution as principles for the formation of the community? Are these principles themselves reliable or decisive enough? The answers are negative: in fact, these principles

[1087] Philippe Van Parijs, 'What Makes a Good Compromise?' (2012) 47 Government and Opposition 466. The author claims that a good compromise requires – 'it must make both parties better off than under the status quo, not just better off than in the absence of compromise'. See also Amy Gutmann and Dennis F Thompson, 'Valuing Compromise for the Common Good' [2013] *American Academy of Arts & Sciences* <https://www.amacad.org/publication/valuing-compromise-common-good> accessed 16 May 2023. In addition, we must take note of the point that the process of compromise itself is a complex process which most people do not understand. A meaningful compromise requires understanding when not to compromise. See Sandrine Baume and Yannis Papadopoulos, 'Against Compromise in Democracy? A Plea for a Fine-Grained Assessment' (2022) 29 Constellations 475.

[1088] Personal morality varies to an infinite degree based on infinite interests, objectives, values, and utilities. Thus, any community, however inclusive, compromising, tolerant, or liberals it is, the community is bound to come into conflict with its members to the extent that would be too burdensome to the extent of compromise its members would be agreed to make and this will lead to the hard cases solution of which is Dworkin's main concern. In this process, instead of solving the problem, he is adding more problems. Therefore, the community must have specific, transparent, and acceptable objectives that will make sense as 'common good'. See Richard Layard, 'Wellbeing as the Goal of Policy' (2021) 2 1; Mark C Murphy, 'The Common Good' (2005) 59 The Review of Metaphysics 133; Waheed Hussain, 'The Common Good' <https://plato.stanford.edu/entries/common-good/> accessed 16 May 2023; Jonathan Marks, 'Jean-Jacques Rousseau, Michael Sandel and the Politics of Transparency' (2001) 33 Polity 619; George Duke, 'Political Authority and the Common Good' (2017) 65 Political Studies 877; Louis Dupré, 'The Common Good and the Open Society' (1993) 55 The Review of Politics 687; William Arthur Galston, 'The Common Good: Theoretical Content, Practical Utility' [2013] *American Academy of Arts & Sciences* <https://www.amacad.org/publication/common-good-theoretical-content-practical-utility> accessed 16 May 2023; Piero Tarantino, 'An Alternative View of the European Idea of the Common Good: Bentham's Mathematical Model of Utility' [2020] Revue d'études benthamiennes <https://journals.openedition.org/etudes-benthamiennes/8227> accessed 16 May 2023.

[1089] Dworkin, *Law's Empire* (n 1) 216.

[1090] Dworkin, *A Matter of Principle* (n 1) 199; Dworkin, 'Equality, Democracy, and Constitution' (n 1) 341.

themselves are breeding grounds for numerous issues involved in the hard cases.[1091] Why should one accept these principles? What is the extent of the external preference one can make about the personal issue of another? What are the criteria for recognising a process initiated by one class as detrimental to another class of people? Heterosexual people, for instance, may submit dozens of reasons against homosexuality, and hence, may demand criminalization of it; the community is bound to take care of the interest of both types of people. Is there any way out to making a balance and honouring the interest of both classes of people? There is not any such way and the dispute has been in full swing for decades; Dworkin's community contributes nothing in resolving such hard cases.[1092]

[1091] For instance, Dworkin states – 'It insists on a structural place for constitutional guarantees of freedom of speech, association, and religion, all of which are necessary to allow and encourage individuals to take responsibility for their own personalities and convictions…liberal tolerance of unpopular sexual and personal morality part of the very conditions of democracy'. We think that, eventually, there is nothing new in this. Numerous scholars have been claiming the same, while numerous other scholars and judges opposing the same claims. We do not see any contribution in the claim of Dworkin as he fails to give any solution of the issues relating to these so-called constitutional guarantees. Why would the majorities accept it? Further, and most important question, if these are accepted at all by the majorities, the acceptance must be reflected by the legislative action as Dworkin fails to show any specific reason as to why judges be accepted to take this so-called political matter as matter of issue under their jurisdiction. To take another example, Dworkin states about the right of abortion that 'right to abortion, are not actually "enumerated" in the Constitution at all, but were invented by the justices themselves'; see Dworkin, *Freedom's Law* (n 1) 1. Isn't it making the situation more complicated? Cannot the group that is against the right to abortion take it as a defence to criminalise abortion claiming that since the right is not guaranteed by the Constitution, it is a matter of political decision and thereby beyond the jurisdiction of the court? They do it. See *Dobbs v. Jackson Women's Health Organization* (n 497); P Liben, 'What the U.S. Constitution Says. The Law and Abortion' (1995) 26 Freedom Review 20. There are countless problems associated with the Constitutional provisions. See Lynn A Baker, 'Constitutional Ambiguities and Originalism: Lessons from the Spending Power Symposium: Original Ideas on Originalism' (2009) 103 Northwestern University Law Review 495; David Landau, 'Abusive Constitutionalism' (2013) 47 U.C. Davis Law Review 189; Carlos E González, 'Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice' (2011) 61 Duke Law Journal 583; Stephen A Simon, 'Rights Without a Base: The Troubling Ambiguity at the Heart of Constitutional Law' (2012) 57 Saint Louis University Law Journal 101.

[1092] Oliver B Papa, 'Homosexuality and Religion: The Conflict' (2015) 11 The BYU Undergraduate Journal of Psychology 118; Lionel Ovesey, 'The Homosexual Conflict' (1954) 17 Psychiatry 243; Lawrence A Kurdek, 'Areas of Conflict for Gay, Lesbian, and Heterosexual Couples: What Couples Argue about Influences Relationship Satisfaction' (1994) 56 Journal of Marriage and Family 923; Donald P Haider-Markel and Kenneth J Meier, 'The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict' (1996) 58 The Journal of Politics 332; 'Homosexuality and Priesthood: Conflict in the Life of a Norwegian Woman' (2015) 185 Procedia - Social and Behavioral Sciences 160; Chai R Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 Brook. L. Rev. 61; Amy Maitner, 'Judicial Bias Against LGBT Parents in Custody Disputes' 30 University of Florida Journal of Law & Public Policy 109; Nasrudin Subhi and David Geelan, 'When Christianity and Homosexuality Collide: Understanding the Potential Intrapersonal Conflict' (2012) 59 Journal of Homosexuality 1382; Gregory M Herek, 'Heterosexuals' Attitudes toward Lesbians and Gay Men: Correlates and Gender Differences' (1988) 25 The Journal of Sex Research 451; Huang-Chi Lin and others, 'Perception of Attitudes of the General Population toward Homosexuality in Taiwan: Roles of Demographic Factors, Mental Health, and Social Debates on Legalizing Same-Sex Marriage' (2021) 18 International Journal of Environmental Research and Public Health 2618; Shinsuke Eguchi, 'Social and Internalized Homophobia as a Source of Conflict: How Can We Improve the Quality of Communication?' (2006) 6 Review of Communication 348; Jojanneke van der Toorn, Ruthie Pliskin and Thekla Morgenroth, 'Not Quite over the Rainbow: The Unrelenting and Insidious

Dworkin feels it well that the concept of the community he proposes is sufficiently ambiguous and 'ghostly' in the sense he considers Hegel's super-person.[1093] Hence, he makes a failed attempt to distinguish the organic nature of his community from Hegel's super personal character of the community. In doing so Dworkin claims that, unlike a metaphysical entity, a genuine community is a genuine phenomenon that is 'constituted by social practice and attitude'[1094]. We do not see how a community based on social practice and attitude can fit into the narrative of the genuine community as described by Dworkin. Nor do we see how such a community can solve the legal issues connected to the hard cases. Even in theory, we cannot accept a community that is devoid of plurality, originality, and diversity in social practice and attitude. If Dworkin's genuine community presupposes unanimity, harmony and absolute compromise in social practices and attitudes that would be a dangerous and tyrannical community and, the same will be the nature of PPM too.[1095] Does Dworkin presuppose such a community? We do not think so. In fact, he expects general outcomes of a community from a purpose-specific and purpose-limited partnership of people.[1096] Therefore, his concept of genuine community is nothing but a misnomer.

7.1.2 Extraction of PPM – an Endless, Confusing, and Misleading Journey

As we have submitted earlier, the PPM is extractable from the result of a complex activity that presupposes political integrity, legislative integrity, and adjudicative integrity along with the integrity of the law, itself. To get the 'best' result the extraction process, as Dworkin claims, must be based on internal legal practice and, at the same time, it has to be ensured that the extraction process is not biased by personal or individual

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Nature of Heteronormative Ideology' (2020) 34 Current Opinion in Behavioral Sciences 160. Dworkin's narrative does nothing substantial to help resolve these issues.

[1093] Dworkin, *Sovereign Virtue* (n 1) 226–227.

[1094] Dworkin, *Sovereign Virtue* (n 1) 226.

[1095] How can this make any sense at all? It may make sense only and only if - all LGBTQ+ people are identified as heterosexual; if all immigrants could become natural persons of the receiving country; if all black could become white; if all Muslims could become Hindus and vice versa. What could be more absurd and more tyrannical than this? This suggestion will rather promote tyranny in the name of making people all similar. This will be one of the dumbest attacks on diversity and plurality. How can we make a community where all people will consider themselves as a single unit? Under what basis? What is the stride that will make the people so united? To what extent such unity is expected while keeping the option of plurality in other spheres of life? There is only one basis: Human and humanity; the rules that are similar for all humans can guide all humans as a community nothing else; dividing humans in the artificial community, the goal-specific community will just divide the humans and thus will become a breeding zone of our group tyranny. See Gommer, 'The Molecular Concept of Law' (n 481). Dworkin states – 'treating him as a member means accepting that the impact of collective action on his life and interests is as important to the overall success of the action as the impact on the life and interests of any other member'; see Dworkin, 'Equality, Democracy, and Constitution' (n 1) 339. Our question is, how is it possible that a Muslim will accept that the interest of homosexual people or idol worshipers should be promoted? Dworkin has no answer. We have answers.

[10961096] It is reflected in his narrative on several occasions. His repeated reference to the orchestra, laws of the commercial world, football team, etc is indicative of the fact his mind is strangled to such target specific entity. See Dworkin, *Law's Empire* (n 1) 157; Dworkin, *Freedom's Law* (n 1) 20, 25.

morality, while it is to be ensured that the extraction reflects the participants' internal points of view. This is the role-switching twist we have already mentioned in the previous chapter. Along with this problem, Dworkin has two more problems – who to be entrusted to conduct the activity of extraction facing the challenge of role switching twist and how this activity is to be conducted. Dworkin's narrative is proved to be incoherent in responding to all these three problems.

How will the PPM be extracted or interpreted? Dworkin's statement gives us an answer:

> [I]ts essence to be extracted from the argumentative legal practices and to comprehend the features and propositions about it, one needs to understand the internal dynamics of the argumentative practices take place *within the very practice*.[1097]

The obvious defect of his narrative is that he fails to give us enough information about, as Nerhot asks, - what does this "within" that practice mean?'[1098]. We acknowledge that Dworkin does give us some hints about it but those are very ambiguous and not enough to make a coherent sense. He does states that it is not difficult to identify the 'practices that count as legal practices'[1099]. He refers to the activities of legislatures, courts, administrative agencies and bodies and decisions of these institutions including the practices allowed by the constitutions as legal practices.[1100] Apparently, the message he delivers is as clear as he claims. However, is it the case? Does he really want to mean what the plain reading of the narrative reflects? We do not think so, because in that case, it will go against the very objective of his theory – setting law free from the four walls of the institutions. Doesn't the legal practice have anything important to do with the very people who suffer, who seek remedy, and who bear the burden and responsibility that law imposes? What is the role of the people here then?[1101] We have already seen that Dworkin claims that law and its merit PPM is based on social practices and attitudes. Therefore, how can we consider that it is not difficult to understand what these legal practices mean?

Law is not a practice-oriented discipline in the narrow sense ie practices within the lawyers, judges or politicians; it is practice-oriented in its general and the wider sense where all people in general are the participants not only a few. Further, our user-interface[1102] argument shows that Dworkin's narrower practice

[1097] Dworkin, *Law's Empire* (n 1) 13 (emphasis added).
[1098] Nerhot, 'Interpretation in Legal Science' (n 22) 208 (footnote).
[1099] Dworkin, *Law's Empire* (n 1) 91.
[1100] Dworkin, *Law's Empire* (n 1) 91.
[1101] The moment we talk about the role of people with reference to the practice of law, we do not see any accepted role of the people. While searching on Google, the most common answers it comes up with 'unauthorised practice'.
[1102] To be discussed in chapter eight.

theory is completely misleading and makes no sense at all. We do agree we need to take the view of the legal experts, but it does not mean that the expert's view is enough; we have to take note of the view of the users who suffer and who are both the start and end of the very process. Dworkin, himself, has this opinion that these experts are just third parties in their usual actions; they are not the actors in its stricter sense.[1103] Then what might motivate Dworkin to come up with the narrower meaning of "within" the practice that excludes the participation of the people? The answer lies with the associated condition of the role-switching twist that requires a meaning without being biased by individual morality. If Dworkin includes the people as participants in the legal practice, he will not get a result of interpretation without the personal conviction of the participants for he is not aware of the role differentiating parts of the self. Therefore, Nerhot's question remains valid; Dworkin fails to provide us with the internal meaning of the PPM from the sense of its internal practice meaning.

Unfortunately, Dworkin's failure to find a solution to the role-shifting twist tricks him to ignore the problem, as a whole and proceeds not only to respond to the second problem ie whom to be entrusted but also to make another misleading claim that the solution of the first problem lies in the solution in the second problem. He believes that the problem associated with internality and neutrality could be solved by just making sure that the duty of interpretation of the law and its merit ie PPM is entrusted to an authority that will, hopefully, do the job successfully. Who are these authorities? These are the same authorities, Dworkin has named to be the internal legal practitioners ie lawyers, judges, political officials, and so on.[1104] What makes these practitioners trustworthy to Dworkin; what is the basis of Dworkin's hope that these authorities are the authorities we should rely upon? Dworkin replies:

> Most of us would endorse we share an understanding that our officials must treat all members of the community they govern as equals because we believe they should behave that way, not the other way around. We need an idea that cannot be found there [in ordinary principles of private morality]: that the community as a whole has obligations of impartiality toward its members, and that officials act as agents for the community in acquitting that responsibility. Once we accept that our officials act in the name of a community of which we are all members, bearing a responsibility we therefore share, then this reinforces and sustains the character of collective guilt, our sense that we must feel shame as well as outrage when they act unjustly.[1105]

[1103] Dworkin, *Law's Empire* (n 1) 13.
[1104] Dworkin, *Freedom's Law* (n 1) 33.
[1105] Dworkin, *Law's Empire* (n 1) 174–176.

We have an obligation not to evaluate this statement with reference to the empirical evidence.[1106] Therefore, our response to the statement will be limited to the point of narrative consistency. When we do not have the way to know, we believe.[1107] From this perspective, Dworkin's decision of having belief in the political officials is justified as he, apparently, surrenders and acknowledges that there is no other source of morality whence the practical authority could be derived. On several occasions, he expresses his observation about his deep distrust of political institutions.[1108] Now the question is how can he prioritise his belief when his observation is sharply in contrast to that belief? Can narrative consistency afford the triumph of belief over observation or knowledge?[1109] At least, in Dworkin's own terms that cannot be for, in that case, it would be something 'ghostly', or so on that Dworkin always rejects.

Above all, how can these officials play the role differentiate roles ie participant and evaluator not being biased by the judgement of the participant? Dworkin acknowledges that it is not possible.[1110] Dworkin assumes a pure, spontaneous, unconstrained connection of the community with the official that ensures spontaneous reflection of the community in the acts of the officials. Does this, anyway, fulfil the requirements of the role-shifting judgement? We submit that the officials become a separate identity from

[1106] The empirical evidence we have, all goes against Dworkin. See Nicholas Carnes and John Holbein, 'Do Public Officials Exhibit Social Class Biases When They Handle Casework? Evidence from Multiple Correspondence Experiments' (2019) 14 PLoS ONE e0214244; 1615 L. St NW, Suite 800 Washington and DC 20036 USA202-419-4300 | Main202-857-8562 | Fax202-419-4372 | Media Inquiries, 'Beyond Distrust: How Americans View Their Government' (*Pew Research Center - U.S. Politics & Policy*, 23 November 2015) <https://www.pewresearch.org/politics/2015/11/23/beyond-distrust-how-americans-view-their-government/> accessed 16 May 2023.

[1107] Siba E Ghrear, Susan AJ Birch and Daniel M Bernstein, 'Outcome Knowledge and False Belief' (2016) 7 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2016.00118> accessed 16 May 2023; Isabelle Hansson, Sandra Buratti and Carl Martin Allwood, 'Experts' and Novices' Perception of Ignorance and Knowledge in Different Research Disciplines and Its Relation to Belief in Certainty of Knowledge' (2017) 8 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2017.00377> accessed 16 May 2023.

[1108] Dworkin, *Sovereign Virtue* (n 1) 351. He states – 'Our politics are a disgrace, and money is the root of the problem. Our politicians need, raise, and spend more and more money in each election cycle … In recent years candidates and anxious donors have exploited the "soft money" loophole'. Dworkin, *Law's Empire* (n 1) 191–194.

[1109] Although there are a few exceptions, the standard practice responds to the question negatively: observation and knowledge to be triumphant. See Ghrear, Birch and Bernstein (n 1107); Hansson, Buratti and Allwood (n 1107); Anthony Kenny, 'Knowledge, Belief, and Faith' (2007) 82 Philosophy 381; Halla Kim, 'Kant and Fichte on Belief and Knowledge' [2018] Revista de Estud(i)os sobre Fichte <https://journals.openedition.org/ref/895> accessed 16 May 2023.

[1110] Dworkin, *A Matter of Principle* (n 1) 139–140. Dworkin's arguments can be presented as -X & Y are in the system and within that system X believes K while Y believes L; Z a person outside of the system can never have either of the beliefs that of X and Y and hence Z will never be able to say whose belief is superior. Dworkin further states – 'Would the independent observer or critic himself have beliefs, if he became a participant, even in controversial cases? If not, then the participants will properly doubt whether he has the capacity to judge their debates…when he steps back from the debate and reassumes the role of the critic? Of course, he cannot demonstrate his beliefs, either as a participant or critic, any more than the other participants can demonstrate their beliefs'.

that of the community or its members from the very moment they are identified as officials as such. Dworkin's own structure of argument supports our submission. He, on the one hand, rejects the reliability of private morality while on the other hand, attributes complete trust on the morality of the political officers only because of their identity as officials. Hence, it is indicative from his argument, that the moment one becomes official, he or she loses the membership of the community of organic nature and thereby, they become trustworthy.[1111] In such a case, the roles of the officials, as long as the sense of law or PPM is concerned, is not that of the participants; it is no better than that of the role of the sociologists, historians or philosophers who take note of the social practices externally.[1112] Dworkin does not accept the practice of the sociologist as an internal practice.[1113]

Dworkin's narrative inconsistency is carried forward in his claim that– the community takes the guilt on their shoulders for the actions of the officials! We have not found any explanation in Dworkin's narrative as to why X, Y, or Z, members of the community, should be guilty of the actions of the political officials; as far as the guilt is connected to law or morality of law, we do not see any connection. In the same vein, Dworkin claims that the '[c]oherence would be guaranteed because officials would always do what was perfectly just and fair'.[1114] We think that the claim is superficial not merely because of the empirical grounds but because of the absence of comprehensive philosophy and narration as to what it takes, even roughly, to consider a decision just and fair.

It is apparent that Dworkin's decision to trust the political officials is a sort of political decision, a decision he, himself, tries to disown on several occasions. It seems to us that his reliance on political officials is more a strategic decision rather than a decision of coherence. Since he has already claimed that the PPM is a political morality, he is automatically drawn to claim that the extraction of the PPM is made by the political officials; it is a sort of showing things sound and good, instead of doing the same. Once he establishes the claim that the activity to extract the PPM is to be made by the political officials and the judges are also political officials, his trust shifts, exclusively, to the judges.[1115] He seems to hope that his

[1111] All positivists have this peculiar idea that an individual becomes trustworthy and a source of authority as soon as he or she is bestowed with a political or official identity. Austin, Hart, Hobbes, Gardner, Raz, Gardner, and many others' narrative support this submission. See David Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20 Law and Philosophy 461, 462; Jules L Coleman, 'Negative and Positive Positivism' (1982) 11 The Journal of Legal Studies 139, 140.

[1112] Dworkin, *Law's Empire* (n 1) 13; Dworkin, *Taking Rights Seriously* (n 1) 72, 95 (ebook page number).

[1113] Dworkin, *Law's Empire* (n 1) 14; Dworkin, *Taking Rights Seriously* (n 1) 72 (ebook page number).

[1114] Dworkin, *Law's Empire* (n 1) 176.

[1115] While he acknowledges that all political officials possess this authority, his theory consistently emphasizes and prioritizes the authority of judges over other political officials.

emphasis on the role of the judges in interpreting the PPM and adjudicating accordingly will compensate for the omission he makes in not resolving the role-shifting twist.[1116] Nevertheless, we do not see any hope in it. Instead, we see dangers in confusing the law, legality, and legal morality with the politics and political morality or presenting the judges as political officials beyond their existing identity ie officials of the courts and of law.[1117]

His narrative displays a clear duality. While he trusts exclusively in the judges to extract the PPM, revealing his desire to keep the extraction process free from political influence, he simultaneously defines legal practices, morality, and the law itself from a political perspective. Instead of resolving old questions, this process seems to pave the way for their revival. Is political influence truly irrelevant to the formation of political morality and the PPM? And if not, who should be more involved in their construction - the judiciary or the legislature? On what basis do judges derive the authority to make these decisions?[1118] Could this not lead to a dictatorship of the judges?[1119] Furthermore, the claim that judges have the authority to extract the PPM in some cases but not others only complicates matters. Is this not just the same old wine in

[1116] His hope is reflected in his attempt to demonstrate that judges are the most competent, privileged, and structurally well-positioned officials to extract the PPM, surpassing counterparts such as the legislature and others. Dworkin expresses a great deal of optimism about the judges' ability to make political decisions. He states – 'there is no a priori reason to think them less competent political theorists than state legislators or attorneys general. Nor does history suggest that they are'; see Dworkin, *Law's Empire* (n 1) 375.

[1117] Brendan H Chandonnet, 'The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and Its Effects on Future Judicial Selection in State Courts' (2003) 12 William & Mary Bill of Rights Journal 577; Michael Blauberger and Dorte Sindbjerg Martinsen, 'The Court of Justice in Times of Politicisation: "Law as a Mask and Shield" Revisited' (2020) 27 Journal of European Public Policy 382; Lawrence J Trautman, 'The Politicization of the U.S. Supreme Court: Danger to Democracy' <https://papers.ssrn.com/abstract=3706545> accessed 16 May 2023; Stanford Law Review, 'Politicizing the Supreme Court' (2012) 65 Stanford Law Review <https://www.stanfordlawreview.org/online/politicizing-the-supreme-court/> accessed 16 May 2023; 'Judicial Authority Under Pressure: Politicisation and Backlash against Courts in the Age of Populism' <https://ecpr.eu/Events/Event/PanelDetails/7687> accessed 16 May 2023.

[1118] It is already a matter of extreme debate. See John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 Law and Contemporary Problems 41; Hélène Sallon, 'The Judicialization of Politics in Israel' [2005] Bulletin du Centre de recherche français à Jérusalem 287; Torbjörn Vallinder, 'The Judicialization of Politics. A World-Wide Phenomenon: Introduction' (1994) 15 International Political Science Review / Revue internationale de science politique 91; Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 Annual Review of Political Science 93; Russell A Miller, 'Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany' (2004) 61 Washington and Lee Law Review 587; Federico Fabbrini, 'The Paradox of Judicialization' in Federico Fabbrini (ed), *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016); Parker Hevron, 'Judicialization and Its Effects: Experiments as a Way Forward' (2018) 7 Laws 20; Juliana Pondé Fonseca, 'The Vanishing Boundaries between Technical and Political: Normativism and Pragmatism in the Brazilian Courts' Adjustment of Public Policies' (2015) 2 Revista de Investigações Constitucionais 61.

[1119] Dworkin is aware of such consequences. He states – 'Judges have their own ideological and personal interests in the outcome of cases, and they can be tyrants too'; see Dworkin, *Law's Empire* (n 1) 375.

a new cup? The question of jurisdiction of the courts is already one of the most debated and contentious issues in the US, and his suggestion is likely to provoke further conflict between the judiciary and legislature.[1120] Additionally, his narrative does not provide any compelling argument in favour of judges looking beyond the "four walls" of statutes and other legislative documents to search for the PPM. As a result, this suggestion is unlikely to gain traction in civil law countries.

We want to clarify that we do not support limiting the authority of judges. Instead, we argue that judges should have even greater authority than Dworkin proposes. Our concern is with the insufficient support in his narrative for the increased, controversial, and unfounded authority of judges. We know that judges are already highly criticized for exceeding their jurisdiction, and Dworkin is well aware of this fact. Therefore, if his theory proposes even more authority for judges, it must be backed by strong reasoning that is consistent with the narrative of his theory. On what basis can judges' authority to interpret the PPM be justified? We know that, specially in the US, judges are often involved in interpreting the PPM beyond the formal and institutional rules, but this practice is highly debated, with both sides lacking conclusive arguments.[1121] Dworkin's argument is also inconclusive in this regard.

What is his narrative in this regard? To summarise the narrative, we can say - He tries to back the law based on 'political morality'[1122]. But 'political morality' does not allow the judges to exercise power exclusively in this regard. Therefore, he has to justify such power of the judges. How does he do it? He tries to do it with reference to the loopholes of the political process itself. What are the loopholes? Although the political process presupposes (or expects) that people will have the same impact and same influence in political decision-making, in practice, it is just a dream.[1123] Instead, it is usually observed that specific persons play

[1120] Kimi Lynn King and James Meernik, 'The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy' (1999) 52 Political Research Quarterly 801; Logan Strother and Shana Kushner Gadarian, 'Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy' (2022) 20 The Forum 87. Also see the dissenting opinions of Justice Scalia, and Justice Alito, and Justice Thomas in *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44); *Obergefell v. Hodges* (n 410).

[1121] See the US Supreme Court judgements in *Bowers v. Hardwick* (n 299); *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44); *Obergefell v. Hodges* (n 410); *Masterpiece Cakeshop v Colorado Civil Rights Commission* [2018] Supreme Court of the USA 584 U.S. ___ (2018); *Dobbs v. Jackson Women's Health Organization* (n 497).

[1122] It is interesting to note that on numerous occasions his PPM becomes indistinguishable from political morality. This is one of the instances.

[1123] Sidney Verba, 'Political Equality: What Is It? Why Do We Want It? | RSF' [2001] Russell Sage Foundation Journal <https://www.russellsage.org/research/reports/political-equality> accessed 16 May 2023; Jeremy N Sheff, 'The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate' (210AD) 75 St. John's Law Scholarship Repository 143; Andrew Moravcsik, 'The Myth of Europe's "Democratic Defi Cit"' (2008) 43 Intereconomics: Journal of European Public Policy 331; Courtenay W Daum and Eric Ishiwata, 'From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements' (2010) 44 Law & Society Review 843.

a substantial role, in terms of influence in the political process. For example, as Dworkin posits, '[a]n acting ambassador to Iraq can create a Gulf War and the chairman of the Federal Reserve Board can bring the economy to its knees'[1124]. Now, Dworkin's question is - if they can do it and still escape criticism, why shouldn't judges have the authority in escaping criticism? However, this counter-question cannot be a sufficient justification for granting judges increased power. While such a justification may be acceptable in political argumentation, legal argumentation demands a more substantial basis for judges' authority.

Admittedly, Dworkin, on one occasion, goes very close to explaining why judges should have this authority but fails to get the whole sense of it for he finds it difficult to connect to the sense of law. He states that the 'courts, whose decisions are meant to turn on principle, not on the weight of numbers or balance of political influence'[1125]. He fails to connect the point of principle to the sense of law as he lacks the relevant philosophy. This limitation leads him, although reluctantly, to make a compromise; he is forced to submit that the legislature also has similar authority.[1126] We find similar confusion in Dworkin on numerous occasions. He is confused as the judge appointed by the conservative upholds judgement that is more in line with liberals. He is confused when he tries to defend his one-right-answer thesis. How does a judge decide a case when there is, apparently, no law relatable to the case? In a confusing response, he claims that it is in fact the lawyer who directs the judges on how to decide the case.[1127] How do lawyers find an answer where the law is not clear or there is no positive law at all? Dworkin's response is that lawyers, including judges, in such cases, always have a sense, which Dworkin calls 'abstract moral judgment'[1128], that justifies the decision as a matter of law, even if they may not have given it a specific name.[1129] GSEC provides answers for all these cases that Dworkin finds confusing. The judge elected by the conservative party decides the case following the sense of law that he or she has for he or she is just another human being. In the second case, both the lawyers and the judges follow the same instinct ie GSEC.

Now, let's turn our attention to the third problem, which is how judges will extract the PPM. In this regard his narrative is overwhelming, and his expectation is ambitious, if not illusive. Along with the common requirements like justness and fairness, he expects so many changes and the introduction of so many

[1124] Dworkin, *Freedom's Law* (n 1) 29.
[1125] Dworkin, *Freedom's Law* (n 1) 30. This point is further clarified in the discussion of the distinction between principle and policy.
[1126] Dworkin, *Freedom's Law* (n 1) 31. He states - I do not mean, of course, that only judges should discuss matters of high political principle. Legislatures are guardians of political principle too, and that includes constitutional principle'.
[1127] Dworkin, *Freedom's Law* (n 1) 3.
[1128] Dworkin, *Freedom's Law* (n 1) 3.
[1129] Dworkin, *A Matter of Principle* (n 1) 127.

methods that his process of extracting the PPM turns out to be an illusory process. Dworkin demands that the meaning of PPM be extracted following the very structure of the legal argumentation in practice. Although the legal arena is quite content about the specificity and availability of structures of legal argumentation, we do not actually find any meaningful and coherent structure of argument in legal practice.[1130] Legal scholars talk about dominant structures like pragmatism, conventionalism, judicial activism, judicial pessimism etc that are already in place. Dworkin does not support either of these structures. Instead, he proposes a completely new structure that is substantially different from the existing structures in practice. Dworkin suggests that we should follow the structures that he himself finds problematic, and as a result, he attempts to restructure his own approach. Eventually, it contradicts his own narrative. Why should the legal arena accept his structure? What is the exact theoretical framework of his structure? Why should that theoretical structure be accepted in the first place?

Dworkin's judge will decide which version of PPM of his supposed genuine community is 'best' suited to the existing political practice and opinion. The interpreter (judge) 'must judge and contest', 'not simply discover and report' of such political practice in force.[1131] In this process, the judge will determine what the existing practice needs and compare those needs with what is actually needed, assuming that the genuine community is in action. The existing needs are extracted from the opinion of the people. How do the judges trace the public's opinion? Dworkin suggests - by following the formal texts ie statutes, the legislative statement 'established by the practice of the legislative history'[1132], formal committee reports, past political decisions, and other formal texts that 'can be seen as part of what the legislative process has actually

[1130] The so-called structures of legal argumentation are fundamentally flawed for these are often based on some political objectives to conceal the very presence of the political objectives. This is primarily because the law is often presented as a subset of politics, leading to the inevitable consideration of political argumentation as the structure of legal argumentation. See Andrew D Martin and Morgan LW Hazelton, 'What Political Science Can Contribute to the Study of Law' (2012) 8 Review of Law & Economics 511; Herman G James, 'The Meaning and Scope of Political Science' (1920) 1 The Southwestern Political Science Quarterly 3. As a result, the available structures tend to obscure the fact that the law has yet to find a meaningful and coherent structure. Without a clear and meaningful structure of its own, the structures that are claimed to be the structures of law are more focused on covering up the flaws and the lack of structure within the legal system itself, in order to defend its claims and authority of coercion. To see the discussion about the major structures of legal argumentation, see Charles Barzun, 'Three Forms of Legal Pragmatism' (2018) 95 Washington University Law Review 1003; Steven D Smith, 'The Pursuit of Pragmatism' (1990) 100 The Yale Law Journal 409; Robert Justin Lipkin, 'Conventionalism, Pragmatism, and Constitutional Revolutions Festschrift' (1987) 21 U.C. Davis Law Review 645; Sotirios A Barber, 'Stanley Fish and the Future of Pragmatism in Legal Theory' (1991) 58 The University of Chicago Law Review 1033; Deryck Beyleveld and Roger Brownsword, 'Practice Made Perfect?' (1987) 50 The Modern Law Review 662; NE Simmonds, 'Why Conventionalism Does Not Collapse into Pragmatism' (1990) 49 The Cambridge Law Journal 63.

[1131] Dworkin, *Law's Empire* (n 1) 65.

[1132] Dworkin, *Law's Empire* (n 1) 343.

produced, something to which the community as a whole is thereby committed'.[1133] The actual needs may not align with the opinions of the political community, and the judge is not required to discuss those needs with the community before delivering the judgment.[1134] Thus, while a judge frees himself or herself from legislative barriers, he or she also risks being accused of being a dictator. Dworkin defends against such allegations stating that the judge does all these not according to what he believes 'but to find the [·]best[·] justification he can of a past legislative event'[1135]. How does the judge do it? At the time of interpreting the constitution, statutes, etc, he or she will follow a method called, as Dworkin terms it, 'moral reading' ie reading through the prism of PPM of the supposed community.[1136]

This is akin to revolving around the same confusing circles. At one stage, it seems that Dworkin's narrative grants the ultimate power to the judge as to how he or she will interpret the PPM, in the 'best' light and then interpret the formal legal documents in the light of the PPM and refer to this interpretation to the PPM of the supposed community.[1137] Aren't the activities becoming too twisted? In addition, what does this 'best' mean?[1138] Dworkin's response is that the best refers to the best outcome the genuine community may aspire for.[1139] Dworkin's response or the narrative is not just a dilemma, but chaos and an introduction of a path to unleash tyranny. Abortion or against abortion, the legality of slavery or abolition of it, legalization of homosexuality or criminalization of it – whatever the decision is, the judges are exclusively in charge of the decision, and they decide in the best light of the aspiration of the supposed community. In any case, people are bound to accept the judgement on an illusory assurance that no one loses anything substantial in this process!

[1133] Dworkin, *Law's Empire* (n 1) 343; Dworkin, *Taking Rights Seriously* (n 1) 142 (ebook page number).

[1134] Dworkin, *Law's Empire* (n 1) 65.

[1135] Dworkin, *Sovereign Virtue* (n 1) 338. Dworkin further states – 'Each of the political considerations he brings to bear on his overall question, how to make the statute's story the best it can be'; see Dworkin, *Law's Empire* (n 1) 348.

[1136] Dworkin, *Freedom's Law* (n 1) 1–3.

[1137] Although Dworkin through his fictional character Hercules tries to show how this complex reasoning process filters out Hercules' own personal conviction in judicial reasoning, he accepts the fact that for real judges, it is difficult to distinguish between subjective conviction and objective conviction. However, he posits that judges' long experience in his professional life automatically internalizes the objectivity that Hercules follows consciously. We submit that this is another misconception of Dworkin; in fact, this is the evaluative self of the judge that dictates the unconscious process of the judges. Interestingly, however, Dworkin, on some occasions, accepts the fact that judges do employ their personal conviction. He states – 'thought that a constitution should reflect not the best standards of justice in some objective sense, but rather the conception of justice the citizens hold from time to time, and he might also have thought that the best means of realizing this ambition would be to encourage legislators and judges to employ their own conceptions'; see Dworkin, *A Matter of Principle* (n 1) 52.

[1138] To understand the complexity associated with Dworkin's best view of law, see W Wendel, 'Sally Yates, Ronald Dworkin, and the Best View of the Law' (2017) 115 Michigan Law Review Online 78, 81–86.

[1139] Dworkin, *Freedom's Law* (n 1) 11–17.

Ambiguity persists and, on a more serious level, as Dworkin does not deny the importance of the majoritarian institutions and their decisions reflected through the formal documents.[1140] He states that as long as the institutions are respecting the 'democratic conditions'[1141], 'the verdict of these institutions should be accepted by everyone'.[1142] This condition gives rise to more questions. AS a citizen, X must understand what these democratic conditions mean. If the conditions are met, X must accept the law. If they are not, the decision will depend on whether the issue at hand is a matter of principle or policy. Dworkin's narrative suggests that we cannot be sure if the judge is obliged to follow a decision. While the judge should generally adhere to the decision, they are not required to do so in order to preserve the integrity of the law. Nevertheless, the judge is also not obligated to uphold the integrity of the law.[1143] Now, the question is why should X be the victim of all these complexities? This eventually led us to the same problem ie the role-shifting twist that has not been resolved, in the first place, and, now the contradictory guidance of extracting the PPM is making the situation worse. Further, if it is the case that, as Dworkin states, in maintaining or making sure of the integrity of the law and ensuring the best outcome for the community, a judge has the power to ignore or give 'customised' emphasis on a legislative decision, or precedents and she or he has the power to decide the PPM he or she thinks correct, it is likely that the judges decide cases based on his or her own intuition.[1144] When judges do so, it is more likely that they do it based on their GSEC. However, Dworkin's narrative lacks justification in support of judges' authority.

The situation is further complicated as Dworkin's inevitable condition requires identifying a particular version out of several versions of PPM by evaluating each version with reference to the integrity of the law when the law is taken as a whole system. This inevitably creates a grey zone of dispute as to what this law, as a whole, means.[1145] In addition, to maintain the compatibility with different situations, different positivist

[1140] Dworkin, *Freedom's Law* (n 1) 17. However, it is true that, on certain occasions, he stands against majoritarian judgements.

[1141] Another confusing and complex political condition that is unnecessarily linked to shape legal reasoning. We will discuss the complexity it poses in the extraction of morality. To get an idea about the complexity associated with such conditions see Jürgen Mackert, Hannah Wolf and Bryan S Turner, *The Condition of Democracy: Volumes 1,2,3* (1° edizione, Routledge 2021); Deane E Neubauer, 'Some Conditions of Democracy' (1967) 61 American Political Science Review 1002; Barry Sullivan, 'Democratic Conditions' (2019) 51 Faculty Publications & Other Works 555.

[1142] Dworkin, *Freedom's Law* (n 1) 17.

[1143] Dworkin, *Law's Empire* (n 1) 218. He states – 'Nor is the adjudicative principle of integrity absolutely sovereign over what judges must do at the end of the day'.

[1144] In fact, at the end Dworkin himself acknowledges the fact that judges do it based on his or her intuition. He states – 'Real judges decide hard cases much more instinctively … No doubt real judges decide most cases in a much less methodical way'; See Dworkin, *Law's Empire* (n 1) 264–265.

[1145] For some general problems associated with such position of Dworkin, see Andrei Marmor, 'Integrity in Law's Empire' 3; Michel Rosenfeld, 'Dworkin and the One Law Principle: A Pluralist Critique' (2005) 233 Revue internationale de philosophie 363, paras 70–79; TRS Allan, 'Law, Justice and Integrity: The Paradox of Wicked Laws'

legal realities and the practice and theory of politics, this principle of the integrity of the law has been compromised to such an extent that it, precisely, loses all its significance for which the principle has been incorporated.[1146] The process of compromise just keeps adding layers of twists and complexity. He states that integrity does require general consistency, but it does not inevitably require pervasive consistency.[1147] He gives us examples of when such consistency will be termed as pervasive. He states that '[t]he framers of the original Constitution were remarkably unrepresentative of the people' like slaves, and the poor.[1148] He reasons that if judges now accept laws against slaves and the poor based on the political morality of the original Constitution, it will be pervasive.[1149] Why? Under what basis? Dworkin defends his position, claiming that the law was bad because there was no balance of representation. Dworkin's narrative is unacceptable, at least, on two counts: 1. the law can be bad and hence, lose its moral authority automatically, and 2. while political rights may be, legal rights by their very nature should not be subject to the issue of representation.[1150] We will see shortly that the legality of the law is not subject to the evaluation of any numbers; it is rather subject to the question of value. Furthermore, anyone can logically question why we should care about the balance of representation now, since it was not a condition when the Constitution was framed, and it might not be a condition in the future either. His theory also misses a very vital point that Rawls picks up on, which is the individual's way of actions, where 'individuals naturally act interpersonally, not representatively'[1151].

Dworkin, to take another instance, considers that predictability and procedural fairness are the preconditions for legal integrity.[1152] However, he thinks that these two conditions should be compromised, for instance, to 'secure a kind of equality among citizens that makes their community more genuine'[1153]. Admittedly, this compromise, *prima facie*, makes his integrity principle an excellent legal evaluative tool, but the truth

(2009) 29 Oxford Journal of Legal Studies 705; Deirdre Golash, 'Pluralism, Integrity, and the Interpretive Model of Law' (1994) 1 Philosophy in the Contemporary World 15.

[1146] Rejecting Dworkin, Golash state – 'particularly under conditions where opinion on relevant issues is significantly divided, the search for a single coherent explanation of law may be seriously misleading. The idea of integrity is a principled basis for legal interpretation only where there is an underlying unity, rather than an underlying plurality. Dworkin suggests that there is a basis for striving toward such unity, and for an obligation to obey the law, in our "associative" obligations to fellow members of our political community. I argue that such obligations, to the extent that they exist, are too weak to provide an adequate basis for a moral obligation to obey the law'; see Golash (n 1145). See also Rosenfeld (n 1145) paras 70–79.

[1147] Dworkin, *Law's Empire* (n 1) 364–365.

[1148] Dworkin, *Law's Empire* (n 1) 364.

[1149] Dworkin, *Law's Empire* (n 1) 365.

[1150] Legal convictions and associated responsibilities are not of representational nature, but a very personal nature.

[1151] Stephen C Hicks, 'The Politics of Jurisprudence: Liberty and Equality in Rawls and Dworkin' 20.

[1152] Dworkin, *Law's Empire* (n 1) 95–96.

[1153] Dworkin, *Law's Empire* (n 1) 96.

is that this exception weakens the strength of the integrity argument by paving the way to curve more exceptions and hence creating more chances to undermine the integrity itself. Any dictator may take it as a precedent to exploit people by not following procedural fairness and justifying it as being in the interest of equality, a standard that varies.[1154]

The integrity of the law is further compromised when he accepts the compartmentalization of law, although the spirit of his theory is expressly against such compartmentalization.[1155] In doing so, he accepts that the merit of the law can be compromised to maintain the certainty of laws connected to matters like traffic rules and negotiable commercial papers.[1156] On one occasion, he even goes too far to state, 'compartmentalization is a feature of legal practice no competent interpretation can ignore'[1157].

Dworkin's spirit of theory, which condemns such compartmentalization, is, absolutely, coherent to the sense of law of which he is not aware and, hence the consequential deviation. It is a grave blow to his narrative that requires merits as an inevitable precondition for law. Law is general and there cannot be any such compartmentalization in the general theory of law. Unfortunately, his acceptance of compartmentalization in the name of "local priority" not only compromises the integrity of the law itself but also loses the opportunity to identify the misleading practices being taking place in the name of the compartmentalization of law.[1158]

[1154] All the dictators use the same strategy. In 1968, for instance, the Pakistani dictator appropriated the properties of minority Hindus living in then East Pakistan claiming that Hindus are weak and therefore the state should help protect their properties from the aggression of the majority Muslims. The consequential, Enemy Property Act, ordering the confiscation of the properties of the Hindus was an attempt to ensure so-called equal protection of the Hindus. See Shelley Feldman, '"Legal" Land Appropriation as Sanctioned by the Vested Property Act(s): Democracy in Practice' (2017) 45 Asian Journal of Social Science 724. For the general benefit of procedural fairness, see Conor Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 The Modern Law Review 1221; TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 Oxford Journal of Legal Studies 497.

[1155] Rejecting the Compartmentalization of law Dworkin states – 'The value of the resources someone controls is not fixed by laws of property alone, but also by other departments of law'; Dworkin, *Sovereign Virtue* (n 1) 215. He further states – 'Law as integrity has a more complex attitude toward departments of law. Its general spirit condemns them, because the adjudicative principle of integrity asks judges to make the law coherent as a whole'; see Dworkin, *Law's Empire* (n 1) 251–252. Dworkin also uses the term 'departments of law' to mean the compartmentalization of law. Khaitan and Steel term it as 'areas of law'; see Tarunabh Khaitan and Sandy Steel, 'Areas of Law: Three Questions in Special Jurisprudence' (2023) 43 Oxford Journal of Legal Studies 76.

[1156] Dworkin, *Law's Empire* (n 1) 367.

[1157] Dworkin, *Law's Empire* (n 1) 251–252.

[1158] Compartmentalization of law, specially in the area commonly considered as the area of private law, paves the way to legislate in such a manner which protects the interests of the powerful and influential sections of people like corporations, etc. Compartmentalization allows them to skip the essential contents and merits of the law as each department of law may have its unique rules that may exclude some of the basic principles of law. Further, the compartmentalization of law paves the way to introduce an increasing number of technicalities in law and thus making it increasingly alien to the shared and general commitment of the people. See Khaitan and Steel (n 1155)

Dworkin's confusion arises from his rejection of compartmentalization since his sense of law tells him that law does not make sense when compartmentalized as the law needs unique contents that cannot vary along the classifications of laws.[1159] Paradoxically, at the same time, he wants the certainty of law that is ensured by compartmentalization of the law. Where is the actual problem for Dworkin? Whether it is the integrity of law or it is the compartmentalization, Dworkin's requirement is dictated by his misleading focus to ensure the general consistency of one principle with another principle of law, because he takes law as a whole. While we expressly reject his misconception of taking law as a whole, we submit that the integrity of law is essential. However, the integrity of law has nothing to do with in the sense Dworkin takes it ie integrity among the principles. Why does Dworkin need integrity of law, in the first place? He needs the integrity to ensure that the law has one-right-answer, predictability, and stability so that a dictator cannot change the law as his or her wish and people are not surprised by the new law.[1160] GSEC-based law fulfils all these requirements by its own design. Our approach ensures higher integrity, but the integrity is between the evaluative self and the sense of law. The GSEC of the evaluative self evolves over time and is not changeable in the lifetime of a single generation. Thus, there is no necessity of supporting compartmentalization and thereby compromising the integrity of law; compartmentalization is an immature and heuristic outcome of the works devoid of the sense of law.[1161]

Dworkin's concept of integrity of law which plays the central role in the extraction of the PPM is distorted and compromised in many other ways. Dworkin supports that the interpretation of law and PPM must be subject to the constraints prescribed by the political institutions.[1162] His judge may think that the equal protection clause, which requires that the rights of both adults and children be given equal concern, is

80–81. To further understand what benefit we lose when the law is compartmentalized see the benefits we get from the general sense of law; see William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Illustrated edition, Cambridge University Press 2009).

[1159] Dworkin thinks, at least in some cases, for example, in constitutional and other substantial matters law must have some specific contents.

[1160] However, we should clarify the point that although Dworkin thinks that predictability of law is important, he does not rule out the possibility of generation of law that many people take as a surprise. See Dworkin, *Law's Empire* (n 1) 141–152.

[1161] Further confusion that may be associated with compartmentalization will be resolved in the next chapter when we will discuss the distinction between law and the provisions of law.

[1162] Dworkin, *Law's Empire* (n 1) 401. In fact, the legal arena not only supports this suggestion provided by Dworkin but also, generally, encourages it. See Georg Wenzelburger, 'Parties, Institutions and the Politics of Law and Order: How Political Institutions and Partisan Ideologies Shape Law-and-Order Spending in Twenty Western Industrialized Countries' (2015) 45 British Journal of Political Science 663; Cornell Clayton and David A May, 'A Political Regimes Approach to the Analysis of Legal Decisions' (1999) 32 Polity 233; William N Eskridge and John Ferejohn, 'Politics, Interpretation, and the Rule of Law' (1994) 36 Nomos 265; David Landau and Julián Daniel López-Murcia, 'Political Institutions and Judicial Role: An Approach in Context, the Case of the Colombian Constitutional Court' [2009] Vniversitas 55.

politically unfair as the community in concern thinks that such distinction is socially acceptable, proper, and fundamental to that community.[1163] We are wondering, how will Dworkin justify such compromise in the background of some countries around the world where girls are forced into child marriage, forced marriage, not allowed to be educated, or killed to save the honour of the family.[1164]

The most serious blow on the integrity of law in particular and on the whole process of extraction of PPM is inflicted as Dworkin places the 'adjudicative principle of integrity as sovereign over law'[1165]. How could he place the procedural principle above the substance the procedural principle is designed for? How is this position cohering with his quest for the merit of law? He reasons – 'because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in the right relation'.[1166] Is not he prioritising the supposed community more than the real members of the community and paving the path for tyranny? If the answer is positive, (in fact, it is so) then he, for sure, contradicts his position that posits – 'I do not suppose that the ultimate mental component of the universe is some spooky, all-embracing mind that is more real than fleshand-blood people'[1167].[1168]

[1163] Dworkin, *Law's Empire* (n 1) 404.

[1164] While we express our wonder to ChatGPT it returns with an answer and explanation that completely support our position. It says: 'It is difficult to say exactly how Dworkin would justify such compromises without a specific context and analysis of his writings. However, based on his general principles, it is possible to speculate.
Dworkin was a proponent of the idea that law is a moral enterprise, and that the principles of justice and equality should guide legal decision-making. He believed that judges should interpret the law in a way that promotes these principles, and that the law should evolve over time to better reflect them.
In the case of countries where girls are forced into child marriage, not allowed to be educated, or killed to save the honor of the family, Dworkin would likely argue that these practices violate basic principles of justice and equality. He would likely argue that the law in these countries should be changed to better reflect these principles, and that judges should interpret the law in a way that promotes them.
However, if there were practical constraints that made it difficult to fully implement these principles, Dworkin may argue that compromises are necessary in the short-term in order to make incremental progress towards a more just and equal society. For example, he may argue that it is better to implement laws that make child marriage illegal, even if there are still cultural and societal pressures that make it difficult to enforce these laws.
Ultimately, it is important to remember that Dworkin was a legal theorist and philosopher, and his ideas were not necessarily grounded in the practical realities of every society or legal system. His theories were intended to be aspirational, and to guide legal decision-making towards a more just and equal society.'

[1165] Dworkin, *Law's Empire* (n 1) 404.

[1166] Dworkin, *Law's Empire* (n 1) 404.

[1167] Dworkin, *Law's Empire* (n 1) 168.

[1168] He has an answer to the questions. He states – 'Our claims for integrity are thus tied into our main project of finding an attractive conception of law …General theories of law, for us, are general interpretations of our own judicial practice'; see Dworkin, *Law's Empire* (n 1) 192, 410. It indicates that in the quest of finding a conception of law his journey is a reverse journey. Instead of having a sense of law, his plan seems to be making a sense of law and in this process, he takes integrity as a type of guiding principle to make sure that the concept of law looks 'attractive'. This is a wrong journey and, unfortunately, he has to choose it because he rejects the philosophy of law.

He distinguishes inclusive integrity from pure integrity.[1169] The former allows compromise in integrity by accepting exceptions of laws with contrasting approaches, such as the law on abortion, while the latter does not allow any scope for such compromise.[1170] Pure integrity, which is related to 'pure law', (as distinguished from the 'actual concrete law'), does not allow any sort of exception, irrespective of the positions of the institutions [political].[1171] Why should we make such a distinction? What is the basis of such distinction? Under what basis? Dworkin is silent. We have answers to be discussed in chapter eight. Furthermore, Dworkin argues that when judges are considering a judicial precedent that implicates political morality, they should adopt a progressive strategy.[1172] How do we determine that an interpretation is progressive? Based on what or which standard we will decide if our interpretation is progressive or not? A dictator or fascist may claim that a regime of rights becomes more progressive in the line of a more paternalistic regime, at least, the way the positivists claim that legal restrictions on natural freedom ensure and increase people's freedom.[1173] We do not find any concrete scheme with reference to which the interpreter can make sure that his or her interpretation is progressive.[1174] GSEC provides us with such a standard with reference to which we will be able to be sure that the interpretation of the law and legal morality will be progressive.[1175]

[1169] Dworkin, *Law's Empire* (n 1) 406–407.
[1170] Dworkin, *Law's Empire* (n 1) 406–407.
[1171] Dworkin, *Law's Empire* (n 1) 407.
[1172] Dworkin, *Law's Empire* (n 1) 398–399. Dworkin suggests how the judge should respond to a precedent – 'his attitude toward precedents would be more respectful when he was asked to restrict the constitutional rights, they had enforced than when he was asked to reaffirm their denials of such rights'.
[1173] Not only some politicians but also some academic considers paternalism as progressive virtue. See Julian Le Grand, 'Some Challenges to the New Paternalism' (2022) 6 Behavioural Public Policy 160; Danny Scoccia, 'In Defense of Hard Paternalism' (2008) 27 Law and Philosophy 351; Singer (n 836).
[1174] As a consequence of which it is often found that the so-called progressive recognition of rights is being constantly challenged and, in some cases, the process is reversed. See Charles M Haar and Michael Allan Wolf, '"Euclid" Lives: The Survival of Progressive Jurisprudence' (2002) 115 Harvard Law Review 2158; Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15 Human Rights Law Review 101; Ralf Kölbel, '"Progressive" Criminalization? A Sociological and Criminological Analysis Based on the German "No Means No" Provision' (2021) 22 German Law Journal 817; Akritas Kaidatzis, 'Progressive Populism and Democratic Constitutionalism' [2022] Revus. Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava <https://journals.openedition.org/revus/8068> accessed 17 May 2023; Robin West, 'Is Progressive Constitutionalism Possible?' (1999) 4 Widener L. Symp. J. 1; Jonathan S Gould, 'Puzzles of Progressive Constitutionalism' [2022] Harvard Law Review 2054; Robin West, 'Progressive and Conservative Constitutionalism' (1990) 88 Michigan Law Review 641; Herbert J Hovenkamp, 'Progressive Legal Thought' (2015) 72 WASH. & LEE L. REV. 653; Conor Tucker, 'In Pursuit of Progressive Jurisprudence | ACS' <https://www.acslaw.org/expertforum/in-pursuit-of-progressive-jurisprudence/> accessed 17 May 2023.
[1175] This point is discussed in chapter eight.

As we have seen earlier, along with integrity, the extraction process needs to take note of justice, fairness, and due process.[1176] Each of these elements gives rise to the multiplicity of the meaning of PPM. Dworkins expects to make a balance of these principles and accordingly choose the best interpretation of the PPM. We have seen how problematic his narration is if we, just, consider his version of integrity. Now, if we need to make a balance within all these three elements, it is easily understandable how complex the whole process of the interpretation would be. His narration is full of compromises, switching of positions, and ambiguous general exceptions.[1177] In a conflict of the principles, integrity will be prioritised, but again it does not mean that the other three principles are less important and, in fact, as Dworkin states, it does not mean judges never choose other principles over integrity.[1178] Further, we all know how complicated the discussion about each of the principles can be on many occasions.[1179] Dworkin's suggestion to subject these issues to the discussion of political conditions makes the extraction process too fluid to contain in the legal discourse, although it may make sense in the political discourse.

Just one example will give us an idea, at some point, of how ambiguous and fluid it becomes. As we have seen earlier, extraction, explanation, and recognition of PPM is substantially dependent on fairness and the decision relating to fairness is substantially dependent on as vague a topic as 'democratic conditions' whereas the 'fairness in the political debate' is one of such conditions.[1180] His morality requires fairness in the political debate so that the true political opinion and hence associated political morality can make up to the legislative process and thus be transferred to the attention of the judges responsible to take note of it and pronounce the law accordingly. To ensure this, his suggestions are, among others, – 1. to make sure that the expenditure made in the election process should be taken care of so that a sense of equal distribution emerges; and 2. to make sure that there are effective strategies in place both 'for the protection of the political speech' and for the restraining of political speech.[1181] He further suggests a strategy for when to

[1176] Dworkin, *Law's Empire* (n 1) 217–218.
[1177] For instance, consider his material equality theory and the number of exceptions he prescribes to make the primary distribution of the resources equal. Dworkin, *Sovereign Virtue* (n 1) (see generally).
[1178] Dworkin, *Law's Empire* (n 1) 217–222.
[1179] Barry Goldman and Russell Cropanzano, '"Justice" and "Fairness" Are Not the Same Thing' (2015) 36 Journal of Organizational Behavior 313; Jack Knight, 'Justice and Fairness' (1998) 1 Annual Review of Political Science 425; John W Chapman, 'Justice and Fairness Section 8' (1963) 6 NOMOS: American Society for Political and Legal Philosophy 147; Carsten Momsen and Marco Willumat, 'Due Process and Fair Trial', *Elgar Encyclopedia of Crime and Criminal Justice* (Edward Elgar Publishing) <https://www.elgaronline.com/display/book/9781789902990/b-9781789902990.due.process.fair.trial.xml> accessed 17 May 2023; TRS Allan, 'Justice and Fairness in Law's Empire' (1993) 52 The Cambridge Law Journal 64.
[1180] Dworkin, *Sovereign Virtue* (n 1) 366–371.
[1181] Dworkin, *Sovereign Virtue* (n 1) 369.

protect political speech and when and on what grounds political speech be restrained because he knows how messy the political landscape is; thus he goes on to propose a strategy for regulating 'free speech'![1182]

Dworkin knows the political situation and, accordingly, he expresses his distrust of the political process.[1183] When this is the case, how can he expect that the judges will succeed in extracting the PPM through a process that is largely subject to the legislative decisions of the political process that is 'controlled by money', 'biased', 'underrepresented', and so on?[1184] Dworkin answers that this is where the magic of his theory is perceived; the judge is not bound to recognise the unfair legislative decision. How will the judge know whether the legislative decision is fair or not? How can he expect that a judge, or the interpreter, will trespass in all these political messes to see whether the legislative decision before him or her was taken fairly or not? Why should the judges, in the first place, be involved in all these empirical issues? Why should we need to regulate free speech at all? What can be more counterproductive than this? Dworkin would say that regulation is essential so that the exact political opinion of the people is reflected in the

[1182] Dworkin, *Sovereign Virtue* (n 1) 370.

[1183] Dworkin, *Sovereign Virtue* (n 1) 365–369. Dworkin states – 'America does not have full popular sovereignty, because our government still has great powers to keep dark what it does not want us to know. We do not have full citizen equality, because money, which is unjustly distributed, counts for far too much in politics. We do not have even a respectable democratic discourse: Our politics is closer to the war I described than to any civic argument…if officials are allowed to punish criticism of their decisions as "sedition," … then the people are not, or not fully, in charge …contemporary democracies is generated not by any official attempt to keep secrets from the people, but by the desire of a majority of citizens to silence others whose opinions they despise'. However, it should be noted that it is not a contemporary matter, it has been always the case; see Alexis de Tocqueville, *Democracy in America:Historical-Critical Edition of De La De´mocratie En Ame´rique* (Eduardo Nolla ed, James T Schleifer tr, Liberty Fund 2010); Benjamin Constant, *Constant: Political Writings* (Biancamaria Fontana ed, Cambridge University Press 1988); Erich Fromm, *Escape from Freedom* (Avon Books 1969); Robert Paul Wolff, *In Defense of Anarchism* (First edition, the University of California Press 1998). Dworkin further states – 'The consequence is the most degraded and negative political discourse in the democratic world. Public participation in politics, measured even by the number of citizens who bother to vote, has sunk below the level at which we can claim, with a straight face, to be governing ourselves'; see Dworkin, *Sovereign Virtue* (n 1) 370.

[1184] Evidence suggest that this is a futile and self-contradictory expectation. See 'Skewed Justice | ACS' (9 April 2018) <https://www.acslaw.org/analysis/reports/skewed-justice/> accessed 17 May 2023; Michele Goodwin, 'Complicit Bias and the Supreme Court' (2002) 136 Harvard Law Review 119; Lawrence Baum and Neal Devins, 'Why the Supreme Court Cares About Elites, Not the American People' (2010) 98 THE GEORGETOWN LAW JOURNAL 1515; Michele Gilman, 'A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality' [2014] Utah Law Review 389; Michele Benedetto Neitz, 'Socioeconomic Bias in the Judiciary' (2013) 61 CLEVELAND STATE LAW REVIEW 137; Adam Cohen, 'How the Supreme Court Favors the Rich and Powerful' *Time* (3 March 2020) <https://time.com/5793956/supreme-court-loves-rich/> accessed 17 May 2023; Dr Nicholas Carnes, 'Working-Class People Are Underrepresented in Politics. The Problem Isn't Voters.' *Vox* (24 October 2018) <https://www.vox.com/policy-and-politics/2018/10/24/18009856/working-class-income-inequality-randy-bryce-alexandria-ocasio-cortez> accessed 17 May 2023; Martin Gilens and Benjamin I Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12 Perspectives on Politics 564; Lisa L Miller, 'The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited' (2007) 5 Perspectives on Politics 305.

legislative documents and thus, it will be convenient for the judges to record the PPM properly. Our freejon approach finds all these complex processes unnecessary, ambiguous, and misleading as we already have a better, more reliable and more meaningful way of getting a sense of law and the morality of law.

7.2 Failure of the PPM with Reference to the Sense of Law

In the last section of this chapter, we have seen how Dworkin's genuine community and its associated supposed PPM lack narrative consistency substantially and, hence, this substantiates our claim that the PPM fails to be treated as the practical authority of law by virtue of its own narratives. This section of the chapter demonstrates that the narrative inconsistency is rampant when his supposed and misleading authority of law is evaluated with reference to the basic sense of law.

7.2.1 Responsibility of the Community Members

When it is the question about the nature of the responsibility of the members of the genuine community, we can no way ignore Dworkin's reference to the German relationship. Analogous to the German relationship, is the relationship of the white American with the Black American.[1185] He presents both instances to support a central conviction of his community that holds that individuals are responsible for the action of the community. Dworkin himself reveals to us the relevant sense of law that 'people must not be blamed for acts over which they had no control', or one must not be held responsible for the act of another.[1186] Then, how does Dworkin defend such 'ghostly' responsibility? Dworkin claims that such a feeling of communal responsibility is 'the product … of a deep personification of political and social community'[1187] and, in this process, as Dworkin thinks, people are united with a communal identity or one identity. Can't we see the contradiction of his claim? This guilt or feeling of responsibility is because of the separateness of identities not, as he thinks, because of the connectedness. Germans are identifying the Jews as 'Jews' and the white Americans are identifying the black Americans as 'black Americans'.

[1185] Dworkin states – 'white Americans who inherited nothing from slaveholders feel an indeterminate responsibility to blacks who never wore chains'; see Dworkin, *Law's Empire* (n 1) 172.

[1186] Dworkin, *Law's Empire* (n 1) 172. Legal scholars often talk about vicarious responsibility as an exception to this general principle. See Daniela Glavaničová and Matteo Pascucci, 'Making Sense of Vicarious Responsibility: Moral Philosophy Meets Legal Theory' [2022] Erkenntnis <https://doi.org/10.1007/s10670-022-00525-x> accessed 17 May 2023; Russell G Thornton, 'Responsibility for the Acts of Others' (2010) 23 Proceedings (Baylor University. Medical Center) 313. However, we submit that this is a misconception that under this term one is held responsible for the acts of another. Under the sense of law, one is held responsible only for his or her action; those who claim the opposite, just miss the fine thread that connects one with his or her act that leads to legal responsibility.

[1187] Dworkin, *Law's Empire* (n 1) 172–173.

We understand what drives Dworkin to look for a sense of connectedness. It is apparent that Dworkin has this sense very well that the force of law lies in the connectedness not in the separateness of identities.[1188] Unfortunately, he follows the wrong approach ie the lawjon approach that begins its activity by dividing the identities as 'ruler-ruled', 'good-bad', and 'evil-innocent' along with other dominant identities. Associated objectivity of the lawjon approach inevitably gives rise to a situation, which, in time, automatically comes up with laws that are biased along the line of different identities like economic, social, political, religious, and so on.[1189] We have clarified that the sense of law, which is reflected by the GSEC, goes beyond any consideration based on any identities other than human identity; any consideration based on the peculiarity of identities like culture, society, religion, nationality, race, colour, and so on are ineffective to the sense of law. Admittedly, the law has an obligation to take note of any social rules, political rules, religious rules, etc when the application of such rules is limited within the boundary respective spheres of each identity provided that such application will not trespass into the sphere of either Freedom or Law, itself.[1190] More significantly, it should be pointed out that such recognition of rules by

[1188] This also explains why Dworkin is drawn to the 'original position' of Rawls. Rawls's original position is presumed to have reduced the chance of separating people by removing the veil of ignorance and, essentially, the veil of ignorance is the result of numerous identities people have.

[1189] Group identities work as an effective, and at times, a nasty tool for the politicians and when the law is considered as a product of the political process, the law is bound to be repressive for one group of people while biased for another group. Specially, notice the language of the election campaigns of the political leaders who extensively work on dividing the people into different identities and then convince people that they are representing the majority group and they will protect the majority group from the illusory attack of the minority group. Italian election campaign (saving the fatherland from the aggression of the immigrant), Turkey election (saving Turkey from the infidelity of homosexuals), Indian election (saving India from Islamization), Bangladeshi election (saving 91% Muslims from the tyranny of 7-8 % Hindus). See 'Italy's Election: Far-Right Giorgia Meloni's Populist Appeal – DW – 09/20/2022' (*dw.com*) <https://www.dw.com/en/italys-election-giorgia-meloni-far-right-favorite-for-prime-minister-appeals-to-disgruntled-voters/a-63184990> accessed 17 May 2023; 'Giorgia Meloni: Migrants' Fears over Italy's New Far-Right Prime Minister' *BBC News* (21 October 2022) <https://www.bbc.com/news/world-africa-63330850> accessed 17 May 2023; Dmitry Zaks, '"We Are against the LGBT": Erdogan Fuels Culture Wars amid Tight Election Contest' <https://www.timesofisrael.com/we-are-against-the-lgbt-erdogan-fuels-culture-wars-amid-tight-election-contest/> accessed 17 May 2023; 'Erdoğan Finds a Scapegoat in Turkey's Election: LGBTQ+ People' (*POLITICO*, 13 May 2023) <https://www.politico.eu/article/turkey-elections-2023-lgbtq-recep-tayyip-erdogan/> accessed 17 May 2023; Cressida Heyes, 'Identity Politics' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/fall2020/entries/identity-politics/> accessed 17 May 2023; Kwame Anthony Appiah, 'The Politics of Identity' (2006) 135 Daedalus 15; Florian Coulmas, 'Identity in Politics: Promises and Dangers' in Florian Coulmas (ed), *Identity: A Very Short Introduction* (Oxford University Press 2019) <https://doi.org/10.1093/actrade/9780198828549.003.0005> accessed 17 May 2023.

[1190] Suppose a community of a particular state has an established rule within that community that a person with Y quality will have the right to be a spokesperson for that community. Now, if Z has this qualification and his or her community deprives him from becoming a spokesperson, the law can intervene here not because of the rule of the community but because of the GSEC that promises must be complied with. There is no scope to accept that rule as law only because law recognizes the rule. Z becomes the spokesperson of the community by virtue of the rule of the community not because of any provision of law. Law intervenes because of the sense of law that one must not be

law is not by virtue of those rules but by virtue of the law itself; there is no scope to identify those rules as law as long as the rules are not GSEC and with the normative force of law.[1191] Neither the Nazi rules segregating and exterminating the Jews nor the American rules of slavery is GSEC and hence, not law at all.

Unfortunately, Dworkin gets it wrong and thinks that those were laws, although bad laws. With such a misconception of good laws and bad laws, he tries to prescribe the concept of purified law or good law adding a sense of connectedness to it. Ignoring the already existing sense of connectedness he goes to invent it in a hypothetical community, members of which are imagined to be united in their social activities and attitude while keeping their diverse identities and objectives intact. The German relationship, which maintains the separateness of identities, cannot give rise to the sense of law. Central to the origin of the sense of law or GSEC are the absence of all these segregating identities and the recognition of these identities as just personal issues of each human to be facilitated by Freedom, or the identity-specified regimes ie society, politics, etc. Thus, it is ensured that the identity of humans is saved while, while the force of law is justified. When humans are united with one identity ie humans, the connection it avails among the human is profound, deep, and compelling. General and shared commitment of the evaluative self ie GSEC is a manifestation of such connection. There is only one unified consideration that shapes the sense of law. The rules that are similar for all humans, in general, can guide all humans as a community; dividing humans in the artificial community, goal-specific community will just divide the human and thus, it will become a breeding zone of our group tyranny, political rules, and diverse PPM.[1192] The GSEC demonstrates that we do not need such a revolutionary community where individuals need to bear responsibility for the action of the community only to make sense of an illusory organic community; GSEC supports the idea of individual judgement and individual responsibility, and this makes sense of the law.

7.2.2 Atmospheric Incompatibility of PPM

There is a basic distinction between the political atmosphere and the legal atmosphere. Since the PPM is meant to function in the political atmosphere, many of its substantial features are incompatible with many fundamental features of law and its overall atmosphere. Dworkin claims that the special responsibility of law of treating all members of the community as equals can only be effectively taken care of by political

deprived of his or her right because of his or her lack of power. Here, Z's right is the result of the social rules not of the law.

[1191] This point is further discussed in Chapter 8.

[1192] 'The Dangerous Quest for Identity' [2023] *Time* <https://time.com/6246269/yuval-noah-harari-quest-for-identity/> accessed 17 May 2023; Gommer, 'The Molecular Concept of Law' (n 481).

officials.[1193] Here it is obvious that he is confusing the means and the source. He is considering political officials as not only the means but also the sources of the law, and hence, they are considered as the sources of political morality as well. This eventually led us to submit that Dworkin's narrative of PPM, if makes any sense at all, makes sense from the vertical perspective of governance ie ruler rules the ruled; in fact, the PPM is, precisely, all about the vertical morality of the political officials.[1194] What can be a more controversial and contradictory position than this? Undoubtedly, the sense of law we have gained so far and that will be revealed in the next section does not support this atmosphere, because the atmosphere of law is, and also has to be, horizontal. Further, law, in its concrete sense, never governs but facilitates the part of the interpersonal sphere of human beings.[1195] From this perspective, people are the only source of legal morality, and the role of political authorities is limited to respecting and abiding by that morality. Taken from the vertical and regulative perspective, Dworkin's PPM is a morality of inflicting coercion on people. By contrast, the legal atmosphere requires that except for the very person, who is subject to coercion, none has any authority of deciding and setting the conditions for inflicting coercion on that person. Maintaining neutrality in the execution of the order of law is part of their responsibility; their neutrality is not the source or condition of the morality of the law. Their morality has nothing to do with giving effect to the morality of law; rather, it is just a result of the morality of law.

On one occasion when he goes too close to the sense of law, Dworkin states:

> Law's empire is defined by attitude, not territory or power or process. *We studied that attitude mainly in appellate courts*, where it is dressed for inspection, but it must be pervasive in our ordinary lives if it is to serve us well even in court. It is an interpretive, self-reflective attitude.[1196]

Except for the emphasised ie '*We studied that attitude mainly in appellate courts'*, the paragraph is indicative of the fact that Dworkin is touched by the sense of law. He clarifies very well that the law is not defined by its process. Then, how does Dworkin identify the political officials including the judges as the

[1193] Dworkin, *Law's Empire* (n 1) 174–176.

[1194] This is not just our presumption; this is acknowledged by Dworkin that his PPM is sketched with reference to the vertical atmosphere. He states – 'My aim is to develop a theory of rights that is relative to the other elements of a political theory, and to explore how far that theory might be constructed from the exceedingly abstract' (but far from empty) idea that government must treat people as equals; see Dworkin, *A Matter of Principle* (n 1) 370. He also clarifies that the governor's concern for his or her subject 'is the most basic requirement of political morality'.

[1195] From this perspective, the governance model of any form, vertical or horizontal, is not compatible with the sense of law, since the legality lies in the facilitating of interpersonal relationships, and not in the governance of it.

[1196] Dworkin, *Law's Empire* (n 1) 413 (emphasis added) .

source of the validity of law where the political institution including the judges, in his own narrative, is just part of the process or means in which or through which the law is executed? Law is validated through our attitude reflected in the General and shared commitment of the evaluative self. Why do we necessarily need to study that attitude only in the appellate court? Admittedly, the appellate court studies and recognises the attitude but it does not mean that the court itself is the source of the validity of the attitude; the attitude is validated through GSEC. Thus, it is demonstrated that the PPM that reflects the vertical morality as extracted by the political officials is likely to be incompatible with the morality that the law is supposed to have.[1197]

On the point of governance, Dworkin is obligated to posit that the so-called concept like 'Self-determination'[1198] or self-governance is 'the most potent and dangerous ideal of our time'[1199]. Therefore, it is likely that Dworkin's political atmosphere is devoid of self-governance and, hence, his PPM must follow the same course.[1200] Challenging the traditional political justification of self-governance he asks that 'how could I be thought to be governing *myself* – when I must obey what other people decide even if I think it wrong or unwise or unfair to me and my family?'.[1201] The atmosphere of law does not support holding one responsible for an act the person is not in control of or should not have been controlled of.[1202] Admittedly, Dworkin, himself, answers this question; he answers referring to the 'communal conception of collective action'. He claims that such communal action provides the individual with an incentive to consider the act of a genuine political community as an act, 'in some pertinent sense' of that person.[1203] As we have seen in the previous section, Dworkin fails to provide us with any coherent narrative that may make sense as to how one can be reasonably held responsible for the act of the community. Unless the community has set objectives and members have enough opportunity to subscribe to the community with their conscious

[1197] This point is further explained in the next chapter.

[1198] Although we, from a deep level where the term is connected to the 'self', also think that this is an absurd concept, we cannot reject the importance of it in the sense he means it.

[1199] Dworkin, *Freedom's Law* (n 1) 21–22.

[1200] Dworkin states – 'it is demonstrated that people fervently want to be governed by a group not just which they belong, but with which they identify in some particular way… same religion or race or nation or linguistic …they regard a political community that does not satisfy this demand as a tyranny'; see Dworkin, *Freedom's Law* (n 1) 22.

[1201] Dworkin, *Freedom's Law* (n 1) 22.

[1202] Berlin, *Freedom and Its Betrayal* (n 52) 66. Berlin supporting the earlier stance of Fichte states –'I cannot be responsible for doing something of which I am not in control. 'Ought' implies 'can' – if you cannot do something, you cannot be told that you ought to do it …My duty can be only that which I can wholly control, not the achievement, but the attempt – the setting myself to do what I deem right. I am free only in the fastness of my own inner self'.

[1203] Dworkin, *Freedom's Law* (n 1) 22.

consent, the legal atmosphere does not find any basis for making the members accountable for the action of the community.[1204]

Setting aside the question of whether a legally sound relationship can exist between members of a community, let's imagine for a moment that such a relationship is possible in a political atmosphere where all members have a say in decision-making. In this scenario, members would be bound to follow the decisions made collectively. However, these decisions would inevitably require compromise, negotiation, and bargaining of the members' interests.[1205] All these processes clearly feature more of a political atmosphere than of legal atmosphere.[1206] However, the freejon approach demonstrates that the sense of law is so profound and compelling that does not leave any space for compromise, negotiation or bargaining, 'in general'[1207]. The gravitational force of law is more prominent and focused, leaving no space for bargaining due to at least two reasons. Firstly, bargaining requires empirical capacity, which is a requirement for making someone legally responsible. Secondly, if the law allows bargaining, it would lose its sense by virtue of which it accepts the fact that others must have the same commitment. More weird consequence, which the first reason will give rise to, is that the legal responsibility of the people will widely vary along the wide spectrum of bargaining capacity of the people and, paradoxically, the assessment of the bargaining capacity is an empirical impossibility. The law can never afford the loss of its profoundness. Neither can it afford an omission of any standards for assessing the bargaining capacity, if the bargaining capacity is considered a requirement of law.

Now one may logically ask – how can the political atmosphere afford something that the legal atmosphere cannot afford? The answer to this question leads to another important atmospheric difference between the

[1204] Even if the community is based on some specific objectives, the PPM of the community is incompatible with the atmosphere of law for law does not have any objective as such. We will discuss further this issue in the next section.
[1205] Otherwise, we have to sacrifice the possibility of plurality in human interests. For the importance of these elements in the political process, see Utangisila Bena Osée, 'Negotiation and Public Policy-Making Process' (2019) 6 Open Access Library Journal 1; Lior Sheffer and others, 'How Do Politicians Bargain? Evidence from Ultimatum Games with Legislators in Five Countries' [2023] American Political Science Review 1; Gideon Doron and Itai Sened, 'Political Bargaining: Theory, Practice and Process', *Political Bargaining: Theory, Practice and Process* (SAGE Publications Ltd 2001) <https://sk.sagepub.com/books/political-bargaining/n1.xml> accessed 18 May 2023; Jack Knight and Melissa Schwartzberg, 'Institutional Bargaining for Democratic Theorists (or How We Learned to Stop Worrying and Love Haggling)' (2020) 23 Annual Review of Political Science 259; Sandrine Baume, 'What place should compromise be given in democracy? A reflection on Hans Kelsen's contribution' (2017) 27 Négociations 73; Friderike Spang, 'Compromise in Political Theory' [2023] Political Studies Review 14789299221131268; Joseph H Carens, 'Compromises in Politics' (1979) 21 Nomos 123.
[1206] Apparently, this is another reason that led Dworkin to believe that law's justification is subject to political morality.
[1207] There may be some unusual circumstances where such processes are the very essential parts of the GSEC.

legal reality and the political reality. For a few moments, we have to go back to the narration of Dworkin's genuine political community. As Dworkin narrates, the community is a pluralistic community, every member's opinion matters, every member's interest is protected, everyone is committed to following the decision of the community while everyone has the assurance that they will lose nothing even if the decision of the community goes against the opinions and judgements of some of the members of the community.[1208] How is it possible, at all? The answer lies in the established fact that if a thing is value-neutral or has no value, losing the thing leads to the loss of no value. The political atmosphere is a **'Value'**[1209] neutral atmosphere and, hence, if a person loses in bargaining in this atmosphere, he or she loses nothing. Nor does the atmosphere require any standard of bargaining because there is no Value to lose.

Dworkin's constitutional conception of the political system ie democracy inevitably presupposes the 'democratic conditions'.[1210] In Dworkin's narrative, democratic conditions are *a priori* that must support the majority opinions to consider those opinions valid and justified to be part of the PPM. By contrast, we submit that this *a priori* is the Value neutrality, and it is more meaningful and efficient than the democratic conditions; when the issue is attached to the Value, the majority opinion becomes irrelevant.[1211] This is one of the fundamental features that distinguishes the political atmosphere from the legal atmosphere. The former may have some value in the descriptive sense ie conveyance, higher utility, and so on, but these are not, in the prescriptive sense, Value, the inevitable feature of the law.[1212] For future reference and for ensuring that there remains no confusion, it should be noted that the bargaining process, in the political atmosphere, either can be completely value neutral or can be evaluative in which case the bargaining process may add or reduce value but this value is not, necessarily, connected to the Value of law.[1213] Further,

[1208] Dworkin, *Freedom's Law* (n 1) 24–25.

[1209] Value with capital 'V' is to indicate the value law is associated with. The word 'value' is used in numerous senses, and, hence, to distinguish the normative and authoritative value associated with the law we will be using the word Value with the capital letter 'V'. the Value of the law is already evaluated and, hence, not further able to be evaluated. A further and detailed discussion of this issue is made in chapter eight.

[1210] Dworkin, *Freedom's Law* (n 1) 23.

[1211] However, there is a different opinion regarding the Value-neutrality requirement of democratic discourse. See Greg Lusk, 'Does Democracy Require Value-Neutral Science? Analyzing the Legitimacy of Scientific Information in the Political Sphere' (2021) 90 Studies in History and Philosophy of Science Part A 102. Our position is still affirmed for the reasons we have provided in the thesis. Further, for a discussion that supports value-neutrality see Ian Carter, 'Value-Freeness and Value-Neutrality in the Analysis of Political Concepts' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy, Volume 1* (Oxford University Press 2015) <https://doi.org/10.1093/acprof:oso/9780199669530.003.0012> accessed 18 May 2023.

[1212] *Bushell v Secretary of State for the Environment - Case Law - VLEX 793681265*. The House of Lords held that the utilitarian calculation cannot be defining or justifying factor of law.

[1213] For instance, as Dworkin states – 'Conflicts among ideals are common in politics…majority rule is [might] the fairest workable decision procedure in politics'; see Dworkin, *Law's Empire* (n 1) 177. In politics, numbers may give

the bargaining generated value, if there is any, like conveyance, utility, etc, of the political process is changeable whereas the Value associated with law is not subject to change by human actions; it is subject to evolve by human actions.[1214]

Dworkin has been criticized on the grounds that his method of creative constructive interpretation, similar to that of artists, is neither evaluative nor objective.[1215] Although confused, a partial sense of law helps him defend his first position ie his interpretation is evaluative; he states that the evaluation of the political decision is not decisive in the sense like 'one side can win by some knockdown argument everyone must accept'[1216]. Here Dworkin's confusion is obvious; he is criticised for his method of legal interpretation. Admittedly, his answer has expressed reference to political decisions, but we cannot rule out the influence of the legal atmosphere he might have in his mind in answering. Although he considers legal decisions as subspecies of political decisions, we submit that the latter type of decision is not compatible with the legal atmosphere. Can law afford such duality in the conviction that the political decisions offer, and should it be allowed at all? Suppose a decision is awarded against the interest of X for doing Y instead of Z. Now if it is the case that X has an equal right of doing either of the Y and Z, on what authority can a court convict X for doing one task rather than another? On a positive note, Dworkin's answer seems indicative of the fact that law cannot be evaluated in the way we evaluate Value-neutral things. Law, being law, is intrinsically valuable and hence there cannot be anything like bad law or good law. Law is already evaluated, and, hence, valuation of law is no more possible, and hence, it is not evaluate-able, and hence, it is not subject to

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us a sense of value or the number may add some value to a decision, but in law the majority opinion is Value-neutral. In law, unless it is an essential part of the GSEC, the number does not have any Value.

[1214] Dworkin himself is touched by this sense. He states - 'it hardly makes sense to speak of principles like these as being 'overruled' or 'repealed'. When they decline they are eroded, not torpedoed'; see Dworkin, *Taking Rights Seriously* (n 1) 59 (ebook page number). In the due course of the discussion, we will understand how the Value, law, and Principles are linked.

[1215] On the criticism of subjectivity, which claims that Dworkin's interpretation will not be objective, he tries to force coherence by introducing some complex terms and thus tries to prove forcibly that the interpretation is not subjective but objective. However, his confusion is apparent when he states that – 'I see no point in trying to find some general argument that moral or political or legal or aesthetic or interpretive judgments are objective. In fact, I think that the whole issue of objectivity is a kind of fake. We should stick to our knitting'; see Dworkin, *A Matter of Principle* (n 1) 171–172. Undoubtedly, the latter position is correct, although he is not aware of the role-shifting nature of the self. His last statement exactly reflects the sense that our role-shifting nature of the self gives us. GSEC, while subjective but no less than objective. It is subjective but without subjective bias of any sort.

[1216] Dworkin, *A Matter of Principle* (n 1) 168. Here, it should be mentioned that he is criticized for his legal interpretation. Unfortunately, as we know he sees law from the prism of political morality, he clarifies that the evaluation is possible with reference to political decisions, because he mistakenly thinks that legal decisions are subspecies of political decisions.

political bargain at all.[1217] Therefore, the PPM, which is inevitably fed with political bargains cannot, necessarily, be compatible with the sense of law.

In the absence of Value, all that the political atmosphere cares most about are the objectives or goals the community sets to achieve, and the bargaining process should be in line with those objectives or goals. By contrast, objectives or goals are not the driving force of the legal atmosphere; it is, intrinsically, objectives neutral. There is no objective of the law. At the least, we do not know if there is any objective or goal; neither is it possible to know. We have already submitted in the previous section that the genuine community if it makes any sense at all, cannot exist without setting its objectives or goals specific and limited. In that case, PPM is bound to be shaped by the objectives or goals of the supposed community. What is the narrative of Dworkin in relation to the objectives of PPM and hence, of the law? Unfortunately, and expectedly[1218], his narrative does not clarify what his exact position is on this point. He, however, clarifies that the PPM is not subject to utility at all.[1219] So far so good, as the legal atmosphere also does not support utilitarianism. Nevertheless, his expressed position against utilitarianism is inconsistent with his narrative and his very substantial claim that holds that legal reasoning is essentially political reasoning.

Dworkin states that '[u]tilitarianism is intrinsic in politics'[1220]. If this is the case, in fact, this is the case, politics is essentially an objective or goal-bound discipline, and, thereby, the PPM is bound to be so. The morality of an objective-bound discipline is bound to be constrained by those objectives. Political morality, whether in the form of PPM or any other framework, cannot be completely detached from politics. If such detachment were to occur, it would cease to be political morality altogether. Dworkin also supports our view and posits that the political justification lies in the political aim.[1221] A political right, as he presents, is

[1217] We think that, specifically, this unique feature of law creates confusion among numerous jurists who understand that law has intrinsic Value but cannot explain this implicit nature of the Value of law and mistakenly look for the sources of Value in the institution, sovereign, and so on. For instance, see generally Raz, 'Authority, Law and Morality' (n 105); Gardner, 'Legal Positivism' (n 19).

[1218] Since he makes the mistake of omitting the very first stage of inquiry, it is likely that his theory will have many flaws in the narrative.

[1219] Dworkin, *Taking Rights Seriously* (n 1) 245, 247, 322. He states – 'utilitarian reasons are irrelevant, because they cannot count as grounds for limiting a right…It may be that abridging the right to speak is the least expensive course, or the least damaging to police morale, or the most popular politically. But these are utilitarian arguments…If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so. This sense of a right (which might be called the anti-utilitarian concept of a right)…we must try to discover something beyond utility that argues for these rights…We might be able to make out a case that individuals suffer some special damage when the traditional rights are invaded'.

[1220] Dworkin, *A Matter of Principle* (n 1) 365–370.

[1221] Dworkin, *Taking Rights Seriously* (n 1) 119 (ebook page number).

an individuated political aim while a nonindividuated political aim is a goal of the community.[1222] To Dworkin, the legal right of an individual is subject to political recognition and, therefore, called a political right because the right is subject to the compromise of the political or community goals when the right and goal contradict or a new right is created in pursuance of the political goal.[1223] Apparently, he has a defence, since his PPM is different from the 'political morality' and his expected version of politics is different from the politics in the sense that the former is goal or objective bound where the latter is utility bound. Eventually, his PPM is not subject to utilitarianism, but subject to specific goals or objectives of the community.

Against the position he takes, we have two questions, one is specifically with reference to the political atmosphere, and another is with reference to the legal atmosphere. Can the political atmosphere accept objectives without utility? Can the legal atmosphere afford law subject to specific objectives or goals of the community? In response to the first question, we submit that Dworkin can never escape the possibility of the involvement of utilitarianism, which eventually shapes the political atmosphere and, thereby, shapes the PPM or mere political morality, as the case may be. Policy rather than principle or 'Principle'[1224] is at the centre of the political atmosphere.[1225] Policy is inevitably linked to utility for there is, inevitably, evaluation; there can be no policy without evaluation. The policy is by nature subject to evaluation; by nature, policy is choice sensitive. Things or considerations that are, by nature, without inherent Value or Value-neutral, can carry higher or lower values based on human evaluation, which is influenced by the number of people supporting or opposing them. Since these do not have the Value of their own, the support of a greater number of people for these things or considerations adds a decisive value. Eventually, the process of evaluation is necessarily a utilitarian process. Therefore, the PPM, which is likely to be shaped by a utilitarian process, is in no way compatible with the legal atmosphere that rejects utilitarianism.

Now, on an apparent logical point of view one may ask – is not GSEC itself a product of utilitarian process as this is a result of the activity of the evaluative self? Is not the evaluative self evaluating the law? If the evaluative self evaluates the law, and the law itself can be evaluated then what is the problem if PPM is coupled with policy? So, where is the problem in it considering law as objectives bound? First, we must

[1222] Dworkin, *Taking Rights Seriously* (n 1) 120 (ebook page number).
[1223] Dworkin, *Taking Rights Seriously* (n 1) 120 (ebook page number).
[1224] Based on the sources, there are numerous types of principles out there. Legal principles are demonstrably different from other principles. We will discuss this matter at length in the next chapter. Meanwhile, for clarification, we write the word 'Principle' with the capital letter P to denote expressly the legal principle.
[1225] This point is further explained in chapter eight.

clarify what we mean by the evaluation.[1226] Evaluation makes sense when it has an effect; the activity of evaluation cannot be separated from its effectiveness. The process of evaluation is meant to add or deduct value to or from the subject matter of evaluation. Some subjects are inherently inconsiderate or irrelevant to evaluation. There are certain things or issues that are not affected by the activity of evaluation and, therefore, cannot be evaluated and these are relatable to Dworkin's 'choice-insensitive'[1227] issues. An issue may not be subject to evaluation for two reasons: 1. Value-neutral and 2. Valued. For example, red is red and black is black and not otherwise, no matter what the majority of the evaluators say. These are Value-neutral issues. Again, there are things or issues having Value of their own and, thereby not evaluate-able by the 'choice' of the evaluators. Law, GSEC, Principles, etc are issues of intrinsic Value. Murder, death penalty[1228], cruel treatment, slavery, breach of trust, etc are against the morality of law because of the intrinsic Value of life, Freedom, commitment, and so on; the Value intrinsic to these is not subject to evaluation of any form. Whatever the evaluation of the evaluators in these issues, the Value remains unaffected. The Value may be subject to evolution (not evaluation) or devolution as an outcome of human actions over a long period of time, but not subject to addition or deduction by virtue of the evaluation.

By contrast, general convenience and inconvenience, the performance of machines, the effect of the provision of law, the performance of the political party or of the Government, the performance of the players, exam scripts of the students, policies of different sorts, etc are evaluate-able and in Dworkin's term 'choice sensitive' in the sense that a 'value'[1229] may be attributed to these issues through the process of evaluation. It is noteworthy that these issues are, from the perspective of the legal atmosphere, also Value-

[1226] The clarification is the key as there is disagreement as to the meaning of evaluation. For general discussion what evaluation means, see Ceri Phillips, Colin Palfrey and Paul Thomas, 'What Is Evaluation?' in Ceri Phillips, Colin Palfrey and Paul Thomas (eds), *Evaluating Health and Social Care* (Macmillan Education UK 1994) <https://doi.org/10.1007/978-1-349-23132-4_1> accessed 30 May 2023; Dana Linnell Wanzer, 'What Is Evaluation?: Perspectives of How Evaluation Differs (or Not) From Research' (2021) 42 American Journal of Evaluation 28.

[1227] Dworkin, *Sovereign Virtue* (n 1) 204–205.

[1228] A little disputed issue but the freejon approach submits that the death penalty is not an evaluate-able matter. Although many people and many jurisdictions claim that the death penalty is subject to evaluation, hence there are abundance of arguments in favour of it and against it. See Paul G Cassell, 'In Defense of the Death Penalty' <https://papers.ssrn.com/abstract=2181453> accessed 30 May 2023; Ernest van den Haag, 'In Defense of the Death Penalty: A Legal - Practical - Moral Analysis' (1978) 14 Criminal Law Bulletin 51; Jon Yorke, *Against the Death Penalty: International Initiatives and Implications* (Ashgate Publishing, Ltd 2008); Louis P Pojman and Jeffrey H Reiman, *The Death Penalty: For and Against* (Rowman & Littlefield 1998); CL Ten, 'Mill's Defense of Capital Punishment' (2017) 36 Criminal Justice Ethics 141. The Freeman approach has reasons to submit that all these arguments are futile and irrelevant, since arguments has no effect whatsoever on the Value of life. Even if most of the people of any particular jurisdiction support the death penalty, it is against the morality of law for it diminishes the possibility of expression of Freedom.

[1229] Please note that this value is not necessarily the normative Value that is associated with the law. This value may indicate Value neutral features like general convenience, higher number, etc.

neutral as these do not have any Value (legal) of their own. However, these are evaluate-able in the sense that the evaluation process may add or deduct value to the subject matter of evaluation with reference to other values (not the Value of law) like practical necessity, general convenience, political value, social value, etc.

Now one may ask - how is it possible that the evaluative self evaluates something that is not evaluate-able? We never claim that the evaluative self evaluates law or the principles of law. We submit that the activity of the evaluative self is to evaluate. However, at one point the evaluative self stops evaluating because the principles or the subject matters it tries to evaluate are no longer evaluate-able. The evaluative self, in such a case, fails to evaluate because of two reasons – 1. there is no more standard[1230]; or 2. the subject matter itself is the standard and hence, the subject matter for evaluation no longer exists. Therefore, in law there is no evaluation; the activity judges do is not the evaluation of the law, instead, the judges look for coherence. The very feature of the legal principles that give the sense of law is that it is no longer evaluate-able. Because there is no scope for evaluation. It comes to human sense as already been evaluated with its intrinsic Value and, hence not subject to active or conscious human evaluation.[1231]

What will happen when two legal principles contradict? Will we not evaluate then? No; we do not need to evaluate (ie calculating the quality, importance, amount or value of the principle). In that case, we try to determine the extent to which the principle in question is connected or relevant to the incident under consideration. This is an activity of comprehending the degree of coherence between the principles and the incidents. Under no circumstance, we have any intention to estimate the value of the principle itself. If we need to assess the value of the principle it is yet to be a Principle of law; it may have a connection with the tentative provision of law.[1232] The Principle is already evaluated and hence it is the Principle of law, and hence, one is presumed to have taken care of its Value.[1233]

In response to the second question, we submit that the legal atmosphere cannot afford to make law subject to the objectives or goals of the community. While the law can and does align with many of the goals and objectives of the community, its objective is not to comply with them. Rather, it is the community's objectives that align with the law. Nerhot clarifies the equation:

[1230] Evaluation process necessarily needs a standard with reference to which the activity of evaluation will be conducted. For support, see Wanzer (n 1226).

[1231] However, just to reemphasise, although it is not subject to active evaluation, over time it may lose value to human sense, or it may come to human sense with more intense value.

[1232] This issue is discussed in length in the next chapter.

[1233] We acknowledge that, in time, to evaluate anything we do use the method of coherence, but the method of coherence itself is not a method of evaluation.

> Just as legal rules can be the source of new social practices, as we observe daily, and this is the very goal of law, so social practices can be the origin of new legal rules. But saying that social practices are at the origin of new legal rules (as was the case for labour law, environmental law, economic law, etc.), does not imply that the law emerged from the fact.[1234]

Nerhot states that 'the very goal of law' supports that the legal rules become the source of social practice. Nerhot's colleague Borrello states that '[legal] force has a goal…to enforced them to realize justice'[1235]. The Freejon approach holds that both the foundation and the goal of the law is Freedom. Neither of us prescribe or go for any sort of objectives that will, inevitably, shape the activity of law; from this sense activity of law is independent of the goal.[1236] We do not use the word 'goal' as the basis or precondition for the action of law; no action is particularly warranted toward that goal. For instance, in the freejon approach, the foundation of the law ie Freedom itself manifests the goal. Therefore, if we just make sure that we have our foundation in place, the law does not need to pursue any goal or objective.[1237]

Furthermore, Dworkin's narrative illustrates the negative implications of regarding the law as essentially objective or goal oriented. He, states that '[s]ome conception of equality may also be taken as a collective goal; a community may aim at a distribution such that maximum wealth is no more than double minimum wealth'[1238]. Such a goal-oriented conception of law is not just misleading, but extremely problematic. The goal is, already, intrinsic to the sense of the law; splitting the goal from the sense of law and then expecting the law to be goal oriented is to destroy the atmosphere of the law itself. It will be like swimming in the open ocean as we never know the objectives of human life, hence we will never know what goal the law is to follow. Dworkin acknowledges that the 'argument from integration does not suppose that the good citizen will be concerned for the well-being of fellow citizens; it argues that he must be concerned for his own well-being'.[1239] Since the concept of well-being is infinitely diverse across people, the goals associated with

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[1234] Nerhot, 'The Law and Its Reality' (n 884) 62.
[1235] Borrello (n 11) 92.
[1236] Although it may seem Borrello is claiming that the law's objective is to ensure justice, her position seems not different from Nerhot and us. She clarifies that when she presents justice as the objective of the law, the '[l]aw, in its very sense, is justice, has to realize justice'. See Borrello (n 11) 92. Thus, the law has no goal to pursue in particular except for pursuing or being guided by its very essence ie 'sense of law'.
[1237] Although the legal arena misconceives the opposite; ends, goals, or objectives are are considered essential. See Max Radin, 'The Goal of Law' (1951) 1951 Washington University Law Quarterly 1; Mary O'Connell, 'The Power & Purpose of International Law: Insights from the Theory & Practice of Enforcement' [2008] Books <https://scholarship.law.nd.edu/law_books/70>.
[1238] Dworkin, *Taking Rights Seriously* (n 1) 120 (ebook page number).
[1239] Dworkin, *Sovereign Virtue* (n 1) 225.

such well-being will be infinite. Law is a matter of conviction, and the conviction is already made; the goal has no compelling role in making the conviction. Finally, as Dworkin himself acknowledges, 'there is no warrant for assuming that any such particular goal is the proper exclusive concern of law'[1240].

Another important distinction between the political atmosphere and the legal atmosphere is that the unit of agency in the former case is communal, while in the latter case, the unit is individualistic[1241]. Dworkin's political atmosphere is also dominated by the communal unit while the unit of responsibility is, for any 'ghostly' reason, which his narrative never explains, the individual.[1242] Dworkin's genuine community 'rejects that whole, individuated way of thinking' and it holds that 'the community, and not the individual, is fundamental'[1243]. Thus, would it not be legally justifiable to assert that any enforceable political decision must be made at the community level? The best favourable logic, which his narrative can offer us, is that the collection of people, or race or community is personified, therefore, eventually, the responsibility is expected to be restricted to the community level and definitely not extendable to the personal level. This is exactly the feature of the political atmosphere, whereas the focus of the law is individualistic. Undoubtedly, the stage of the law's performance is an inter-personal space where each person plays his or her personal part by coordinating his or her action self and the evaluative self. Each person is free to play his or her part according to his or her own story and these stories are parts of the one common story of humankind. The story of humankind or the combined story or the communal story is, while relatable to Dworkin's chain novel theory, also distinguishable in the sense that to form the communal story each of these individual stories is synchronised by the GSEC and all these individuals have a reasonable opportunity to contribute as per the GSEC. When one individual fails to comply with the GSEC or when one is prevented by another individual to play his or her own part, legal coercion is invited by the very person, who fails to comply with the GSEC, to intervene and help in the synchronization of the stories not by adding any new story but by making sure none is being prevented from playing their own role as per his or her own story. Thus, the law does act in the interpersonal space, but its focus of action is individualistic, hence it is individualistic.

The law acts in the interpersonal space, and only for this reason, if we want to consider it communal, we can. However, we have to be careful that it is not a 'ghostly' communal concept like Rawls', which assumes that humans are devoid of practical experience and essential biological drives. Nor is it a communal concept

[1240] Dworkin, *Taking Rights Seriously* (n 1) 23 (ebook page number).
[1241] Individual person ie natural person, artificial person, and so on.
[1242] Dworkin, *Sovereign Virtue* (n 1) 236. He states – 'our private lives …are in that limited but powerful way parasitic on our success together in politics. Political community has that ethical primacy over our individual lives'. See also Dworkin, 'Equality, Democracy, and Constitution' (n 1) 336.
[1243] Dworkin, *Sovereign Virtue* (n 1) 225.

like Dworkin's that holds individual responsibility for communal action. Such a concept may have some relevance in the political atmosphere, but in the legal atmosphere, it is incompatible. Dworkin's narrative reflects that he is aware of such incompatibility:

> *I acknowledged …communal conception seems metaphysically too luxuriant and politically too dangerous*…in our culture, the normal or usual unit of judgment for all actions is the individual. It is necessary for my self-respect, I think, that I make my own judgments about what kind of life to lead and how to treat others and what counts as good or bad work at my job … In the case of communal collective action, however, *individual actors share attitudes that make the pertinent unit of responsibility collective as well as individual*.[1244]

While the 1st emphasised phrase ie '*I acknowledged …communal conception seems metaphysically too luxuriant and politically too dangerous'* makes it clear that such communal conception is not only incoherent but also dangerous, the 2nd phrase ie '*individual actors share attitudes that make the pertinent unit of responsibility collective as well as individual'* is indicative of Dworkin's attempt to compensate and correct his theory. Unfortunately, he has no foundation based on which he could really correct his theory; the wide gap in his narrative is clear. He senses that our individualistic attitudes, in some cases, take a shape that is reflective of the attitudes of people in general. His sense is further clarified as he states, 'We know that when we make the decisions, grand and small, that will shape our lives…We think of ourselves differently-as moral and ethical agents'[1245]. The force of the argument, which supports the practical authority of law, is implied in the sense the statement expresses, and the authority lies purely within the personal sphere of individuals. However, his sense fails to contribute to conceiving the sense of law as he lacks the narrative of the action self and evaluative self.

It is apparent, Dworkin's shown emphasis on the communal unit of agency is not because of the strength of the agency, instead, it is because of his failure to find the strength in the individualistic unit of agency that he could never ignore. Although his failure to relate, directly, the individualistic unit of agency to the authority of law, led him to show communal agency as the authority of law, he tries his best to compensate for the omission by assuring that the individualistic agency is reflected in the communal agency. Against a fear of tentative attack against the PPM of being alien or detached from individualistic moral agency, he claims that his model of equality of resources does 'carries it [personal morality] into politics

[1244] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 336 (emphasis added).
[1245] Dworkin, *Sovereign Virtue* (n 1) 290.

intact…without switching to a special, made-for-politics morality'.[1246] He strongly disparages his critics who 'propose that we should all pretend, in politics, that we are addicts-that we should all act collectively in ways that we would find demeaning individually'[1247]. On a positive note regarding his position, his criticism clarifies that individualistic conviction holds the ultimate value. Unfortunately, he goes on to rely on the communal conviction, and this is wrong. Further, his emphasis on personal morality is completely misleading; central to the legal atmosphere is the morality of the individualistic unit of the agency, but not the personal morality - it is the morality of the evaluative self. In addition, his regard for personal morality is fundamentally contradictory to his theory; in fact, his scepticism of personal morality is the motivation for devising PPM.

Regarding the issue of atmospheric incompatibility of PPM, our last argument is somewhat unconventional and tricky, as it involves some empirical questions. Nevertheless, we believe it is significant to discuss it as it is important and has a narrative relationship with Dworkin's narrative. There are empirical questions like – who are these people who dominate the political atmosphere?[1248] What kind of people are they? What portion of people are they part of? What are their real objectives or goals, although their objectives or goals are presented as a '*bonafide'* mission to 'rule' or 'govern' the people?[1249] We do not have answers to all

[1246] Dworkin, *Sovereign Virtue* (n 1) 294.

[1247] Dworkin, *Sovereign Virtue* (n 1) 295. On a similar note, we may also face criticism. One might question whether the conviction of the evaluative self is justifiable as the conviction is general and detached from the consideration of the action self. The critic may further state that at the time of saying we can say many things, and these may not reflect our original personal position. We admit that the critics are correct. However, the point is their correctness has nothing to do with the genuineness and significance of the conviction of the evaluative self. GSEC is the standard that most efficiently reflects the sense of law and, like many other standards in other matters, this standard also reflects some gaps with reference to what people do in their personal life. However, there is no reason to claim that the standard is detached from the very person whose evaluative self sets it; it does contain his genuine conviction. Each individual's conviction sets the standard and the judges are supposed to see if there is any deviation from that standard. The standard is not superficial or ambitious at all, at times it may be strict. If the level of strictness reaches such a high level that no one can follow that, the GSEC itself has the mechanism to make sense of the standard. For example, all humans do, on many occasions, deviate from the set standard and for such deviation they may become repentant, and feel personally guilty. But for most of these deviations, they do not impose or expect to suffer or be held responsible by the external force. On the other hand, those few deviations for which they expect external coercion are the subject matter of law. For instance, while we may discourage lying and feel remorseful about it, we typically do not expect punishment for it. However, if the lie results in harm or causes someone to suffer, we may then seek external intervention, and therefore, the involvement of the law is justified.

[1248] Although not pleasant, it is open secrete who are these people who dominate the political landscape. See Gilens and Page (n 1184); 'Perspective | Why the Power Elite Continues to Dominate American Politics' *Washington Post* (24 December 2018) <https://www.washingtonpost.com/outlook/2018/12/24/why-power-elite-continues-dominate-american-politics/> accessed 31 May 2023.

[1249] The answer to the question seems imply a negative impression about the goals and objectives of the politicians. As Harrison and Boyd state – 'There has always been a widely held view in politics and political philosophy that 'ideology' merely provides a cloak for the struggle for power, the real stuff of politics. To justify their power and to persuade the people to obey, follow and support them, rulers use ideologies of various kinds'; see Kevin Harrison

these questions, and neither do we need them as long as their venture is Value-neutral.[1250] However, Dworkin provides us one answer that they 'are …typically skilful at judging the convictions of their constituents and choosing their public statements to reflect these'[1251] and they 'remain politically much more interested and informed'[1252]. By contrast, the law is a general and shared commitment of all irrespective of their skills, expertise, and so on. What the legal atmosphere requires is demonstrated in Dworkin's statement:

> We take responsibility for our choices: It makes no sense to take responsibility for these unless they are the upshot of choices. We cannot plan or judge our lives except by distinguishing what we must take responsibility for, because we chose it, and what we cannot take responsibility for because it was beyond our control.[1253]

His statement challenges his own theory, and this led to his contradictory position. On the one hand, he claims that the agency goal of politics can be properly served by 'providing everyone enough access to influential media, if he or she wishes'[1254] or by ensuring the equality of resources, on the other hand, he claims that it is not possible, neither do we aim at it.[1255] We maintain that his latter position is correct, meaning that the political atmosphere is entirely incompatible with achieving the agency goal, and neither do we need it. As Dworkin claims, we also hold that, at least, many 'people have no interest in politics'[1256]; nor do they need to have. In this regard, our concern is more specific, and the concern is about the people who do not care about politics. At the least, in theory, there are people (in fact there are) who have other responsibilities, if not more important responsibilities than just contributing to political morality.[1257] These

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and Tony Boyd, 'The Role of Ideology in Politics and Society', *Understanding political ideas and movements* (Manchester University Press 2018) <https://www.manchesteropenhive.com/display/9781526137951/9781526137951.00011.xml> accessed 31 May 2023.

[1250] Just as is the case in legal studies, so it is the case in political science. While legal scholars are in the dark regarding the questions of the precise sense of law or the nature of legal practice, political scientists, by and large, find themselves in the darkness when it comes to understanding the nature, meaning, motivation, and objectives of political practice. It seems that knowledge in political science has never been able to surpass the era of Machiavelli. See Polly Sly, 'The Nonsense and Non-Science of Political Science: A Politically Incorrect View of "Poly-T(r)Ic(k)s"' (2018) 8 Catalyst: A Social Justice Forum 268.

[1251] Dworkin, *Law's Empire* (n 1) 341.

[1252] Dworkin, *Sovereign Virtue* (n 1) 197.

[1253] Dworkin, *Sovereign Virtue* (n 1) 323–324.

[1254] Dworkin, *Sovereign Virtue* (n 1) 202.

[1255] Dworkin, *A Matter of Principle* (n 1) 27; Dworkin, *Taking Rights Seriously* (n 1) 332 (ebook page number).

[1256] Dworkin, *Sovereign Virtue* (n 1) 196.

[1257] Dworkin is also aware of such people who are completely disinterested about their political role. See Dworkin, *A Matter of Principle* (n 1) 27. For other evidence, see William A Galston, 'Political Knowledge, Political Engagement,

are the people like artists, scientists, philosophers, and so on, who have substantially contributed to what we are today as human species, and their contribution is conditioned by the fact that they do not care about politics and political morality. They do what they are best at. Thus, the political atmosphere, that is so significantly devoid of agency value, cannot properly reflect one's legal responsibility. Dworkin states – '[w]e might try to educate people not to attempt to influence others, with respect to political decisions … People could not succeed in following that advice, because in political argument it is impossible to separate dancer from dance'[1258]. Obviously, influencing people or exercising power resembles a dance where politics is the dancer. As the business is just for profit, politics and its morality are just for power; any attempt of separating PPM of whatever version from power is futile. Power is the antithesis of law.

7.2.3 Power and Influence

Dworkin expressly clarifies that law's empire is detached from the 'power or process'.[1259] Interestingly his narrative is primarily all about the 'power or process'; the centre of gravity of his political theory of law is revolving around the 'power and process', to be more specific, power plays the dominant role in his theory. Power, which can take on many forms ranging from physical force to subtle influence, lies at the heart of political activity and shapes the political atmosphere.[1260] Dworkin's sense of PPM and political morality – both, are the manifestation of power; neither is devoid of the effect and motivation of power. Dworkin himself acknowledges the fact that neither the conventional political morality nor the PPM is immune from the prejudices of power.[1261] More shockingly, Dworkin considers it as a normal and inevitable fact that power, in its whatever forms, will automatically feed into the PPM; thus, he does not have enough motivation to separate power from the PPM.[1262] In fact, on several occasions, he not only justifies but also

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and Civic Education' (2001) 4 Annual Review of Political Science 217; Tamsin Rutter, 'Why People Are Not Engaged in Politics and Policymaking – and How to Fix It' *The Guardian* (1 April 2014) <https://www.theguardian.com/public-leaders-network/2014/apr/01/david-blunkett-involving-people-politics-policymaking> accessed 31 May 2023.

[1258] Dworkin, *Sovereign Virtue* (n 1) 197.

[1259] Dworkin, *Law's Empire* (n 1) 413.

[1260] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 332. See also Marcus Llanque, 'Max Weber on the Relation between Power Politics and Political Ideals' (2007) 14 Constellations 483; Charles P Kindleberger, 'Power' in Charles P Kindleberger (ed), *Power and Money: The Economics of International Politics and the Politics of International Economics* (Palgrave Macmillan UK 1970) <https://doi.org/10.1007/978-1-349-15398-5_4> accessed 31 May 2023; Talcott Parsons, 'On the Concept of Political Power' (1963) 107 Proceedings of the American Philosophical Society 232; PH Partridge, 'Politics and Power' (1963) 38 Philosophy 117.

[1261] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 334.

[1262] His PPM is inevitably aimed at the increasing and flourishing of the power of the legislature and the people. He states – 'Any constraint on the power of a democratically elected legislature decreases the political power of the people who elected that legislature… Suppose the majority wishes that no literature sympathetic to Marxism be published… So the argument that the present majority has no right to censor opinions is actually an argument for reducing the political power of any majority'; see Dworkin, *A Matter of Principle* (n 1) 62. His statement makes it clear here that his PPM is subject to politics and that politics is all about the generation, nourishment and exercise

patronizes the feeding of power in the formulation of PPM.[1263] For example, his PPM is subject to as absurd a political concept as the agency goal of politics.[1264] Central to his claim of agency goal is the objective 'to give each person a fair chance to influence others if he or she can' and, as Dworkin himself acknowledges, this is 'the other side of the liberties of free speech and audience'.[1265] How could Dworkin's PPM, which is connected to features that go against the very basic features of law and Freedom, become a practical authority of law?

We have already discussed in the first part that power has no contribution to making the sense of law; instead, when power is fed into the sense of law, it destroys the very nature of the law, itself. Law by virtue of its nature counters the effect of power; rule that acknowledges, patronises, and increases the effect of power is not law at all.[1266] The very conviction of law is to protect the people who lack political or muscle power, and the conviction is inherent to the sense of law.[1267] Therefore, the PPM coupled with the effect of power has, in fact, a reverse relationship with law, instead of being a denominator of law. The narrative of Dworkin's PPM instructs the judges not to "wholly ignore the public's opinion" as such opinion constitutes political fairness.[1268] What does this "wholly" means? The problem of such an absurd narrative is not only that it is flawed as it lacks the exact explanation of "wholly" but also the fact that this flaw gives rise to a political atmosphere where the people of powerful class are given the privilege to unleash their political influence on the political officials so as to frame the PPM in a manner that will reflect the choice of the powerful.[1269] Such an atmosphere in every consideration is detrimental to the sense of law. This is exactly

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of power. Unfortunately, his narrative of PPM, often, opposes the reduction of the power of the majority, while the law's legality is justified in the reduction of the influence of power.

[1263] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 334. He states – 'The ideal of equal influence defies that ambition, however. When people are fastidious not to have too much influence, or jealous that they do not have enough, their collective concern is only a matter of show; they continue to think of political power as a discrete resource rather than a collective responsibility'.

[1264] Dworkin, *Sovereign Virtue* (n 1) 202.

[1265] Dworkin, *Sovereign Virtue* (n 1) 202.

[1266] Law's fundamental conviction of restraining or neutralizing the influence of power, although common and applied unconsciously, generally, remains silent and this silence is the reason for confusion for many scholars including Dworkin. As we will discuss further, we will see Dworkin confuses things when the convictions of law are silent. However, it should not be thought that the conviction is not expressed in legal decisions, at all. It is expressed in many cases and Dworkin himself goes through the cases, but unfortunately, he apparently fails to connect this fundamental conviction of law to the sense of law itself. For example, he states – 'In the years following the Bowers decision, however, several federal courts held that homosexuals nevertheless do not count as a suspect or quasi-suspect class. Suspect groups, they said, are those that lack the political power necessary to make the political process a fair and democratic one for them'; see Dworkin, *Sovereign Virtue* (n 1) 460.

[1267] As we have already clarified, we should not think that the law has this objective.

[1268] Dworkin, *Law's Empire* (n 1) 342.

[1269]Dworkin, *Sovereign Virtue* (n 1) 194. Dworkin states – 'officials always act in whatever way a majority of their constituents wished, … even if we did schedule elections frequently enough and provide recall mechanisms

the result that the freejon approach wants to avoid while the lawjon approach wants to embrace; seeing and justifying the law through the eyes of the community or state. As we have already discussed above, the law works on individuals and, hence, the law's concern, prima-facie, must be the individual(s). Community, states, etc are the reflection of power and law is supposed to defend individuals from the effect of the power of another individual, community or state.[1270] Therefore, when the law is shaped by political morality, it is likely that we will get exactly the opposite result than the result the sense of law is supposed to yield.

Dworkin's narrative demonstrates that the reverse effect of political morality on law is obvious and compelling as the political power is alarmingly unequally distributed and even the proposed dramatic restructure in the political system will not have enough impact in resolving this problem.[1271] In this context, to make sense of his political theory and ensure that it remains a viable explanation of the authority of law, he turns once again to the concept of power, which is both expected and disappointing. Acknowledging the fact of substantial power imbalance, he suggests a strategy to increase the power of those who lack it and decrease the power of those who have it more and this strategy will be an essential part of his PPM.[1272] In the materialization of this strategy, he suggests strategies, among others, like regulating political speech, ensuring sufficient access to the media, ensuring the equality of resources, and, most importantly,

sufficiently terrifying to make officials generally obedient, we could not make them always so'. In such a circumstance, Dworkin hopes that reliance on the judges will solve this problem. Hence, we have taken care of Dworkin's argument which claims that when the judges are political officials, they are less prone to be influenced by majority opinion. We reject his argument. In jurisdictions like America where judges are politically appointed, judges are likely to be influenced by the political opinion of the majority. See 'Analyzing Ideological Bias on the Supreme Court' (n 1028); Jessee, Malhotra and Sen (n 1028). On the other hand, in countries as in the continental Europe where judges are not politically nominated, even they are not immune from such bias. Because these judges are, generally, less independent in their opinion as they need to comply with the legislative documents strictly. Legislative documents generally reflect the majority opinions as the legislative documents are generally taken as the outcome of more of political process than of judicial process.

[1270] Ryan Miller, 'The State Has Too Much Power | Ryan Miller' <https://fee.org/articles/the-state-has-too-much-power/> accessed 2 June 2023; Lewis W Snider, 'Identifying the Elements of State Power: Where Do We Begin?' (1987) 20 Comparative Political Studies 314; Tony Bilton and others, 'Power, Politics and the State' in Tony Bilton and others (eds), *Introductory Sociology: Instructor's Resource Pack* (Macmillan Education UK 1998) <https://doi.org/10.1007/978-1-349-14741-0_10> accessed 2 June 2023; Petru Hlipca, 'State Power' (2017) VII Union of Jurists of Romania Law Review 113; George H Sabine, 'The Concept of the State as Power' (1920) 29 The Philosophical Review 301.

[1271] Dworkin, *A Matter of Principle* (n 1) 27; Dworkin, *Sovereign Virtue* (n 1) 191–193; Dworkin, 'Equality, Democracy, and Constitution' (n 1). He states – 'some private citizens have disproportionately more political power than others, … unfair influence'. Dworkin further States – 'the ideal of equality of political power, is both implausible and artificial'. See Dworkin, *Freedom's Law* (n 1) 27.

[1272] Dworkin, *A Matter of Principle* (n 1) 27. He states – 'We must take them into account in judging how much individual citizens lose in political power … Some lose more than others only because they have more to lose'.

'transferring some decisions from the legislature'[1273] to the judiciary so that the latter can interpret the PPM to the best interest of the people with no or decreased political power.[1274]

These are the points that significantly distinguish PPM from the 'political morality', at the least, this is the hope of Dworkin. However, we must submit that the hope is not founded on logical grounds and, instead, the changes he brings to distinguish the PPM from the existing 'political morality' will distort the sense of law and this will be more problematic. One of the important features of PPM is its emphasis on the redistribution of material resources so as to enable and balance people's bargaining, representational, and influencing power. To put it another way, as he expects, all with equal material resources will have equal influencing power and the equal influencing power will generate a law that will reflect the choice of all equally and, hence, the law will have more legal force and coercive authority.

Although, apparently sounds 'romantic' or 'egalitarian', empirically that suggestion will lead to a messier situation than we currently have.[1275] However, on a relevant note, our opposition is more fundamental, and it is of coherence. What is the ultimate point, finally? Where does the authority come from? Dworkin's answer is the apparent guarantee of an environment that will ensure that 'roughly'[1276] everyone has equal influence in the formulation of law or in the formulation of the institution or arrangement law is the product of. Isn't it pushing the matter in the Value-neutral sphere, a sphere that can attribute no Value to law? The answer is positive as the matter is presented as a number determining fact. Further, and most importantly, as we have already stated, power or influence is the antithesis of law; the law is validated by self-conviction, not by the amount of influence or power attributed.[1277] X is bound to follow a law not because she or he has equal influence as that of K, L, M, N, and so on in the formulation of the law, nor because almost all 'everyone' orders X to follow the law. The first ground requires further clarification. Suppose a rule has been accepted and 100% of people have equal influence or power in the formulation of the rule. The rule does not have the force of law; it is just a 'romantic' and unanimous political rule. 100% of people may exert their influence equally to make a rule permitting the killing of all mosquitoes from the surface of the world. As long as a rule is a manifestation of influence or power and avoidance of the GSEC, the rule never

[1273] Dworkin, *A Matter of Principle* (n 1) 27.
[1274] Dworkin, *Sovereign Virtue* (n 1) 202.
[1275] Is it, in practice, possible to ensure equal material resources for everyone? Highly impossible with the narrative we find in Dworkin's theory of material resources. The conditions he sets in his book titled '*Sovereign Virtue*' is too complex to fulfil. Even if we take note of all the compensatory measures ie insurance and protective conditions ie abstraction, it will not ensure that one will have the ability to exert a similar influence. Further, if we take into consideration the damages imposed on Freedom by his scheme, the complete arrangement will be futile.
[1276] Please note that Dworkin never expects that literally everyone will achieve this authority to influence.
[1277] The point is further clarified in the next Chapter.

gets the force of law. Even if we consider politics to be its most benign and soft version and take influence in the sense of just sheer communication in the interpersonal sphere, social morality is a more compatible option than political morality. To reject social morality, we do not need to show any further reason apart from that of Dworkin.

Other distinguishing features of PPM are equally defective and hence liable to be rejected as the practical authority of law. He prescribes judges should protect the interest of the people with no or less political power. Why? Under what basis? With the exception of the naive political justification for balancing political power and judges' superior expertise, Dworkin fails to provide any explanation that supports judges' biases in legal reasoning. We do not guarantee that the law is always neutral; in fact, the law's ground of action starts, in some cases, in bias. The law needs to be biased in favour of the party morality of law favouring; this terminal bias of law is supported by the overall unbiasedness of law and by its Value that is reflected by GSEC. Unfortunately, Dworkin's omission of a narrative supporting judges' biases makes his position unacceptable. We have already discussed how absurd it is to relate issues like regulating political speech, ensuring sufficient access to the media, etc to the discussion of legal discourse and reasoning. Thus, all distinguishing features of PPM fail to make any significance in distinguishing it from the existing political morality, and thereby, Dworkin's political theory is liable to be rejected even on the very grounds Dworkin presents to reject the existing political morality.

In conclusion, we can submit that Dworkin's objective is shaped by the scattered sense of law hidden in his mind, but his focus is on politics and political practices. Therefore, his methodology of finding 'ought' from the 'is' completely mistaken; his 'is' belongs to one dimension in the political practice that he thinks is a legal practice, while his 'ought' is connected to another dimension ie a scattered sense of law. Undoubtedly the reason behind such mistakes is explained at the beginning of our discussion ie he ignores the 1st stage; he lacks the philosophical basis of his theory and hence lacks the comprehensive sense of law while at the same time, being hooked with the lawjon approach and his focus is on the practices. It is quite important to mention that our legal practice has traditionally been based on and controlled by political theories and law or sense of law has been reflected in these political theories to the extent the sense of law is adaptive to the political theory. Sense of law has, except in the brief windows of history after wars of different times, never had the upper hand; instead, the political rules have been presented to us in the disguise of law. Eventually, when one explores the legal practices will find the dominance of political morality. Fortunately, Dworkin understands very well that this political morality is not fulfilling the expectations he has as a consequence of being, randomly, touched by the sense of law. Eventually, in the absence of the awareness of the legal morality, he makes a futile attempt to prescribe a modified version of the political morality ie PPM. Admittedly, political morality does play a role in legal cases, and it should. However, it is quite a madness

to avoid legal morality as a whole or cover legal morality in the shadow of political morality. Dworkin's flaw is more serious as he not only skips legal morality but also blindly and exclusively depends on political morality or PPM. In Dworkin's own statement, '[a] conception of law is a general, abstract interpretation of legal practice as a whole'[1278]. Therefore, the theory of the practical authority of law must be based on legal practice, a practice that reflects the sense of law, and definitely, it must not be based on political practice.

[1278] Dworkin, *Law's Empire* (n 1) 139.

Chapter 8: Insulating Dworkin from the Sting of the Lawjon Approach

The last chapter has demonstrated that Dworkin's quest for the practical authority of law is failed. Even if taken in the most favourable light possible, Dworkin's political theory and its relation to both conventional political morality and prospective political morality (PPM) do not make sufficient sense. The contribution of Dworkin's political theory of PPM is limited to proving that neither PPM nor any other form of political morality can be of any significance when the discussion is about the practical authority of law. The previous chapter has demonstrated that exploration into political morality is not only methodologically incoherent but also futile and misleading and the practical authority to be explored in the very practice of law and in the morality behind the practice itself. However, as discussed in the previous chapter, the significant issue that legal scholarship faces is a lack of awareness of the distinctive features that set legal practice and legal morality apart from other seemingly similar practices and their corresponding moralities.[1279] We submit that the legal practice and its morality are identifiable and comprehensible through the very sense of law and the philosophy behind the scenes. This chapter reveals that once the legal practice is distinguished and the morality of law is comprehended, not only Dworkin's question as to the practical authority of law will be resolved, but also the major confusions associated with the concept of law, in general, will be resolved.

[1279] In fact, the conventional scholarly arena seems even cannot think that law can have a separate identity apart from the apparently, similar discipline. Instead, they are rather more interested to reemphasise the connection and dependence between them. In the editorial note, Whittington states – 'Law and politics are deeply intertwined', see Keith Whittington (ed), *Law and Politics* (1st edition, Routledge 2012). Cerar states - 'Law and politics as social phenomena are two emanations of the same entity (a monistic ontological conception), regarding which their separate existence is only a consequence of a human dualistic or pluralistic perception of the world (a dualistic ontological conception). Furthermore, the difference between law and politics is, from a deeper ontological perspective, in fact only illusory'; see Dr Miro Cerar, 'The Relationship Between Law and Politics' (2010) 15 Annual Survey of International & Comparative Law 19, 20. However, it should be admitted that, as he states - 'the distinction (i.e. consciously persisting in a distinction) between law and politics at the current level of human development is necessary and indispensable'. Unfortunately, the distinction he refers to is not any original or substantial difference in its concrete sense; the distinctions are just some insignificant procedural differences. The distinction in the sense of law's autonomy and binding coerciveness. He distinguishes law from the notorious sense of 'power politics'. His distinction is not in the sense of separateness of law but in the sense of variation in different political subdisciplines whereas law is one of the subdisciplines of politics. This is absurd. Robert's book does present law and politics as two distinct disciplines but without telling us where the distinctions are exactly. In fact, the whole purpose of the book is to identify the connections of these two disciplines. See Robert E Goodin, *The Oxford Handbook of Political Science* (OUP Oxford 2011). Take a look at another book Angela Condello and others, 'Law and Politics: Continental Perspectives -', *Book Series - Routledge & CRC Press* (Routledge & CRC Press). The complete series of books are dedicated to show the 'core legacy of the Continental juridico-political tradition is the methodological commitment to the idea that law and politics are inextricably tied to one another'. See Ralf Michaels, '"Law Is Politics by Other Means?": In Support of Differentiation' <https://lpeproject.org/blog/law-is-politics-by-other-means-in-support-of-differentiation/> accessed 1 April 2023. Michaels states – 'The idea that law is "politics by other means," a finding emerging from a particular strand of American legal realism'.

This chapter is presented in three sections. The first section, while explaining the scope of the law, also distinguishes its scope of practice from other, apparently, similar spheres ie political, social, etc. The second part reveals unique and distinguishing features of legal morality and its associated legal sense that gives law the practical authority. This section, further, explains the basis of the strength of legal morality that fulfils all the requirements that Dworkin claims are inevitable to be considered as the practical authority of law. The third section aims to further clarify the sense of law and the morality of law in order to respond to and resolve the major confusions that Dworkin has regarding the concept of law.

8.1 Freedom, Law, & Politics

Although the claim of separateness of law is a debated issue, the claim is not unprecedented.[1280] Many scholars, including Dworkin himself, accept the separateness of law to a certain degree and the degree of separateness varies across a wide spectrum. However, the main challenge is connected to the separability itself; in the conventional and contemporary legal arena, there is unanimity about the inseparability of law and the sense of law from other, apparently, similar systems, institutions, and senses.[1281] In fact, we think that it will not be an exaggeration to claim that the sense of law is, largely and substantially, overshadowed by the senses and claims derived from the, apparently, similar spheres. Biological theories of law associate the sense of law with biological rules and in this process, the sense of law is overshadowed by or presented as a just outcome of the biological process.[1282] Political theories of law, including that of Dworkin's,

[1280] Cerar (n 1279) 20; Georgios I Zekos, 'Politics Versus Law' in Georgios I Zekos (ed), *Political, Economic and Legal Effects of Artificial Intelligence: Governance, Digital Economy and Society* (Springer International Publishing 2022) <https://doi.org/10.1007/978-3-030-94736-1_5> accessed 1 April 2023; Rachel E Barkow, 'Law Versus Politics' (2013) 63 The University of Toronto Law Journal 138.

[1281] Michaels (n 1279). He states – 'it is very specific to the US in another—law is really nothing more than politics'. Amy Kapczynski, 'Partisan Warriors and Political Courts' <https://lpeproject.org/blog/partisan-warriors-and-political-courts/> accessed 1 April 2023. Kapczynski states – 'It is both descriptively true, and normatively desirable, that courts are torqued by politic'. Hugh Baxter, 'Niklas Luhmann's Theory of Autopoietic Legal Systems' (2013) 9 Annual Review of Law and Social Science 167, 167; Britton-Purdy, 'No Law Without Politics (No Politics Without Law)' <https://lpeproject.org/blog/no-law-without-politics-no-politics-without-law/> accessed 1 April 2023; Jonathan R Macey, 'Law and the Social Sciences' (1997) 21 Harvard Journal of Law & Public Policy 171; Daniel Martin Katz and others, 'Complex Societies and the Growth of the Law' (2020) 10 Scientific Reports 18737; Amy Rublin, 'The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law' (2011) 19. According to Rublin, law is intrinsically inseparable from the social science. John Monahan and Laurens Walker, 'Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law' (1986) 134 University of Pennsylvania Law Review 477, 477; David Howarth, 'Is Law a Humanity: (Or Is It More Like Engineering)?' (2004) 3 Arts and Humanities in Higher Education 9, 9. Law is necessarily entangled with the 'practical and normative humanities, such as ethics and political philosophy'. Jerome Hall, 'Law as a Social Discipline' Temple Law Quarterly 63; Geoffrey Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67 The Cambridge Law Journal 288.

[1282] Hugh Gibbons and Nicholas Skinner, 'The Biological Basis of Human Rights' (2004) 13 Public Interest Law Journal 51; Gibbons (n 558); Gommer, 'The Molecular Concept of Law' (n 481); Hendrik Gommer, 'Integrating the Disciplines of Law and Biology: Dealing with Clashing Paradigms' (2015) 11 Utrecht Law Review 34; H Gommer, 'The

associate the sense of law with the political process and claim that the sense of law is inseparable from political morality, political practice, and its processes.[1283] Even scholarly works, which claim the autonomy of law, present the law in an associated sense and hence law loses its separability.[1284] The same outcome is observed from other theories focusing on other similar spheres be it social, natural, religious, or historical.[1285]

Failure of all these theories to distinguish the sense of law is due to their omission of the comprehensive sense of law and the associated philosophy. Instead, these theories, more or less, focus on the connectedness of law to their respective sphere of concern.[1286] They just overlook the very fact that the connectedness is not a unique feature in nature, in the human mind, or in matters of human creation of any sort; anything can be connected to anything and hence, the law can be connected to any sphere of life or to any discipline. As long as the quest is for the authority of law or of the concept of law, their focus is on sheer contrast with the requirements of the quest; the journey is supposed to be, primarily, inward, instead of outward. Eventually, their quests are not only directed in the wrong direction but also come up with wrong results.

The freejon approach enables us to understand the sense of law and the associated philosophy, which in turn highlights the need to draw a tentative distinguishing line to separate law from other seemingly similar spheres. Now we should be able to draw a tentative line between law and other spheres. Admittedly, the line cannot be perfect, but demonstrable enough and this should enable us to find the clues about, support, and confirm the practical authority of law. Demonstration of the separability of law is not only important for its own sake but also important to substantiate and verify the philosophy that the freejon approach presents about the sense of law as the separability is intrinsic to the sense of law. In fact, any comprehensive and meaningful theory of law must presuppose the separability of law. In this section of the discussion, we

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Resurrection of Natural Law Theory' (2011) 42 Rechtstheorie 249; Gommer, 'The Biological Essence of Law' (n 481); Hendrik Gommer, 'From the "Is" to the "Ought": A Biological Theory of Law' (2010) 96 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 449; Hendrik Gommer and Erik-Jan Broers, 'Evolutionary Backgrounds of the Sex Offense: A Dutch Case Study' (2013) 14 Ethiek en Maatschappij 1.

[1283] Jeremy Waldron, 'Kant's Legal Positivism' (1996) 109 Harvard Law Review 1535; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1028&context=lectures_pre_arch_lectures_sibley>; Richard A Posner and Jeremy Waldron, 'Review of Jeremy Waldron, "Law and Disagreement"' (2000) 100 Columbia Law Review 582.

[1284] Richard A Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harvard Law Review 761; Bix (n 756).

[1285] Lewis Kornhauser, 'The Economic Analysis of Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2022, Metaphysics Research Lab, Stanford University 2022) <https://plato.stanford.edu/archives/spr2022/entries/legal-econanalysis/> accessed 1 April 2023; Anthony Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22 Oxford Journal of Legal Studies 419.

[1286] Cerar (n 1279); Condello and others (n 1279).

will understand the line that roughly but sufficiently separates law from other, apparently, similar disciplines. Then, we will reveal how badly Dworkin's own theory presupposes separability. Finally, we will demonstrate how the awareness of the separability of law could help clarify some of his confusion.

8.1.1 Understanding the Dividing Line

In the last chapter, we have dealt with why we should maintain the line between law and politics. This chapter focuses more on demonstrating that the law is distinguished from other relevant spheres and the distinction is supported by the grounds that are specifically relatable with reference to the narrative of Dworkin.[1287] To begin our demonstration of the separateness of law we find Nerhot's conception of 'plot' worth noting.[1288] Nerhot states:

> The plot - we mean that which makes the interpretation come about - is constructed by this philosophy: reality will be perceived through this contemplation, the texts will take on meaning on the basis of this definition, and legal technique in general will become comprehensible only within this overall philosophical design and will be entirely at its service.[1289]

In the same vein, we submit that Freedom, law, politics, society, religion, etc have their own respective and unique plots and based on the plots, they have their own respective meaning, reality, function and so on. No doubt, the political situation or set-up has an immense impact on law and the morality of law. Nevertheless, the point of significance is that political morality or PPM is not an inevitable element of the law, while the morality of the law is. Consequently, political morality can never take the place of the morality of law. In addition, Freedom, the foundation of the freejon approach, imposes further restrictions in considering political morality or PPM as an essential justification for the law. To further clarify the point, we may refer to the following equation that depicts where the law stands with reference to Freedom

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[1287] Therefore, the chapter, unless it is part of Dworkin's narrative, does not focus on general grounds that can be presented or commonly presented to distinguish law from other spheres. For example, a point of distinction that is remarkably picked up by Rawal about individual's way of actions is that 'individuals naturally act interpersonally not representatively' where representational value plays a central role in politics; see Stephen C. Hicks, 'The Politics of Jurisprudence: Liberty and Equality in Rawls and Dworkin' (2017) 25 The Catholic Lawyer 106, 114.. In addition, three values of political morality ie symbolic, agency and communal, which make the political morality special for Dworkin, proves to be flawed as the latter two values are often contingent; see Alexander Latham, 'Dworkin's Incomplete Interpretation of Democracy' (2018) 10 Washington University Jurisprudence Review 155, 166.

[1288] Dworkin's own narrative has also a similar concept of plot and his concept of theoretical framework requires almost similar conditions to be fulfiled as that of Nerhot; see Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 172–176.

[1289] Nerhot, 'Interpretation in Legal Science' (n 22) 6.

and other moralities including political morality. What role law is supposed to play in 'facilitating'[1290] human life? To answer this question, we submit the following equation:

Spheres or Plots	Self-facilitating (Freedom at play)	Legal Facilitating (Law at play)	Facilitating by other Morals or Institutions (political, social, religious, etc role at play)
Distinguishing Lines	self-concerning & self-addressing contents	Interpersonal contents involving the question of morality of law (GSEC)	Interpersonal contents but no question of morality of law or GSEC

Before going to the explanation of the chart we must admit that spheres of life cannot be separated as precisely as the chart shows; there is always a possibility of overlapping of the spheres. Nevertheless, it does not follow that law is inseparable. The chart depicts the scope of the law, which begins where the sphere of freedom ends and ends where the sphere of politics, democracy, and so on begins. The sphere of freedom consists of the personal realm, and as long as one's actions are self-concerning and self-addressing, they fall within the sphere of freedom. Any issue within the plot of Freedom will be facilitated with reference to the conditions of Freedom as laid down in the first part; the matters are not, generally, subject to the plot of law as long as any matter is not developed into a matter constituted of the plot of law.

The plot of law is constituted of matters which are interpersonal and with the question of the morality of law (GSEC). On the other hand, other plots ie social, political etc are constituted of matters which are interpersonal but not with any question of the morality of law (GSEC). We must keep in mind which dimension or plot a particular aspect of an incident belongs to; it is not possible to drag an aspect related to one plot into the sphere of another plot. To understand the dividing lines, we will go back to the incident of X, a naturalist who wants to go to the public park nude, which we have discussed in Part 1. Our concept of Freedom suggests that it is X's body; whether he or she will cover his or her body is relatable to X's Freedom. *Prima facie*, there is no reason on its own to bring the matter within the sphere of law and punish someone for their actions; the law cannot generally prohibit or put restrictions on one's freedom to cover or not cover their body, even in a public place like a park. Just because X does something in the public place it does not become the plot of the law; it remains as a part of the Freedom of expression of X as long as the

[1290] We use the word facilitating instead of the regulating for reason the freejon approach wants to promote.

act is self-concerning and self-addressing.[1291] Wearing or not wearing the dress is, by default, self-concerning and self-addressing. As long as the concern is about a public place, there may be a user manual for using the property of the park and, in such a case, X has to follow that user manual. However, as long as it is X's body, he or she is not subject to any prescription or restriction of law. Other people have the option not to stare at X if this disturbs them. Until this point, the matter is as simple as this.

Now, if it is a sensitive place and X's naked body has the possibility of having a concrete impact on the place, there can be a prohibition of nudity by law subject to the fulfilment of two conditions that the plot of law needs to satisfy ie inter-personality and morality of law (GSEC). Let's suppose that the place is a very sensitive archaeological site or other places of like nature such as a highly infectious place where dress is inevitable to contain the impact of the infection. Or it may be the case that only a dress is not enough, the dress must be of a specific type of clothes or fabric or so on. The elements of inter-personally surfaced from the moment X steps into the place and the incident is likely to satisfy the second condition too as the GSEC will not only support the restriction but also support coercion to prevent the violation of such restriction order. The musk mandate, which was in place during the COVID 2019, may be justified from this perspective subject to the assurance that the decision is not just a mere political decision.[1292]

We may, further, suppose that the park is an exclusive property belonging to a Church and they have taken a decision not to allow any nude person in the park on their religious ground. The matter is now purely within the sphere of the third dimension or plot, and, hence, neither Freedom nor law, *prima facie*, has anything to do with it. The moment X enters the park, he comes into the interpersonal plot. However, this incident is not within the premise of a legal plot as a question of legal morality is yet to be surfaced. Instead, in the absence of the issue of legal morality, the incident is exclusively within the area of a religious plot. Again, let's suppose that the premise is duly allocated for an assembly of a political party named 'Conservative Party' that takes a position against public nudity. If X is prevented from attending the assembly, that will be well justified on the political ground. Neither law nor Freedom has, generally, a stake in it.

What will happen to the identification of different plots, if such interpersonal incidents come with the question of legal morality or GSEC? Can legal action be sought, if, for instance, the church authority or

[1291] Although, the incident takes place in the public space, there is no feature of interpersonal relationship. Further, to constitute a plot of law, interpersonal relationship alone is not sufficient. The relationship must be with question of morality of law.

[1292] In such a case, for instance, the decision is supposed to be supported by the recommendation of the relevant expert that substantiates that the concern is genuine.

political party allows white people while restricting black people from entering into the church or the political assembly? Yes, legal action can be sought from the moment such a discriminatory decision is made, it adds a new dimension to the facts by introducing a new plot involving the morality of law that holds that all should be treated without discrimination. Now, the plot in consideration of the court is no more a plot of religion or politics; it is now a plot of law as long as the discriminatory decision is concerned.

Can anyone, now, claim that in such a case the plot of law overlaps or intervenes with other plots? Or does the overlapping or intervention of one plot into another plot necessarily rejects the separability of law? Such questions and associated confusions are a natural outcome of unawareness, lack of awareness, or misunderstanding of the inevitable and distinguishing features of each dimension of our life that gives rise to varieties of plots i.e. political, social, legal, Freedom, etc. In fact, this confusion is central to the inseparability claims; the main problem is that the scholars miss or are unaware of the unique features each plot is associated with. An incident can have multiple aspects, and each aspect may give rise to its own unique issue. As a result, various plots may be simultaneously connected to the same incident. However, we cannot say that the plots overlap, because each issue is associated with its respective plot through which the very issue comes into being. Each plot and its issue, as Nerhot posits, is distinguished by respective rules and the application of the plots is not made along the incidents but through their constituting issues and the rules of application.[1293]

Let's take an instance - X and Y make a contract as per their own terms. As long as the contract is not detrimental to either Freedom or the existing law of contract, the law has nothing to say about the terms of the contract. Those terms are, simply outside of the legal plot; instead, the terms are more subject to the plot of their respective Freedom, political arrangements, etc. Now, suppose the contract has a term that the price of the goods must be paid in USD. Law has nothing to say about the term; the term itself is outside of the plot of law. In this circumstance, the seller comes to the court, because the buyer wants to pay in Ruble instead of USD. Should the court entertain a case that involves a term not within the plot of law? Although

[1293] Nerhot, 'The Law and Its Reality' (n 884) 62. Nerhot states – 'A number of social practices do not, by definition and in consequence of what we have said, constitute the object of any involvement by the law. Only those events are taken into consideration that allow the demanding of a right or the operation of rules. Carbonnier had already noted this phenomenon when he spoke of the "self-neutralization" of law. It is in fact through its own needs that the law manages to annihilate itself'. Nerhot further states - 'A fact receives a definition only from its contribution to the development of the plot. …Correspondingly, the plot is more than an enumeration of events, of facts; it organizes them into an intelligible whole … Interpreting a text, understanding a text, is also understanding how and why some facts are called in to support the technical arguments in which legal argumentation unfolds and which allow a certain conclusion which, far from being predictable, must appear to be "reasonable"…Through the plot, thus, we learn to read the end in the beginning, and the beginning in the end. The plot leads us to an analysis of circular'. See Nerhot, 'Interpretation in Legal Science' (n 22) 223.

the term is not part of the legal plot and hence not a legal issue, the answer is yes. Why or how? In the absence of a legal provision obliging the parties to pay in a certain currency, it is simply not a matter for the court to see whether the party to the contract is paying in USD or in another currency. The court will look into the matter from a purely legal perspective or plot and will look for a legal issue following the two conditions of law ie inter-personality and GSEC. In this case, the law interprets the incident in the language of the law. The buyer promised 'K' and now he or she is not fulfiling the promise. The promise constitutes the condition of inter-personality and GSEC holds that the promise must be fulfiled. The legal plot is introduced and thus, the emergence of the legal issue. Thus, each plot constitutes its own fact; the given fact or incident simply does not exist in the plots.[1294] Nerhot states that [t]he fact is not meaningful in itself, but only when bound up with and integrated into a set of practices that give it meaning…Reality is constructed and defined every time'[1295]. Therefore, the claim of the overlapping of the plots, and thereby, the inseparability of law is futile.

Let's take another example - X and Y are in a contract where X is supposed to perform in a cultural function. X rejects to perform. Y proceeds to the court for an order of a compulsory performance. Apparently, X can easily be charged for the violation of the promise as the plot of law is supported by inter-personality and the GSEC ie promises must be fulfiled. The court rejects the application of specific performance on the ground that it will go against the Freedom of X as it involves X's personal performance. Instead, the court orders X to compensate for his or her non-performance. Can we say that there is an overlapping of law and Freedom? Can we say that the plot of Freedom overlaps and rejects the plot of law? More importantly, can we say that the plot of law is not separatable from the plot of Freedom? Although the incident is the same, there is no overlapping of Freedom and law; the unique features of each of the plots are sufficiently identifiable. This also answers our third question negatively; here the plot of law is obviously separatable.

[1294] Nerhot states – 'Speaking legally, no fact can be stated without reference to a rule. The fact, as legal science understands it, is in no way a given that imposes itself by itself, external to legal science. Quite the contrary, legal science speaks of "conclusive" facts (i.e., those able to convince the judge), of "pertinent" facts (useful in the matter, but no more), and conversely of "inconclusive" or "non-pertinent" facts, i.e., facts which do not exist for the law "having regard to the circumstances of the case"; see Nerhot, 'The Law and Its Reality' (n 884) 59. Plunkett and Wodak state – 'We argue that taking the possibility of the disunity of legal reality seriously has important upshots'; see David Plunkett and Daniel Wodak, 'The Disunity of Legal Reality' (2022) 28 Legal Theory 235, 235. See also Robert Gordon, 'Unfreezing Legal Reality: Critical Approaches to Law' (1987) 15 Florida State University Law Review 195, 198. Gordon states how legal fact is different from the given fact – 'legal discourse [reality] paints an idealized fantasy of order according to which legal rules and procedures have so structured relations among people that such relations may primarily be understood as instituted by their consent, their free and rational choices'. Kelsen, for instance, clarifies the point through the instance between a Feme murder and a 'execution of a legal death penalty. When the reality taken from the general perspective there is no distinction between these two incidents, but in the eye of the law the reality is completely different in these two instances of homicide; see Kelsen (n 18) 3.

[1295] Nerhot, 'The Law and Its Reality' (n 884) 60.

However, since Y's legal claim of specific performance is rejected to honour the Freedom of X, it may apparently justify the second question. Nevertheless, we answer the second question negatively too; Freedom neither overlaps nor rejects the plot of law. The performance of the promise is still, largely within the sphere of X's Freedom as the promise requires X's personal performance, the very essence of his or her Freedom. Therefore, the performance of the promise is not within the plot of law and hence compelling the performance is beyond its authority. Law does what its plot allows it to do, ie ordering X to compensate. The compensation is a remedy as the plot of law allows.[1296]

Now let's think about an opposite scenario which is less common in comparison to the incidents discussed above. Suppose a scenario where one has apparently a sound claim of Freedom, and it is rejected by the plot of law. Suppose, X is a mature person engaged in a sexual relationship with Y, a minor girl of 12 years. The relationship was consensual from both ends and thereby X defends himself on the ground of the lifting of the Freedom boundary by the minor. While the lifting of the Freedom boundary may be supported by the GSEC, the merger of X's Freedom with the minor in this relationship is in no way accepted by the GSEC. Therefore, the case comes in the plot of inter-personality and morality of law and, hence X's defence of Freedom is not acceptable. This inevitably brings the issue into the plot of law and justifies legal action against X. We can take another simpler case for a better understanding of the point. X, a mature person, may take employment with conditions that will dehumanise him or her; the term may, for instance, involve that X must work 16 hours in a day without a single break. The employer cannot defend the term by claiming that X had the Freedom to accept the term or reject it; X's waiver of Freedom may not justify the employer's term by virtue of the effects of the law in force. This justifies Dworkin's conclusion – X's Freedom allows X to be a 'prostitute'[1297], but this does entitle Y to run a prostitute house.[1298] This, explains why one has no right to commit suicide while, at the same time, it is not a crime if he or she attempts to commit suicide.[1299]

[1296] If compensation is not allowed under the plot of law, no such remedy is obtained in such cases. This explains why the spouses of lawful wedlock have a higher chance to get compensation if one of the spouses breaches trust, while the partners whose union has not been legalised yet have a lesser chance to get compensation. On the other hand, in neither of the cases, the spouses or the partners are not, generally, forced to specific performance. However, the opposite trend is seen in those jurisdictions where Freedom has been given less value, for instance, in the countries following the Sharia law or Hindu law women are forced to continue their marital obligations. However, it is to be clarified that while we are claiming that this is the case in those jurisdictions, it does not necessarily follow that the Sharia law or Hindu law itself is responsible for the forced performance.

[1297] Although current linguistic practice discourages using the word and, in its place, the phrase 'sex worker' is used, we have a special reason to use the word 'prostitute'. The freejon approach requires further justification and philosophical basis to accept the claim that the phrase 'sex worker' is better to use in place of the word 'prostitute' while our concern is about the dignity of the person who is involved in such acts of prostitution.

[1298] Dworkin, *Taking Rights Seriously* (n 1) Chapter 10 and 11.

[1299] Unfortunately, the Penal Codes of the Commonwealth countries have such horrific provisions that criminalize an attempt of committing suicide. For instance, see section 309 of The Indian Penal Code 1860 (Act No 45); The

Again, suppose X and Y two political parties add Z, another political party, to form a large political unity with a commitment that they will do the task 'A' once they get the chance to form the government. Now, if X and Y do not comply with their commitment, Z may go to court on that political issue. The court will decide as per law and there is no scope to claim that the decision is a political decision. Neither does the legal decision turn the original political matter into a legal matter. To take another example, suppose a community of a particular state has an established rule within that community that a person with Y quality will have the right to be a spokesperson for that community. Now, if Z has this qualification and his or her community deprives him of becoming a spokesperson, the law can intervene here not because of the rule of the community but because of the GSEC that promises must be complied with or that one must not be deprived of his or her right because of his or her lack of power. We cannot say that in any of these two cases, the law intervenes in, respectively, political plot and social plot.

Since, as Nerhot posits, there is no given fact or incident in the premises of the plots, it is neither logical nor safe to accept or classify a fact or incident as a legal incident or social incident or political incident and so on. We have already seen that an incident is constituted of numerous features some of which are traceable by legal plots, some are traceable by political plots while others are traceable by other plots. In addition, one plot may involve the question of other plots and thus an original plot may be constituted of secondary or branch plots some of which may be of completely different plots. However, still, the plots maintain their separability. As the structure of a building is constituted of different elements like sand, steel, bricks, cement, etc, an incident may have different elements of composition or different features. The elements of the structure are distinguishable from each other ie cement is cement which is different from steel; both follow their respective rules. We can never attach steel with the principle of cement. So is the case for the features of the incidents; each feature is subject to its respective plots. Human life is facilitated by different facilitating regimes ie Freedom, law, politics, etc and while all of these function in combination, each functions their own respective roles in their own way separately and hence the separability is not only demonstrated but also important.

Penal Code 1860 (The Penal Code). There has been a continuous urge, for instance in India, from all sections of the people to decriminalize such acts. See Md Ali Ashraf, 'Culpability of Attempt to Commit Suicide – a Legal Labyrinth Amidst Ethical Quandary' (2007) 49 Journal of the Indian Law Institute 503; Farhana Helal Mehtab and others, 'Right to Commit Suicide in India: A Comparative Analysis with Suggestion for the Policymakers' (2022) 8 Cogent Social Sciences 2017574; Rajeev Ranjan and others, '(De-) Criminalization of Attempted Suicide in India: A Review' (2014) 23 Industrial Psychiatry Journal 4; Nikhilesh Mondal, 'Suicide and the Law : Indian Perspective' (2019) 23 Bengal Journal of Psychiatry 12. There have been countless efforts made in India to strike down such provision from the statue but without any success. The freejon approach offers the justifications and a concrete ground in support of the annulment of such provision. One does not have right to commit suicide as this is against the very concept of one's Freedom. On the other hand, state does not have any authority to criminalize an act of attempting to commit suicide because the act never comes into the plot of law for the element of inter-personality never presents.

8.1.2 Dworkin's Theory Presupposes the Separability

Dworkin's omission of the 1st stage of the quest and thereby omission of getting a comprehensive sense of law obstruct him from drawing a legal plot. His acceptance of reality as given and its recording as 'direct and immediate'[1300] obstructs him from seeing the facts of different realities constructed by different frameworks of different theories resembling different senses of humans. Consequently, he fails to be aware of the distinguishing features of relevant human senses and hence his failure to draw a proper legal plot that is presumed to be the outcome of the sense of law. In the absence of the legal plot, which could conveniently guide him in maintaining the separateness of law, he presents law and legal practice in the disguise of politics and political practices; this omission led him to present law and legal practices as appendices of politics and political practices. Nevertheless, Dworkin's narrative, as much as it is touched by the sense of law, presupposes the separateness of law from the political sphere and the separateness is not only presumed but also warranted in the narrative of Dworkin and thereby, Dworkin's theory also endorses and justifies the separability of law.[1301]

Dworkin asks – 'Is an unwise highway an act of injustice?'[1302] In response to the question, all of his answers refer to the indication that there must exist a dividing line between politics and law. He clarifies that it is a policy issue and should be decided by political institutions, specially by the government and not by the court.[1303] He goes further 'deeper' to claim that it will not make any sense if one claims that this is an

[1300] Nerhot, 'Interpretation in Legal Science' (n 15) 224.

[1301] Dworkin states – 'So there is, after all, a general right to liberty as such, provided that that right is restricted to important liberties or serious deprivations. This qualification does not affect the political arguments'; see Dworkin, *Taking Rights Seriously* (n 1) 320-321 (ebook page number). He is acknowledging a clear dividing line between Freedom and Politics. Dworkin further states – 'Constitution forbids certain forms of legislation to Congress and the state legislatures. But neither Supreme Court justices nor constitutional law experts nor ordinary citizens can agree about just what it does forb'; see Dworkin, *A Matter of Principle* (n 1) 33. The freejon approach has definite answers in this regard. The gap which is intentionally left behind presupposes the presence of something other than the law itself, and the freejon approach submits that the area of the gap is allocated for Freedom. He further states – 'The communal life of an orchestra is limited to producing orchestral music: it is only a musical life…But they do not suppose that the orchestra also has a sex life, in some way composed of the sexual activities of its members, or that it has headaches' ; see Dworkin, *Sovereign Virtue* (n 1) 227. His reference to the orchestra is, primarily, in relation to reflect the political and legal reality. He is clarifying here that the political and legal reality is limited to just producing the orchestral music; other aspects of orchestra are not connected to these spheres. This indicates a separateness of other aspects. See Dworkin, *Law's Empire* (n 1) 180. He states – 'a political decision causes injustice, however fair the procedures that produced it, when it denies people some resource, liberty, or opportunity that the best theories of justice entitle them to have'. The statement demonstrates that the political process is distinguished from the legal process.

[1302] Dworkin, *A Matter of Principle* (n 1) 98.

[1303] Dworkin, *A Matter of Principle* (n 1) 100. Endorsing the decision of Lord Diplock, he states - 'Lord Diplock's point is precisely that the second-order policy decision should be made by the government, through the administrative agency in question, not by the courts'.

injustice, 'even if we do assume that when the government makes a mistake in its policy calculations the government thereby violates each citizen's rights'[1304]. We have two messages to take from the statement of Dworkin – a mistake in the policy decision does not violate one's legal rights even if it could be shown that the decision, anyway, violates his or her right of any sort. This gives us a clear idea that the legal right is different from the policy-supported right (supposedly, political right). When a policy decision is violated, this becomes more of a political matter rather than a judicial matter.[1305] His comparative discussion on the decisions of the *Mathews vs Eldridge*[1306] and the *Bushell vs the Secretary of State*[1307] reveal that the dividing line is prominent. He posits that the distinguishing factor between the two cases is the injustice factor 'that cannot be captured in any utilitarian calculation'.[1308] The more relevant point of distinction for our purpose is that, as Dworkin states, *Mathews* involves a question of principle that requires the element of moral harm (as distinguished from bare harm), whereas *Bushell* does not involve any such question involving moral harm and thereby the question of principle. The question of moral harm or principle, as Dworkin claims, is the 'fit question of adjudication' while the issue involved in the *Bushell* is a matter of 'an ordinary judgment of policy, with no distinct issue of entitlement'.[1309] Thus, in Dworkin's own submission law is distinguished from politics with reference to the presence of moral harm, while it is inevitably connected to the former, for the latter it is not the case; moral harm is an inevitable denominator of assessing legal entitlement.[1310]

Dworkin's explanation of moral harm also presupposes the existence of separability. Although his narrative fails to show the exact reason why moral harm carries demonstrably higher significance than that of the

[1304] Dworkin, *A Matter of Principle* (n 1) 99.

[1305] His narrative presupposes that the claim of policy is more connected to politics whereas the claim of principle is likely to be associated with law. We will further explain this point in a while.

[1306] *Mathews v Eldridge, 424 US 319 (1976)*.

[1307] *Bushell v Secretary of State for the Environment - Case Law - VLEX 793681265* (n 1212).

[1308] Dworkin, *A Matter of Principle* (n 1) 100.

[1309] Dworkin, *A Matter of Principle* (n 1) 101.

[1310] Dworkin, *A Matter of Principle* (n 1) 102. Dworkin expects that Laurence Tribe also make note of the element of moral harm as a denominator of legal rights as distinguished from rights (political) originating from bare harm calculated by 'cost-benefit, utilitarian calculations'. Laurance Tribe's statement is more clarifying and more significant in showing the dividing line: 'the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one'; see Laurence Tribe, *American Constitutional Law, 3d* (3rd edition, Foundation Press 2000) 503–504. Tribe's reference Dworkin page 102. Tribe's statement clarifies that the question of law is a deeper, and serious question than that of politics. The question of law is related to the very person or individual, his or her status as a person and dignity as a person. The person matters, his or her opinion matters not merely in the representational or statistical sense but because of his or her existence as a person. Each individual matters in law whereas the case is substantially different from communal perspective.

bare harm, he does identify some features of it and these features are the reflection of the sense of law.[1311] His comparative discussion of these two types of harms is indicative of the distinctions between the plot of law and other plots. He clarifies that the assessment of moral harm is not based on the harm one suffers empirically or physically.[1312] The moral harm is not a statistical matter; instead, it is more a phenomenon of conviction that people usually have about the harm.[1313] The conviction of moral harm, as he says, must not be personal, political or majoritarian.[1314] Rather the conviction needs to be objective and social.[1315] He further goes on to explain that the objective and social conviction should be extracted by an ideal political process and through the decisions of the majority provided that the decision is taken in an ideal environment where the decision is not biased by the conventional majoritarian concept of politics.[1316] All these ideal processes and environments are indicative of the enormous complexities associated with genuine community and PPM which we have already discussed and here we do not need further discussion on these. However, what is relevant and important for us is the fact that his narrative presupposes moral harm as clearly distinguished from other bare harms and the distinction of moral harm is based on the elements which, inevitably, distinguish law from politics and its conventional morality.

Further, his emphasis on the abstractness and generality of the legal theory, inevitably, presupposes separability.[1317] His theory cannot comply with the requirement of generality if he continues to, inevitably, associate law with politics, political morality, or the political sphere. His theory of law, when taken as inseparable from the political association, loses its generality; it, arguably, makes the theory very much like the American theory of law. For example, Buller posits with reference to the Nazi legislation, South African law or classical Roman law that the principle of political morality rather led to a fundamental principle of

[1311] Dworkin, *A Matter of Principle* (n 1) 85. He states that the moral harm, unlike bare harm, is inevitability, associated with the violation of principles and such violation is of special type.

[1312] Dworkin, *A Matter of Principle* (n 1) 87. He states – 'the normal phenomenology of guilt itself includes the idea of moral harm being a special harm to others, over and beyond the bare harm one causes them. For why else should we feel guilt for causing harm deliberately when we feel less guilt or even no guilt for causing the same harm accidentally?'.

[1313] Dworkin, *A Matter of Principle* (n 1) 86.

[1314] Dworkin, *A Matter of Principle* (n 1) 86–87.

[1315] Dworkin, *A Matter of Principle* (n 1) 86–87.

[1316] Dworkin, *A Matter of Principle* (n 1) 86–87.

[1317] Dworkin, *Law's Empire* (n 1) 90. He states – 'General theories of law, like general theories of courtesy and justice, must be abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it'. To reconfirm us that his purpose is to construct a general theory of law he further states – 'General conceptions of law, like the three I named, begin in some broad thesis about whether and why past political decisions do provide such a justification'; see Dworkin, *Law's Empire* (n 1) 109. Also see Dworkin, *Taking Rights Seriously* (n 1) 8 (ebook page number). He states – 'A general theory of law must be normative as well as conceptual… We test general theories about justice against our own institutions … The second - intuitions of justice …features of a general theory to be constructed'; Dworkin, *Taking Rights Seriously* (n 1) 199–200. (Page 200)

inequality that is completely the opposite of Dworkin's objectives.[1318] Therefore, Buller along with many well-wishers of Dworkin, mistakenly, seems that Dworkin might not want to present a general theory of law.[1319]

We have two plans to discuss the lack of generality of a theory of law. First, accepting that his theory really lacks generality. In this case, the thesis submits that Dworkin's theory does not fulfil the minimum requirements, because a theory of law must be general and homogenous.[1320] Sense of law as we have seen earlier is connected to the human in general and the connection transcends society, culture, nation, etc; the more general a sense the more it becomes legal.[1321] Dworkin's main concern is to find the practical authority of law; in another language, his main objective is to make the law more legal and hence, make the law better than worse. Dworkin expressly acknowledges this equation expressly through the principle of abstraction.[1322] This suffices that Dworkin cannot afford the omission of generality and, thereby, cannot afford the omission of separateness.

Second, accepting that his theory does fulfil the generality requirement; his theory of law is not meant to be jurisdiction-specific. We have several reasons to conclude that he intends to offer a general theory of law. The objectives and the spirit of his theories reflect so.[1323] Another very important point is his tilting

[1318] Buller (n 2) 13–15.

[1319] Richard A Posner, 'Hart versus Dworkin, Europe versus America' in Richard A Posner (ed), *Law and Legal Theory in England and America* (Oxford University Press 1997). Posner thinks that Dworkin presents the American theory of law, while Hart presents the European theory of law.

[1320] A theory of rules that varies from community to community, that is nothing but community rules. Theories or rules which vary along the lines of cultures, religions, societies, etc , are nothing but the theories of cultural rules or religious rules or social rules as the case may be. According to Fuller, the law must take the form of general rules because 'it furnishes him [man] with base lines against which to organize his life with his fellows. A transgression of these base lines may entail serious consequences for the citizen — he may be hanged for it'; see Fuller, 'Human Interaction and the Law' (n 52) 24. See also Chen, 'Positive Law and Natural Law: Han Feizi, Hobbes, and Habermas' (n 49) 11–12.

[1321] Generality is proportionate to the profoundness of the sense of law. In a short while we will see that the practical authority of law is subject to the profoundness of the sense of law.

[1322] Dworkin, *Sovereign Virtue* (n 1) 147–158. Apart from the perspective of the freejon approach and Dworkin's own objective, there are other methods and grounds that substantiate that the theory of law is destined to be general. Both the thesis and the anti-thesis of Kant, for instance, support the generality of the theory of law. Whether we accept the deterministic thesis or non-deterministic thesis of Kant, a theory of law is destined to be general; see Kant (n 28) 484–532.

[1323] For example, at the time of defending his one right answer thesis, he does posit that what will be counted as moral and what not is purely a conviction reduced from the interpretation of the legal practices of the respective jurisdictions, but it does not follow that his theory about what counts morality in law is jurisdiction specific. Instead, his theory as to what counts as morality of law is applicable across the jurisdictions and, as per his theory, the morality is the morality that is interpreted as such in the best light of the legal practice of the respective jurisdictions. See Dworkin, *A Matter of Principle* (n 1) 131–137.

towards political morality is not the primary move; it is just a consequential move.[1324] His primary focus is to empower the judges. To be specific, he wants to offer a ground that will approve the exercise of herculean roles by the judges. However, he realizes that his theory is becoming too judge-centric, and it seems strikingly ignoring the participation of people and political institutions. In addition, he is completely aware of the fact as to how important it is to take note of the immense importance of political morality in an atmosphere where the political authorities are expected to play a dominant role in the legislative process. Therefore, he has to rephrase his theory by taking resort to a lucrative term like 'political morality'. Nevertheless, at the end of the day, he worships a mighty judge ie Hercules and he never places political morality on the list of his superior virtue from his mind. He holds that slavery and racial segregation, both of which are outcomes of the political legislative process, have always been illegal, be it before or after the constitutional amendments that declared such acts illegal.[1325] Further, it is worth noting that he tries to defend the Nazi law by proposing his own brand of naturalism[1326], and this supports the fact that he does intend to offer a general theory hence his theory is supposed to take note of the general features of law which give law a distinguishing identity.

Dworkin's classification of the 'political decision' is indicative of a stronger presupposition of the separability of law. He distinguishes choice-sensitive issues from choice-insensitive ones. His choice-sensitive political decision includes 'whether to use available public funds to build a new sports center', whereas the choice-insensitive 'political decision' includes 'whether to kill convicted murderers or to outlaw racial discrimination in employment', and these decisions do not 'depend[s] in any substantial way on how many people want or approve'.[1327] This classification clearly demonstrates the confusion and the limitation of Dworkin's political theory. To maintain a forced and fake narrative consistency and to maintain the strength of the political authority, he makes the mistake of considering legal decisions as political decisions. The choice-insensitive decision is not a political decision at all; in fact, this is a legal decision. On the way to making the false coherence, he rejects even those fundamental features that constitute the plot of politics; he rejects the fundamental activity that justifies the political decision.

[1324] He has to use some technical words, specially when he is to fight against countless professors, judges, legal experts and legislatures, who want the political power of people to determine judicial outcomes. For example, take the instance of Professor Grey. He writes – 'judiciary …They are not experts in what is ultimately right and wrong, though their conceptions of justice … the judges would also have gone beyond their authority had they tried to abolish slavery before the Civil War as well'; see Thomas C Grey, 'Advice for "Judge and Company" Book Review, Revewed Book - Law's Empire by Ronald Dworkin' [1987] *The New York Review*.

[1325] Dworkin, *Taking Rights Seriously* (n 4).

[1326] David Lyons, 'Moral Limits of Dworkin's Theory of Law and Legal Interpretation' 90 Boston University Law Review 8.

[1327] Dworkin, *Sovereign Virtue* (n 1) 204.

Independence, preference, choice, negotiation, bargaining, influencing, representation, etc are at the heart of the political decision.[1328] In addition, as has already been submitted in the last chapter, Value-neutrality is the atmosphere of the political decision. The choice-insensitive issues are so only because they are Valued; already Value is attached and hence not responsive to political activity.

Dworkin points out another important equation in relation to the classification of the 'political decision'. He states that 'the second-order question whether any particular first-order question is choice-sensitive or -insensitive is itself choice-insensitive'.[1329] Freejon's distinguishing priority also suggests so. On the question of whether an issue is a matter of Freedom, law or politics, one must need to exhaust the criteria of Freedom first, then law then to see the criteria of law and afterwards other spheres of the third dimension ie political, social, etc. Law's normative force is inevitably intrinsic to the conviction of the evaluative sense, hence the issue associated with the law is, inevitably, choice insensitive. If the issue is interpersonal and with the morality of law, it must be an issue of law and hence no matter what the majority opinion is; the decision thereto is legal or choice-insensitive.[1330] Dworkin further states – 'I do believe that what I call issues of policy are choice-sensitive, and that issues of principle are choice-insensitive'.[1331] His belief is correct. It is more than a belief; it is an already established fact.

Dworkin's distinction between the principle and the policy is the strongest evidence that his narrative presupposes the separability of law from the political sphere. Dworkin has a clear understanding of the dividing line between policy and principle and on numerous occasions, he has a propensity to relate principles with law while policies with politics.[1332] The statement makes two claims - one of his dividing lines between the principle and policy and the second is about his propensity to relate a principle with a law and a policy with politics. The first claim is undisputed and unquestionable as it is supported by his expressed statement and narrative, while the second claim could not be supported by his expressed position

[1328] David P Redlawsk and David P Redlawsk, *The Oxford Encyclopedia of Political Decision Making: 2-Volume Set* (Oxford University Press 2021); Paul H Rubin, 'How Humans Make Political Decisions' (2001) 41 Jurimetrics 337; Knight and Schwartzberg (n 1205)..

[1329] Dworkin, *Sovereign Virtue* (n 1) 204–205.

[1330] Dworkin also emphasizes the fact that the question of legal rights is more connected to the choice-insensitive decision. He states – 'Since the question whether individuals have moral rights the majority should respect is plainly preference-insensitive - it would be absurd to suppose that individual citizens have these rights only if the majority thinks they do'; see Dworkin, 'Equality, Democracy, and Constitution' (n 1) 331.

[1331] Dworkin, *Sovereign Virtue* (n 1) 205.

[1332] Dworkin, *A Matter of Principle* (n 1) 1–3. Dworkin states – 'It rejects the popular but unrealistic opinion that such convictions should play no role in these decisions at all, that law and politics belong to wholly different and independent worlds. But it also rejects the opposite view, that law and politics are exactly the same… Arguments of principle are right-based. Because the simple view that law and politics are one ignores this distinction…adjudication is characteristically a matter of principle rather than policy'.

for in that case, he would lose the ground to associate law with the political morality or PPM.[1333] Dworkin's dividing line makes it clear that while general welfare, community goal, utility, etc are central to policy, entitlements of the individual or individual group are central to the principle, and the dividing line is as precise as it could be.[1334] He states – 'even if the procedural issues were decided as plain issues of policy, that would pose no flat contradiction to the claim that the underlying substantive issue is an issue of principle'.[1335] This is indicative of two realities both of which are complementary to our position. First, there can be two separate realities of principle and of policy, and hence, the dividing line between them is obvious. Second, a single incident may involve both the question of policy and Principle and thereby respectively politics and law and this very fact is indicative of the reality that there is a separating line between Principle and policy. We just need to learn the art of distinguishing them. Dworkin not only distinguishes principles from the policy but also emphasises that the distinction must be made and maintained and in case of any conflict between these two, 'the contest must be settled in favor of principle'.[1336]

Now let's settle the disputed claim. Does Dworkin himself claim principle is for law while the policy is for politics? The answer to this question cannot be straightforward for the position he takes, he could never, expressly, state that principles and policies are respectively linked to law and politics. Although he does not express it directly, Dworkin's narrative is conclusive proof of the fact that he, consciously or unconsciously, presupposes that principle may have an inevitable connection with the law while policy has it with politics. Does Dworkin expressly reject any such direct relationship between law and principles? The answer is negative; in fact, his narrative is rather in support of the inevitability of this relationship, however, with a bit of cynicism evoked by some questions and confusion that remain unanswered and

[1333] However, as we will see in a while that he does, in fact, expressly relates policy more with politics while principle more with law.

[1334] Dworkin, *Taking Rights Seriously* (n 1) 41, 349 (ebook page number). He states – 'principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community'. He states – 'then the conflict between a fair trial and freedom of the press is …rather a contest between a principle and policy'; Dworkin, *Taking Rights Seriously* (n 1) 5 (ebook page number). Again, he states – 'it may be that the average citizen would have been worse off if the stories had not been written, but that is a matter of the general welfare, not of any individual right'; see Dworkin, *A Matter of Principle* (n 1) 388.

[1335] Dworkin, *A Matter of Principle* (n 1) 93.

[1336] Dworkin, *A Matter of Principle* (n 1) 388. There are other authors who also think that the distinction must be maintained; see Dimitrios Kyritsis, 'Principles, Policies and the Power of Courts' (2007) 20 Canadian Journal of Law & Jurisprudence 379.

unresolved to Dworkin.[1337] He wonders how he can directly connect principles with formal acts or statutes.[1338] He is afraid of the absence of an appropriate master rule through which the principles eligible to have the force of law will be identified.[1339] He, naively[1340], asks:

> If no rule of recognition can provide a test for identifying principles, why not say that principles are ultimate, and form the rule of recognition of our law? If, instead, we tried actually to list all the principles in force we would fail. They are controversial, … they are numberless, and they shift and change so fast … Once we … treat principles as law, we raise the possibility that a legal obligation might be imposed by a constellation of principles as well as by an established rule…how do we decide which principles are to count, and how much, in making such a case? How do we decide whether one case is better than another?[1341]

These questions and confusions are indicative of his real concerns; his concerns have never been in relation to the existence of the relationship between law and principles. Instead, all the indications traceable from his narrative demonstrate that he presupposes the inevitable relationship between law and principle. Dworkin states:

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community…Arguments of principle justify a *political decision* by showing that the decision respects or secures some individual or group right.[1342]

Except for the emphasised two words 'political decision', the paragraph makes sense and supports our claim that the Principle is for the law. All the confusion is due to the interpretation of what this 'political decision' actually refers to. We have seen above, in order to maintain a forced coherence of his political theory he has

[1337] To be precise Dworkin's confusion as to the relationship between principle and law is the reflection of the overall confusion of the legal arena. The legal arena neither rejects the relationship nor accepts the relationship. See Jordan Daci, 'Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?' (2010) 2 Academicus International Scientific Journal 109; Guido Alpa, 'General Principles of Law' (1994) 1 Comparative Law. In fact, the confusion is due to the lack of a sense of law. In the absence of the sense of law, legal principles cannot be distinguished from other contextual principles. In the next section of the discussion, the distinction will be clarified.
[1338] Dworkin, *Taking Rights Seriously* (n 1) 61 (ebook page number).
[1339] Dworkin, *Taking Rights Seriously* (n 1) 61–63.
[1340] We will explain why such a question is naïve in the latter part of the chapter.
[1341] Dworkin, *Taking Rights Seriously* (n 1) 63-64 (ebook page number).
[1342] Dworkin, *Taking Rights Seriously* (n 1) 108 (ebook page number) (emphasis added).

to consider both political decisions and legal decisions as political decisions. He has no other way but to use the word 'political'. This is the same mistake he does in considering both choice-sensitive and choice-insensitive issues as matters of political decision. If we can recall, he further considers the choice-sensitive and choice-insensitive issues are, respectively, related to policy and principle.

One with ear pain may go to the ENT specialist as the problem in the ear. However, the problem may be associated with the teeth and hence, he or she may be referred to the dentist. If finally, it turns out that the problem is with the teeth, we cannot say that the matter lies with the ENT expert only because the problem is being experienced in the ear and not with the teeth. Admittedly there can be an issue that requires the service of both the ENT expert and the dentist. There can be similar issues in interpersonal life involving questions that affect both the spheres of politics and law. The solution to such a problem is not, inevitably, expected to be a mixture of legal solutions and political solutions; legal questions are to be answered from the legal perspective as far as it is allowed by the plot of law while the political questions are from the political perspective. It is a sheer absurdity to consider both solutions as political solutions.

The political decision or choice-sensitive decision is a political decision, not a legal decision, whereas the latter decision is always choice-insensitive. Dworkin himself clarifies why we should maintain the basic differences. He states – '[p]olicy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be considered'[1343]. As we have said earlier, the political process requires independence of the participants, preference, choice, negotiation, bargaining, influencing, representation, etc., while the choice-insensitive decision or principle or legal decisions are based on Value and its associated convictions. Dworkin further states that the policy is a 'standard that sets out a goal to be reached, generally an improvement…of the community' while the principle is 'a standard that is to be observed… because it is a requirement of justice or fairness or some other dimension of morality'.[1344] Therefore, Dworkin is expected to be aware of the fact that the standard the Principle is associated with is relatable to the sense of law, while the standard associated with policy is relatable to the political process.

Dworkin's reference to the rejection of the judgement of the Court of Appeal by the House of Lords in *McLoughlin*[1345] reemphasises Dworkin's presupposition. The Court of Appeal delivered its judgement based on some policies.[1346] The House of Lords held that the policy arguments are the wrong sort of

[1343] Dworkin, *Taking Rights Seriously* (n 1) 111 (ebook page number).
[1344] Dworkin, *Taking Rights Seriously* (n 1) 47 (ebook page number).
[1345] *McLoughlin v O'Brian* [1982] House of Lords [1982] UKHL J0506-3, UK.
[1346] *McLoughlin v O'Brian* (n 1345).

arguments that cannot be considered as arguments of law.[1347] In the same vein, the majority of judges, legal scholars, and others hold that judges should not interfere in policy issues; judges should concentrate on the question of principles.[1348] Dworkin's own view is exactly the same as long as it is concerning the principle and it is reflected in his statements – 'Supreme Court must make important [']political decisions['][1349]…My own view is that the Court should make decisions of principle rather than policy'[1350]; 'judicial decisions in civil cases…characteristically are and should be generated by principle not policy'[1351]. Unfortunately, on the question of policy, Dworkin is confused – he understands and acknowledges that legal decisions should be based on the grounds of principles, however, he cannot reject the policy for the policy is inevitably linked to the formation of the political decision. Consequently, we see him claiming that political decisions should be taken by the judges for, as he believes, they are better at doing this, however, just to retreat and acknowledge that other political officials have the same authority to take these political decisions. He states -'We have reached a balance in which the Court plays a role in government but not, by any stretch, the major role'[1352]. What does this 'major' or 'minor' role mean? How do we determine this? Is there any way to determine it? Why, in the first place, do we need to talk about all these confusing things at all?

Court plays its own role as much as the legal plot allows it to play. Wherever the law finds its plot, the court of law will play its role; it simply does not matter whether the role is associated with the questions of government, governing, formulating of policy, facilitating, serving, legislating, adjudicating, or so on. This fundamentally lands us in a position similar to that of Nerhot who is sceptical about 'two fundamental principles of law known as separation of power and sovereignty of the legislator'[1353]; Our sense of law and plot of law is not compatible with either of the principles. What matters for the court is that its decision has to be based on Principle, the principle of law. Dworkin himself states that the court's 'decisions are meant to turn on principle, not on the weight of numbers or balance of political influence'[1354]. Then what might

[1347] *McLoughlin v O'Brian* (n 1345).

[1348] *DeFunis v Odegaard, 416 US 312 (1974)*. The Supreme Court holds that it is not the duty of the judges to work on the policy grounds. Judges should stay away from making or revising the policy made by other officials. Similarly, in *Lawrence vs Texas* Justices Scalia and Thomas explicitly criticises the majority Justices for their involvement in policy or political matters; see *Lawrence v. Texas, 539 U.S. 558 (2003)* (n 44). For a similar dissenting opinion see *Obergefell v. Hodges* (n 410).

[1349] Evidently, including the legal decision in the form of choice-insensitive political decision.

[1350] Dworkin, *Taking Rights Seriously* (n 1) 69. By referring to principle and policy, Dworkin is referring to the political principles or policy. However, it does not follow that the principle he talks about is not the Principle of law because Dworkin is not aware of the tentative dividing line between the legal Principles and political principles.

[1351] Dworkin, *Taking Rights Seriously* (n 1) 110 (ebook page number).

[1352] Dworkin, *A Matter of Principle* (n 1) 71.

[1353] Nerhot, 'Interpretation in Legal Science' (n 22) 218.

[1354] Dworkin, *Freedom's Law* (n 1) 30.

distract him? In fact, what happens behind the scenario is that he just confuses the political decision and legal decision and the only solution to this confusion is accepting the separability.

Dworkin posits – 'this is the argument from democracy that elected legislators have superior qualifications to make political decisions…this argument is weak in the case of decisions of principle'[1355]. The statement demonstrates that there are two types of ventures – one of principle and another of policy, and when it is the turn of the Principle, it should be dealt with by the judges rather than other political officials. Why should not other political officials deal with the question of principles? Because Dworkin takes principles with a certain meaning and with a higher weight. When he means principle as the principle of law rather than the political principle or policy, he states – 'I say that judges adjudicate civil claims through arguments of principle rather than policy, even in very hard cases. I mean that they do not grant the relief the plaintiff demands unless satisfied that the plaintiff is entitled to that relief'[1356]. Thus, it is obvious when he talks about the legal Principle, the Principle must be coupled with the sense of legal entitlement.[1357] His problem is in the inability to distinguish legal Principles from other types of principles. Further, he expects a sense of authority attached to the Principle, while for policy that is not expected. To talk about the general and higher gravitational force of Principles in comparison to the policies, Dworkin states – '[i]f we care so little for principle that we dress policy in its colors when this suits our purpose, we cheapen principle and diminish its authority'.[1358] To Dworkin, this authority that the Principle is associated with is fundamental; the sole objective of his theory is the quest for this authority and hence the decision of the Principle with this authority must be separated. He further clarifies that the authority associated with such a Principle is higher than the authority associated with the principle or policy exercisable by other officials.[1359] Cannot policy unleash this authority at all? The answer is negative and we will discuss this in a little while.

[1355] Dworkin, *Taking Rights Seriously* (n 1) 156 (ebook page number).

[1356] Dworkin, *A Matter of Principle* (n 1) 77. Dworkin claims that the judges 'decide hard cases by trying to find, in some coherent set of principles about people's rights and duties…'.

[1357] Dworkin, *Law's Empire* (n 1) 255; Dworkin, *Taking Rights Seriously* (n 1) 184 (ebook page number). He states – 'Indeed the suggestion that rights can be demonstrated by a process of history rather than by an appeal to principle shows either a confusion or no real concern about what rights are'.

[1358] Dworkin, *A Matter of Principle* (n 1) 6 (ebook page number).

[1359] Dworkin, *A Matter of Principle* (n 1) 376. He states – 'no official may limit the content of what they say, even if that official believes he has good policy reasons for doing so, and even if he is right as a matter of principle the war protesters had a right to speak and the Nazis a right to march, protected by the Constitution, and the courts so decided'. Dworkin understands that the principles are superior to policy; also, here the point is clear that there are principles more important than other principles. The former principles are the Principles of law.

While Dworkin's narrative presupposes the separability of law from the sphere of politics, he, on certain occasions, expresses the separability of Freedom (also freedom)[1360] from both law and politics. Although Dworkin's meaning of Freedom varies along the contexts, on some occasions he takes Freedom in Mill's sense as self-regarding activity.[1361] In this sense, he, like Mill, considers an act self-regarding for the act is connected to the formation of the very person as human person and when such an act is so deeply connected to the formation of the human person, the obvious effect the act is likely to have on others may be disregarded depending on the degree of attachment of the act in the formation of the person.[1362] He, supporting Mill, states – 'decision to drink is nevertheless self-regarding, not because these consequences are not real or socially important, but because they work, as Mill says, through the personality of the actor'.[1363] He further states that the personality formation aspect of Freedom 'must be distinguished from license and anarchy'[1364]. Thus, it can be concluded that Freedom is more about the formation of the person as a human person and it is not connected to license or permission, and hence outside of the realm of the plot of law and hence in Dworkin's own sense these questions of law are not, necessarily, relevant to Freedom.

8.1.3 Application of the Separability to Solve the Problems Dworkin Faces

In the absence of a legal plot in his narrative, his identification of legal practice is bound to be erroneous, and, in time, it is likely that he considers some political practices as legal practices and *vice versa*. In addition, on numerous occasions, he fails to separate political and legal practices even from the symptom expression activity of Freedom.[1365] On countless occasions, Dworkin's narrative suffers such confusion that could be conveniently remedied by the application of the separability principle. Dworkin, for instance, states:

[1360] Since Dworkin does not have a comprehensive concept of Freedom, often he is very confused in identifying what is Freedom and what is not Freedom. Therefore, the word 'freedom' with a small letter 'f' indicates the activity that is not in fact Freedom.

[1361] Dworkin, *Taking Rights Seriously* (n 1) 314 (ebook page number).

[1362] Dworkin, *Taking Rights Seriously* (n 1) 314 (ebook page number). Dworkin states – 'there is, after all, a general right to liberty as such, provided that that right is restricted to important liberties or serious deprivations. This qualification does not affect the political arguments'; see also Dworkin, *Taking Rights Seriously* (n 1) 220-221 (ebook page number).

[1363] Dworkin, *Taking Rights Seriously* (n 1) 314(ebook page number).

[1364] Dworkin, *Taking Rights Seriously* (n 1) 315 (ebook page number).

[1365] Dworkin, *Taking Rights Seriously* (n 1) 321 (ebook page number). He states – 'the rights to liberty that stand in the way of full equality are rights to basic liberties like, for example, the right to attend a school of one's choice'. This is an example of his confusion where he confuses Freedom with other privileges. Attending a school of choice is in no way an expression of Freedom. It is something interpersonal and dependent on the approval or acceptance, etc of others.

> Justice requires that property be distributed in fair shares, allowing each individual his or her fair share of influence over the economic environment …If we insist that the value of the resources people hold must be fixed by the interaction of individual choices rather than by the collective decisions of a majority, then we have already decided that the majority has no right to decide what kinds of lives everyone must lead.[1366]

Here, justice is used as a merit or moral principle of law and hence, the sentence is a typical example where he muddles law and politics. Except for the question of Freedom resources, the economic distribution of property is primarily a question of politics. The law may be relevant on the occasion of the introduction of a secondary event that may give rise to the plot of the law. If, for instance, it is found that X or his or her community is being discriminated against only because of his or her personal identity, something they are not in control of or, in the case of Freedom, they have complete control of and only because of that control they are discriminated against. For example, X and his or her community is being discriminated against only because they hold a particular religious view. The secondary matter is no longer within the area of politics any longer; in the first case it is a violation of law while, in the second case, it is the infringement on Freedom. However, until the secondary features are added on, the question of distribution of the property is purely a political matter that is required to be resolved through the political process. On the methods of deciding the value of resources one will be entitled to hold – whether it will be based on individual choice or majority choice – it is also a political question; the law has no stake in it unless there involves a legal question afterwards.

Dworkin states that '[a]ny constraint on the power of a democratically elected legislature decreases the political power of the people who elected that legislature'[1367]. To give an example of such instance, he

[1366] Dworkin, *Sovereign Virtue* (n 1) 214–215.

[1367] Dworkin, *A Matter of Principle* (n 1) 62. The claim that a constraint on the legislature is akin to decrease of the political power of the people is simply absurd. Unfortunately, this is the dominant claim in the legal arena. See Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 The Yale Law Journal 1346, 1353. He states - 'it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting'. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) <https://www.cambridge.org/core/books/political-constitutionalism/C9E9302CFF3B972304F0E1617090FF22> accessed 3 April 2023. He states – 'A system of "one person, one vote" provides citizens with roughly equal political resources; deciding by majority rule treats their views fairly and impartially; and party competition in elections and parliament institutionalizes a balance of power that encourages the various sides to hear and harken to each other, promoting mutual recognition through the construction of compromises. According to this political conception, the democratic process is the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself'. Therefore, any interference of the judges on the majoritarian process is offensive for the majority opinion, as he claims. See also -Fred O Smith, 'Undemocratic Restraint' (2019) 70 Vanderbilt Law Review 845; Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 Perspectives on Politics 805; David Landau and Rosalind Dixon, 'Abusive

mentions legislation prohibiting 'literature sympathetic to Marxism'[1368] or legislation against the interests of marginalized or weak groups of people like black Americans, Jews, or LGBTQ+.[1369] According to Dworkin, if judges declare this kind of legislation invalid, judges do it by applying their political power to make a balance of the political power.[1370] This is not only a sheer misconception but also misleading. Judges being what they are and for not being regulated by the political plot, it is not their business to balance the political power of the people. They do not play with power; they distance themselves from any relevance of power. Further, Dworkin himself acknowledges, on several occasions, that the nature of political power is such that it cannot be balanced, nor should we try to do it.[1371] Then, how can he expect it to be done? Above all, law's plot does not allow judges to do it. Judges work on the Principles of law. They declare those legislations illegal because those are ultra vires; the legislators legislate going beyond the political plot and they trespass into the plot of Freedom. Therefore, the common claim that judicial review decreases the right of the majority is simply absurd, when the issue reviewed is within the plot of law.

Wolfenden Committee validating the homosexual acts in the private sphere states – 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[1372] Lord Devlin rejects the submission of the Committee.[1373] While we do not accept any ground of rejection, our discussion is not about Devlin's rejection of the Committee report. Our point of discussion is Dworkin's response to the rejection. Dworkin claims that "Lord Devlin apparently understood the Wolfenden Report's statement of a 'realm of private morality…not the law's business' to assert a fixed jurisdictional barrier placing private sexual practices forever beyond the law's scrutiny".[1374] We submit that even Dworkin's position along with the position of the Wolfenden report is not correct. The committee's statement implies that on certain occasions one's private sexual life may be subject to the law's scrutiny, while Dworkin's statement indicates that he does not think that private sexual practices should be 'forever beyond the law's scrutiny'[1375]. Why should private sexual practices ever be subject to the scrutiny of law? Whether Devlin

Judicial Review: Courts Against Democracy' 53; David Feldman, 'Democracy, the Rule of Law and Judicial Review' (1990) 19 Federal Law Review 1.

[1368] Dworkin, *A Matter of Principle* (n 1) 62.

[1369] Dworkin, *Sovereign Virtue* (n 1) 460.

[1370] Dworkin, *Sovereign Virtue* (n 1) 460.

[1371] Dworkin, *Taking Rights Seriously* (n 1) 332 (ebook page number).

[1372] John Wolfenden, 'Wolfenden Report, Report of the Committee on Homosexual Offences and Prostitution.' (The British Library 1957) <https://www.bl.uk/collection-items/wolfenden-report-conclusion> accessed 3 April 2023.

[1373] Patrick Arthur DEVLIN (Baron Devlin.), *The Enforcement of Morals ... Maccabaean Lecture in Jurisprudence of the British Academy, 1959. From the Proceedings of the British Academy, Etc* (London 1959); Dworkin, 'Lord Devlin and the Enforcement of Morals' (n 1).

[1374] Dworkin, *Taking Rights Seriously* (n 1) 292 (ebook page number).

[1375] Dworkin, *Taking Rights Seriously* (n 1) 292 (ebook page number).

gets the meaning of the Committee report correct or not, it should, in fact, be a case of 'fixed jurisdictional barrier' for the private sexual practice, specifically and sexual practice in general falls beyond the sphere of law and the practice is an exclusive concern associated with Freedom.

We can recall Dworkin's dilemma relating to the question of compartmentalization and the integrity of the law.[1376] This dilemma forces him to accept things that he rejects throughout his narrative. He goes on too far to accept that, in some special cases such as tort, contract, commercial law, etc judicial decisions are justified not only on the ground of policy but also on the ground of utility.[1377] He argues that the judges' decisions are justified if the decisions 'serve the collective goal of making resource allocation more efficient' or provide higher economic prospects and in such cases, judges may like to ignore the relevant principles.[1378] This is a sheer misconception; even in these cases, courts play their judicial role within the plot of law, and they do not play any political role at all. Businessmen, for instance, make the decision that they will do something in some matter. Now if one does not do it, the aggrieved party can go to the court. Whatever the arguments of the parties might have, judges will transcript everything through the plot of law and if the plot allows remedy the judges will decide accordingly. Relating to the distribution of property, courts do the same – just play the judicial role based on the Principles of law, not based on the policy or utilities of politics.

Suppose it is politically decided that the farmers will have a maximum 60 acres of property whereas industrialists will not have more than 120 acres. Everyone, farmers and the industrialists, accept the decision. Now if anyone violates the rule, the matter at the first instance will be decided politically and if that political process fails to solve the problem, the problem may be referred to any other forum including the court. The court will decide the case as per the agreement politically reached. Thus, here the court is following the policy set in the political process. Nevertheless, we cannot say that the judge is taking a decision based on the policy or ground of utility. The judge is deciding the case as per the GSEC that when a people or a group of people agree to follow a particular goal and take action to that end, they must comply with their agreement. Now, if there is a legal question relating to the agreement itself, for instance, the policy made is discriminatory to the farmers or their consent was not duly taken, a plot of law is introduced although the agreement is of political nature. Related GSEC holds that all should be given a proper chance to decide and accept an obligation well before the obligation is imposed on them, or no one should be unduly discriminated against.

[1376] Dworkin, *Law's Empire* (n 1) 251–252.
[1377] Dworkin, *Taking Rights Seriously* (n 1) 127 (ebook page number).
[1378] Dworkin, *Taking Rights Seriously* (n 1) 126 (ebook page number).

In deciding whether statistical or empirical discrimination is considered discrimination within the plot of law, the court will look into the constitution, objectives, etc of the political association. If it is found that the statistical discrimination is well aligned with the objective of the political association, then there is no discrimination.[1379] The court will uphold the policy; if the finding is the opposite where discrimination is established through the parameter of law the policy will be struck down. Now, - what would be the basic arrangement of the political union, and what would be the terms and conditions of their union – these are the concerns of the political community, not of the law, or judges. If, however, it is found that the very basic principle of the political foundation was meant to destroy the farmers, and create slavery, the law has to take action as both the law and Freedom are being violated. If a political constitution provides the aspiration of male dominance, the law has to take action as the domination gives rise to the plot of the law. Here, the law is not interfering with political action; instead, the law is just defending against political interference beyond its own plot. We have the GSEC and all must have the Freedom resources. Again, we have a complementary GSEC that no one should make his or her fortune at the labour of others and thus the GSEC allows discrimination if that discrimination is the consequence of the free actions of the people.

We have seen that, in the process of delivering the judgement, the judge is calculating who can generate what amount of profit from a unit acre of property. This makes Dworkin confused again and led to conclude that the judge decides the case based on utility. Referring to Hand's theory of negligence, which considers economic value as deciding factor in judicial reasoning, Dworkin states:

> It does not suppose that these judges were aware of the economic value of their rules …this economic test provides an argument of policy rather than principle, because it makes the decision turn on whether the collective welfare would have been advanced more by allowing the accident to take place or by spending what was necessary to avoid it.[1380]

Dworkin fails to understand the dynamics of the case, to understand the rationale behind the calculation, he has to understand the philosophy of the commercial world; only then he would understand that in this decision right has not been downplayed. In fact, the right is best protected in such cases where the right has

[1379] Suppose the objective of the political community is to ensure the effective distribution of property and now it is found that a farmer can generate profit twice from 1 acre of property than that of an industrialist can generate from his or her 1 acre of property. From this perspective, there is no discrimination in this distribution.
[1380] Dworkin, *Taking Rights Seriously* (n 1) 126-127 (ebook page number).

a sort of concrete phenomenon.[1381] Suppose there is a commercial contract between X and Y. Y wants to breach the contract, and in such a case X will suffer a loss of 10 Euros. Now, Y wants to breach the contract even at the expense of 20 Euros in the form of damages. The general principle of law holds that promises must be met. If the promise is not met, the opposite party has a likelihood of suffering the loss of his or her right. The GSEC may have a justification from the policy perspective too; if a promise is violated, parties suffer wrong, and it will encourage the commission of similar wrong in future if the law does not take action against the violation of the breach.

The reality of the commercial contract and transaction is different; hence, the commercial world solves problems differently. They find that there are some cases where breaking a promise is rather better for all parties concerned even if the violation renders damages. In this scenario, no one is harmed or loses any rights, as any damage incurred in the commercial transaction is always reparable and ultimately restores the party to a position as if they had not suffered any loss. Now the question we will inevitably face: is not here a judge following a policy by choosing one method over another in commercial cases? Isn't the judge being driven by the policy that accepting such breaches in commercial or tort matters will not motivate further breaches of the same nature? Is not the court taking the utilitarian way of reasoning, more specifically, the profit? Admittedly, a decision in such cases may serve the interest of both policy and utility, but we do not find any deviation of the judges from their general judicial roles. They calculate utility or profits because the subject matter of the case is the profit and utility, and rights of the parties are exclusively connected to the calculation of these utilities or profits and the legal Principles require the judges to take care of the rights of the parties. What else should the judge think about? If the subject matter is health, the judge will think about the rights of the parties associated with health. If a policy itself is the subject matter, the judge will definitely speak about the policy based on the Principle of law. We can never say that judges decide based on policy or utility.

On a few occasions, Dworkin does acknowledge that in such cases judges seem to decide on policy grounds but in fact, the decision is made on the ground of principle. He states – 'unoriginal judicial decisions that merely enforce the clear terms of some plainly valid statute are always justified on arguments of principle,

[1381] The philosophy behind such judgements is best understandable from the judicial reasoning of judges like Lord Mansfield, Lord Denning, and Lord Diplock. Mansfield states – 'The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case'; see *Hamilton v Mendes* [1761] King's Bench 97 ER 787, 97 ER 787.. See also, *Carter v Boehm* [1766] King's Bench 97 ER 1162, 97 ER 1162; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] Court of Appeal 2 QB 26. However, we must say that Lord Denning has the same confusion as that of Dworkin regarding the applicability of policy in the judicial reasoning. See *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] Court of Appeal [1973] QB 27.

even if the statute itself was generated by policy'[1382]. Unfortunately, his explanation of such a phenomenon is completely misleading and a reflection of the confusion he has about the inseparability of law from the political process. Dworkin claims that when some policies give rise to a statute or legislation by virtue of being enacted, the policies get the status or features of principles to the judges and when judges decide a case based on the provision of the statute, they consider the provisions as a reflection of associated principles.[1383] His explanation is well reflective of the consequences of the omissions he makes by ignoring the sense of law, the separability of law, and the associated philosophy of law. He states that the 'manufacturer sues to recover the subsidy that the statute provides…his argument is an argument of principle …the statute made it a matter of principle'[1384]. How can we explain it? The subsidy policy, as Dworkin claims, becomes a principle by virtue of legislative enactment.[1385] How can a policy become law only by virtue of the legislative declaration? How does policy turn into a legal Principle? Can a policy turn into a Principle at all? Can a policy be attributed with the authority a Principle is supposed to have only because the policy ends up as an enactment?

The policy is policy; it cannot have the force of Principle that has a Value of its own and is not subject to evaluation. The policy can never constitute law. The policy may give rise to a practice that over time becomes profound enough to generate a sense of law among the people. The sense of law is so by virtue of its own sake ie for being the sense of law among the people not because of any other reason. If there is any credit attributable to the policy that generates the practice and that eventually gives rise to the sense of law it is no more than a credit attributable to other events or things that trigger a particular practice generating the sense of law. Brutal wars, which claim the lives of millions of innocent and defenceless children, may, over a long period of time, give rise to the sense among the people that children under any circumstance must be kept outside of the brutality of war. Thus, there may be a law that no child, whatever the case is, be the subject of the brutality of war. The brutality of the wars might contribute to giving rise to the sense of law, but, as we think, any credit should not be attributed to the wars, or we cannot say that the wars are the constituting part of the law. Thus, neither the policy nor the legislation has the force to generate the authority a Principle, reflecting the sense of law, has.

Then the question remains – why does the court uphold the political decision of subsidising all manufacturers equally? The answer has already been given; the court may have a legal obligation in any

[1382] Dworkin, *Taking Rights Seriously* (n 1) 109 (ebook page number).
[1383] Dworkin, *Taking Rights Seriously* (n 1) 109 (ebook page number).
[1384] Dworkin, *Taking Rights Seriously* (n 1) 109 (ebook page number).
[1385] Dworkin, *Taking Rights Seriously* (n 1) 109 (ebook page number); Dworkin, *Law's Empire* (n 1) 339.

matter provided that the matter has given rise to a plot of law. Since all concerned agree politically that all manufacturers will get subsidies equally, the court has to take legal action to make sure that everyone gets so. Although the court is upholding the political morality here, it does not mean that the political morality itself is the force of law. A medical issue may involve a legal issue. we cannot say that in this case, the judge is performing the action of the Doctor. An architect facing a legal problem whether he or she will name his subject of work as an explorer or invader, or a gasoline producer may seek help on whether they can use lead as raw material. The judge is neither the architect nor the gasoline producer.

Therefore, to draw a conclusion from this section, we can logically and for the reasons shown above restate the fact that life consists of different spheres each of which attracts their respective plots to make sure that life is facilitated meaningfully and properly. It may also be logically and generally submitted that all these spheres are not equally important for everyone. However, if the importance is taken from its objective perspective, the comparative importance of the spheres can be ranked in their descending order as – Freedom, law, and other spheres ie politics, religion etc. Accordingly, if, like Dworkin, anyone else wants to devise a scale of progressive rights, the scale must follow the descending order whereas rights in relation to Freedom to be ranked highest, then the rights based on the GSEC and then other rights reflecting or in association with other spheres of life.[1386] Although confused, Dworkin's narrative does give us hints supporting this scale of progressive rights.[1387] The central assumption or presupposition of Dworkin's political landscape ie democracy is the 'freedom of speech and association, and other political rights and liberties, as well'[1388]. This supports our claim that a genuine democracy or political system needs Freedom[1389], law[1390], and liberties[1391] as the foundation; to the least, the first two are the most important elements.[1392]

[1386] Freedom ranked highest for the reasons we have pointed out in the chapters describing the importance of Freedom (see specially, Chapters 4 and 5).

[1387] Dworkin, *Taking Rights Seriously* (n 1) 147, 183 (ebook page number). Dworkin states – 'the gravitational force of a precedent is defined by the arguments of principle that support the precedent, suggests a second (page 147) … argument from democracy, the argument that since men disagree about rights, it is safer to leave the final decision about rights to the political process' (page 183). This clarifies that democracy or politics comes in the next stage. In the first stage, people will decide the rights based on the GSEC when there is unanimity and then we will move on to the next stage ie politics and others.

[1388] Dworkin, 'Equality, Democracy, and Constitution' (n 1) 333.

[1389] We can logically relate Freedom with his 'freedom of speech and association'.

[1390] We can logically submit that some of his 'political rights' are in fact legal rights.

[1391] These liberties are more the political rights established by the political process rather than Freedom.

[1392] Apart from Dworkin, there are other scholars who, unconsciously or consciously, partially or entirely, support this priority scale. Lowi, for instance, states – 'Policy is the informal side of government, the real statement of what government actually does. But policy should be tolerated, not embraced, and even so, tolerated only as long as it

8.3 **Morality of Law – Practical Authority of Law**

Dworkin's quest for the practical authority expects a morality more forceful and more practical than that of personal morality as Dworkin's obvious and deep insecurity is based on the assumption that personal morality is not a reliable option when it is the question of governing people because it has internal regression problem ie problem of biases, subjectivity, emotivism[1393], the possibility of tyranny, etc.[1394] He has specific scepticism to the versions of social morality that play dominant roles in the theories of Hart, or Pound.[1395] Neither the romantic versions of morality from the religious schemes or natural law theory nor the unromantic versions of morality as that of Raz is of any interest to Dworkin.[1396] His narrative does provide us with an unconventional classification of morals – concurrent morality and conventional morality.[1397] Conventional morality imposes a normative obligation on the people to follow the trend or practices established by convention and it presupposes an agreement of the members to follow the morality.[1398] On the other hand, in the case of concurrent morality, while people have a similar normative conviction to follow the morality, it does not presuppose any previous agreement among the members.[1399] Dworkin, mistakenly, believes that the legal obligation may be related to conventional morality.[1400] Conventional morality, which is based on pre-existing agreement, necessarily presupposes a political process. Apparently, this bias toward the political process leads him to trust as absurd a term as political morality extractable by the political officials. Unfortunately, his theory claiming political morality or PPM as the practical authority of law is as erroneous as that of Hart, Kelsen, Raz, and others.[1401] In fact, Dworkin's

knows its place: as the servant of the formal rule of law'; see Theodore J Lowi, 'Law vs. Public Policy: A Critical Exploration' (2003) 12 Cornell Journal of Law and Public Policy 493, 501.

[1393] Richard A Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press 1999) 1645.

[1394] The problem with personal morality is ubiquitous when there is a question of relating it to law. Posner states – 'Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases'; see Posner, *The Problematics of Moral and Legal Theory* (n 1393) 1639.

[1395] HLA Hart, 'Social Solidarity and the Enforcement of Morality' 35 The University of Chicago Law Review; Hart and others (n 20); Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' (n 1075); Linus J McManaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' (1958) 33 St. John's Law Review 1.

[1396] Raz, 'Authority, Law and Morality' (n 105); Raz, *The Authority of Law* (n 875); Fuller, *The Morality of Law* (n 20). According to Raz, morality of law lies in the very texts of the law while for Fuller, finds morality in the revised versions of the natural law theory.

[1397] Dworkin, *Taking Rights Seriously* (n 1) 75 (ebook page number).

[1398] Dworkin, *Taking Rights Seriously* (n 1) 75 (ebook page number).

[1399] Dworkin, *Taking Rights Seriously* (n 1) 75 (ebook page number).

[1400] Dworkin, *Taking Rights Seriously* (n 1) 80 (ebook page number). It is his mistake because if the law can be related to any of his classifications of morality that would be the concurrent morality that requires no pre-existing argument among the members.

[1401] Kelsen (n 18). Neither of them focuses on the intrinsic morality of law. Everyone tries to import morality from other sources ie Hart tries to find it in society, while Raz tries to find it in statutes, legal texts, etc. Kelsen prefers not

dependence on political morality, Hart's dependence on social morality, positivists' rejection of morality or naturalists' reliance on different types of moralities ie natural, personal, religious, etc – are the result of not being aware of the morality connected to the sense of law and not being able to distinguish this morality from other types of moralities.

8.2.1 Morality of Law Distinguished

Social rules are subject to social morality, political rules are subject to political morality, religious rules are subject to religious moralities, and so on. Similarly, law is necessarily associated with the morality of law and to no other morality; the sense of law is coupled with its intrinsic morality. All questions and confusions associated with the normative force of law are likely to be answered and resolved if we can identify and comprehend the unique morality intrinsically coupled with the sense of law or GSEC. Let's take note of the same three moral instances and their associated normative reactions or responses, which we have already pointed out in Chapter 5: 1. X did not help a blind man when crossing a road although he could = immoral but not illegal; 2. X has committed theft = immoral and illegal; and 3. X has violated the speed limit = not immoral but illegal. Incident 1 is an example of immorality but not of illegality by law, in such a case, it does not impose any legal obligation. Incident 2 is an example of illegality for the law imposes an obligation on X for not committing theft. On the other hand, traditional legal discourses posit that although X does not do anything immoral in incident 3, he or she can be held legally responsible as the statute provides a speed limit. These three types of incidents keep the entire legal arena confused.[1402] To avoid this confusion everyone takes shortcuts: legal positivists consider that there is no necessary connection between law and morals, while others, including some positivists, assume that there must have a moral connection. Nevertheless, they are divided as to the types of moralities involved. They argue that the law takes note of some morals while ignoring others, but they do not know why it is the case.[1403]

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to use the word morality as, to him, morality is just an internal element. To him, the merit of law lies in the 'will of nature' or in 'pure reason'. See Hart and others (n 20); Raz, 'Authority, Law and Morality' (n 105).

[1402] These three possibilities create, at least, three groups of scholars. One group holds that law must be supported by morality; see Hart and others (n 20); Fuller, *The Morality of Law* (n 20); Friedmann (n 94). However, it should be noted that many scholars claim that Hart does not belong to this group; instead he belongs to the 2nd group that claims morality is not an essential condition for the legality of law; see George Fletcher, 'Law and Morality: A Kantian Perspective' (1987) 87 Colum. L. Rev. 533. We disagree. Narrative consistency of Hart's theory does indicate that Hart should be in group 1 and 3, but not in group no 2. Another group (group 2) holds that law is detached from the morality of any sort; see Gardner, 'Legal Positivism' (n 19); Austin and Campbell (n 60); Kelsen (n 18). The third group takes position between the 1st and the second; to them some laws are backed by morality and some are not, or all laws do not support all sorts of morality; see Kent Greenawalt, 'Legal Enforcement of Morality' 85 The Journal of Criminal Law and Criminology. For general grouping, see Moka-Mubelo (n 916).

[1403] Greenawalt (n 1402) 711. He states – 'This does not mean, of course, that the law will enforce every aspect of morality that concerns preventing harm to others...Many immoral acts that hurt others are unregulated by the law.'

The freejon approach submits that law cannot exist without morality and the morality is the morality that is not necessarily linked to any other morality, but the morality associated with the GSEC. The morality of law is the shared and general commitment we have discussed about earlier, and all these three incidents can be explained with reference to the morality of law and the freejon approach. How do we distinguish this morality from other types of morality? Thanks to our freejon approach that helps us distinguish legal morality from any other types of moralities. Personal morality is shaped by personal perception, self-interests, confirmation bias, endowment effect, etc and it has an inward trend or inward regression effect. Similarly, societal internal perceptions and interests shape the morality of society.[1404] The same is true for all other types of morality except the morality of law. The morality of law creates an outward obligation of general nature, while all other morals generate an inward obligation of personal nature. Since the hallmark of law is to create an outward obligation, other morals are simply irrelevant as an essential constituent element of the law.[1405] Therefore, in sharp contrast with what Dworkin, Hart, and many other jurists posit, these internal morals cannot, necessarily, be the basis of legal obligation and we have already proved how Dworkin's political morality generates more problems instead of solving them.[1406]

Further, while all these moralities are prone to be questionable because of their internality, subjectivity, and biases, the morality of law is blessed with externality, generality, and neutrality. Eventually, the morality of law conveys significantly higher coherence essential to ensure the legality of the legal actions because of its nature and when we follow the freejon approach, we get the highest coherence. With its highest coherence, it gives the highest justification for legal coercion. The freejon approach justifies why the Value

[1404] Radoslav A Tsanoff, 'Social Morality and the Principle of Justice' [1956] Ethics <https://www.journals.uchicago.edu/doi/10.1086/291082> accessed 3 April 2023; PF Strawson, 'Social Morality and Individual Ideal' (1961) 36 Philosophy 1.

[1405] Kelsen has similar observation; he states that the special nature of legal obligation that the law is associated with is not relatable to any obligation generated by the contextual moralities. Kelsen's legal obligation presupposes a certain objective and therefore the law gets its authority from the objective. He states – 'The legal authority commands a certain human behaviour, because the authority, rightly or wrongly, regard such behavior as necessary for the human legal community'; see Kelsen (n 18) 32. We have already discussed how futile such an objective-bound concept of law is. From this perspective, if law is supposed to have any moral authority or practical authority that must be in line with the objectives of the community. Kelsen further states – 'A difference between law and morals…only in how they command or prohibit a certain behavior. The fundamental difference between law and morals is: law is a coercive order, that is, a normative order that attempts to bring about a certain behavior, by attaching to the opposite behavior a socially organised coercive act; whereas morals is social order without such sanction'; see Kelsen (n 18) 62. Either way Kelsen's practical authority of law completely detached law from any sort of morality; this is a grave misconception. He is so engrossed by the externality approach of legal authority that he just loses the privilege to have the sense of morality of law.

[1406] Similarly, Hart's rule of recognition is a sort of tool to identify the social morality and the social morality itself irrelevant in the discussion of the practical authority of law. See Hart and others (n 20). Kelsen's Grundnorm, Raz's intrinsic morality extractable from the formal legal texts, and other related explanations to support the practical authority of law are futile. See Raz, 'Authority, Law and Morality' (n 105); Kelsen (n 18).

of the morality of law is of the most acceptable nature in justifying legal obligation or coercion. The most magnificent aspect of the Value is that the Value itself is not the reason or contributor of the coercion; the coercion or legal obligation is not imposed by virtue of the existence of the Value. What the Value does is offer a strong normative foundation for the law by certifying that the matter in the issue comes within the 'plot' of law, and it reconfirms that we have Freedom and hence, we take responsibility for our actions or omissions. In reality, the person who is subjected to coercion or legal obligation is actually contributing to the development of the Value and is fully committed to living by the Value. Thus, one thing is very clear that it is the Value with which no string is attached and hence, the Value is superior to any value attached to other forms of morality or normative mechanisms.[1407] Thus, the Freedom of a person is protected to its maximum limit by the Value and when his or her Freedom is protected, by default as per the concept of Freedom, he or she holds responsibility for his or her actions.

Now let's see what solution the legal morality can offer us with regard to the three instances and other related instances in which Dworkin is mistaken and confused. For better understanding, we should also take note of the discussion we have already made about the plots of Freedom, law, and other dimensions. The first instance is purely an incident related to personal morality and falls within the plot of Freedom, and hence, not subject to law. We all may generally believe that we should help a blind man at the crossing of a road, but the element of inter-personality is missing here and hence whether X should help or not is more a matter of his Freedom. In addition, and by virtue of the argument of the plot of Freedom, the GSEC itself does not support the adding up of the incident into the plot of law. We should not have any ambiguity as to the explanation of the second incident - theft is illegal and also immoral; be it from the perspective of contextual morality or legal morality. The third incident requires an explanation. The incident is both immoral and illegal. Setting the speed limit is not directly related to the sense of law or Freedom; it is more related to the third dimension ie political and/or technical, and so on. However, when the violation of the general agreement takes place, X may logically be charged with immorality as he or she fails to stick to his or her commitment. As Nerhot states that the social situation does not necessarily constitute a legal situation, therefore social morality cannot be the inevitable constituting and verifying morality for law.[1408] The same

[1407] Kelsen's normative mechanism of the science of law, Raz's normative claim or Dworkin's normative force of utopian political morality – none makes sense of authority to this level.

[1408] Nerhot, 'The Law and Its Reality' (n 884) 62. Nerhot states – 'There is no opposition between fact and law, but an opposition between social practices that are non-existent in the eyes of the law and a situation for which legal effect has been imagined. We have seen how social practices were not purely and simply the situations that the law constitutes'.

is true for personal morality and other morality.[1409] Therefore, the conventional claim that the third incident does not involve immorality is wrong; X does something immoral, and it is immoral within the plot of law. This should resolve the confusion of Hall, Hart, Dworkin, and many others who search for a moral ground but fail to find any moral ground in association with a law.[1410]

8.2.2 The Morality of Law as the Practical Authority of Law

We have already revealed at the beginning of the thesis that Dworkin's quest for the practical authority of law is driven by a dual objective, on the one hand, to make sure that law has merit or moral basis which will restrain the dictators from using the law as a tool to tyrannise people, on the other hand, to ensure that the authority is not as weak as that of the contextual morals. We must not confuse the quest for the practical authority of law with the mission to devise a system that will accomplish the dual objective for we have already clarified that law has no objectives to pursue.[1411] Therefore, although it intrinsically fulfils the dual objective, our main focus is to assess the prospects of the morality of law as the practical authority of law. The morality of law is substantially, and functionally different from the contextual morality against which Dworkin is logically disinterested; none of Dworkin's objections against the contextual moralities is applicable to the morality of law. We have previously discussed some of the objections to contextual moralities, such as internal regression, biases, and subjectivity. Additionally, we have seen the effectiveness of the morality of law in addressing these objections. This section of the chapter focuses on one last objection and, definitely, one of the most fundamental objections, particularly, associated with the question of the practical authority of law. For further reference, we call this objection as 'objection of externality or

[1409] It should be clarified, however, that undoubtedly, they have roles to play but they are not the replacement of the legal morality. Instead, the opposite may be true; legal morality replacing common, social, or political morality. We may see law devoid of or indifferent to political morality or social morality but there cannot be any law without legal morality. There can be a policy devoid of legal morality but when the legality of the policy is in question that is not a legally justified policy. Social facts are not part of the equation of law; these are catalysts, and the law must take care of the variation of the situation and deal with the situation in responding to the differences of the situations. However, in every case, the law will play its role as per its own rules.

[1410] Dworkin, *Taking Rights Seriously* (n 1) 24-26 (ebook page number); Hart and others (n 20). Relating to the English Rail Transport Regulation Hart fails to find any moral blameworthiness. On the other hand, Dworkin, criticizing the position of Hart, submits that moral blameworthiness is not an essential condition for law. To him, some acts are illegal by virtue of the provision of the law. Hart's position is wrong as he confuses legal morality with contextual morality while Dworkin is wrong as he thinks that an act can be illegal without being morally illegal just by virtue of the provision of law; by this, he means to say there are some acts which are themselves not immoral but become immoral only because the statute or formal legal documents consider them immoral or wrong. In this case, Dworkin's position is close to the position of Raz who claims that the statute itself gives rise to the moral obligation; meaning something may become wrong or immoral only because the statute provides so; see Raz, 'Authority, Law and Morality' (n 105).

[1411] However, the sense of law and its morality is intrinsically so designed that it by default fulfils many objectives including the objectives Dworkin is aimed at accomplishing through locating the practical authority of law.

externality objection'. First, we will try to understand the objection and its associated background. Then we will see while raising the objection, what substantial point he omits to take into consideration about the externality, and we will demonstrate how that omission helps overrating his objection. Finally, we will see the prospects of the morality of law in dealing with the objection.

A. What is Dworkin's Exact Problem? Externality

Central to his externality objection is the unique legal landscape that is inevitably associated with the concept of coercion; the objection is associated with the special nature of the obligation law has and to comply with the obligation, the law needs enough external force to apply enough coercion as the law deems necessary.[1412] The nature of legal coercion itself is the source of further confusion associated with the externality objection; the special nature of the legal coercion and related ambiguity about the speciality makes it difficult to comprehend what this externality objection is all about. The legal coercion has a special nature and forces that differentiate itself from the nature and force associated with contextual morality, personal morality, the 'raw or brute power'[1413] of the terrorists, the 'raw and brute' power of hard positivism, Kelsenian coercion, etc.[1414] In addition, we must distinguish it from legal sanction for the associated coercion may or may not involve sanction in any form.[1415] In the absence of the sense of law, the associated morality of law and the GSEC, the confusion associated with the nature of coercion leads

[1412] Yankah (n 14) 1246. He states – 'Finally, the law is intrinsically coercive. Without coercion, a normative system cannot be differentiated or understood as the law'. However, other scholars, for example Lamond, hold that coercion is not a constitutive element of law, nor it is a distinguishing feature of law. He posits that coercion is rather coupled to law's claim of having practical authority; see Lamond (n 14). Either way, whether coercion is a constituting element of law or law's practical authority, discussion of coercion is inevitable when quest is about the practical authority of law.

[1413] Yankah (n 14) 1246. Yankah claims that the 'raw or brute' power is distinguishable from the legal coercion at least from three ways - First, having brute power over someone does not equate to possessing normative power over that person … Second, power need not claim authority over its subject. The robber does not … Third, coercion alone need not be part of an act-guiding or normative enterprise and, thus, need not be a sanction. The robber does not mug you because you did something; he simply mugs you'; see Yankah (n 14) 1205–1206.

[1414] The Kelsenian concept of coercion is also inevitably connected to the externality objection. He thinks that the force of coercion contextual morality is capable of inflicting is of just psychic nature, while the legal coercion is associative of 'coercive acts [necessarily acts with external dimension] namely the forcible deprivation of life, freedom, economic and other values'; see Kelsen (n 18) 35. To him, the coercion is justified by the overall community objective. On the other hand, in hard positivism, institutional framework or the virtue of sovereignty is considered as the background force of coercion.

[1415] Yankah (n 14) 1216. He states – 'Where a medical quarantine is imposed against a group, the coercive force applied would be ill-conceived as a sanction'.

Dworkin to consider coercion as an external element which is more or like an extension beyond the personal moral force.[1416]

Error begs further errors. Since personal moral authority does not govern it, the authority of such a thing must originate from somewhere beyond the individual. Therefore, like other political philosophers, to Dworkin, coercion is imposed from outside against the will of the person who is subject to the coercion.[1417] Since it is something external and imposed from outside, the existence of it must be observable from outside and it must be imposed by an external authority.[1418] Eventually, Dworkin shows his strong support for the importance of the externality of the legal obligation that exerts enough power and influence to make people committed to the legal obligation while showing extreme scepticism to the legal obligation that is erroneously expected to be founded on personal morality. Like other positivists and legal political philosophers, Dworkin also holds that the obvious and external force legal coercion is supposed to be associated with cannot be justified by the force and nature of personal morality; legal coercion requires a more concrete, more neutral, more visible, and more forceful source of justification.[1419]

His insecurity about personal morality or other contextual morality and hereby depending on the external influence and hence relying on the political process and political morality is just to make sure that the law has bargaining or compelling power that will justify the law's coercions and hereby coercion will in return ensure law's bargaining power or compelling power - cause will become effect and the effect will become cause – this bargaining power is necessary to distinguish law from other social, religious, moral and other power or tyranny. This increased bargaining power will serve to reinforce the legitimacy of the law's use of coercion. Therefore, law must need a concrete and visible source to support its higher bargaining power and thereby its coercion. He states that right being a right, only matters when we take note of the external aspect of it ie right's influencing effect on others; to him, if the right's influence does not affect others, it is

[1416] Lamond (n 14). To Lamond, the practical authority of law is exactly the authority that law has and that distinguishes law from other normative forces associated with the contextual morality. To Lamond, this represents the extension of authority beyond the normative force of the contextual morality.

[1417] Yankah (n 14) 1220. Yankah states – 'To be coerced, the pressure must aim to force one to act against his will-act as they otherwise would not. However, to Kelsen, whether the force associated with the legal coercion is internal or external does not matter; to him what matters is that the coercion is not just psychic but must be reflected through practical actions; see Kelsen (n 18) 59–62. Therefore, it is clear whatever he states expressly, Kelsen's narrative requires an external feature of coercion ie an action. Schauer states – 'Law makes us do things we do not want to do. It has other functions as well, but perhaps the most visible aspect of law is its frequent insistence that we act in accordance with its wishes, our own personal interests or best judgment notwithstanding'; see Frederick Schauer, *The Force of Law* (Harvard Univ Pr 2015) 1.

[1418] Dworkin, *A Matter of Principle* (n 1) 160.

[1419] Lamond (n 14); Martin (n 66); Raz, *The Authority of Law* (n 875).

worthless – what is the point of having such right?[1420] How come is it a right worthy of calling it a legal right? To this end, he needs a strong and fair enough community that would be a landmark of externality.

Unfortunately, the community needs people and he does not trust people because they always think about their own interests. Personal morality or contextual morality does not have enough force to guarantee that X, Y, or Z will also compromise if A, B, or C compromises. When this is the case, there cannot be a community which he wants to consider as a source of legal justification. The apparent ground reality as perceived by Dworkin and the theoretical framework that he follows trick him to imagine a political enterprise and its morality as the justification of law. Thus, the law comes to Dworkin as 'political enterprise'[1421] and, as Dworkin states, people can express their sense of justice (or sense of the merit of law) 'only in politics'[1422] and hence, the practical authority of law is justified by 'a certain type of political-moral reasoning'[1423]. This unique type of political-moral reasoning is entrusted with the external authorities and, according to Dworkin, the most reliable and appropriate authorities are the formal political bodies ie, government officials, police, legislatures, courts, etc.[1424]

The externality objection apparently turns out to be counterproductive. Instead of guarding against the loopholes of law and possible mal-enactments, it is likely to contribute to the generation of those negative outcomes. The political solution Dworkin suggests to defend against the externality objectives damages the sanctity of both law and Freedom and, hence, damages the dignity of human existence by justifying a model resembling or mimicking the structures followed to tyrannising the power by the strong over the weak.[1425]

[1420] Dworkin, *Taking Rights Seriously* (n 1) 184-185 (ebook page number). He states – 'It is one thing to appeal to moral principle in the silly faith that ethics as well as economics moves by an invisible hand, so that individual rights and the general good will coalesce, and law based on principle will move the nation to a frictionless utopia where everyone is better off than he was before'. He further states that it is one thing to take principle as just a principle with no force and 'it is quite another matter to appeal to principle as principle'. Clearly, the last principle means something with force and, of course, with legal force. Dworkin takes Freedom also from its externality. He states that freedom of speech is a political right in the sense of its external effect on others and he does not count on its internal nature ie what it internally means to the very person whose Freedom is in question; see Dworkin, *Taking Rights Seriously* (n 1) 119 (ebook page number).(page 119).

[1421] Dworkin, *A Matter of Principle* (n 1) 160. He states – 'Law is a political enterprise, whose general point, if it has one, lies in coordinating social and individual effort, or resolving social and individual disputes, or securing justice between citizens and between them and their government, or some combination of these'.

[1422] Dworkin, *A Matter of Principle* (n 1) 349.

[1423] Yankah (n 14) 1249.

[1424] Martin (n 66); Raz, 'Authority, Law and Morality' (n 105). Like Dworkin, Martin and Raz also have full trust in this regard on the political institutions.

[1425] Even Dworkin is aware of it and hence his notorious attempt throughout his life to give us an idea about the composition of a utopian political system that will act, reasonably (he knew that perfection is never possible) for the interest of the people in general who are ruled. He never leaves the possibility that the political institution will always

The political enterprise and its morality are likely to be turned into a model that may be followed to terrorise the people and justifying such a model is to patronise the models used to unleash lawlessness over people.[1426] His externality objection, an essential by-product of the lawjon approach, is based on assumptions that are either misleading or biased. External influence is justified on the assumption that it will generate a uniform result as expected by the political institutions and thus there will be an order in the community with some unanimous goals. Chapter 7 has shown how futile this assumption is.[1427]

Dworkin and many other scholars who see humans as necessarily from a negative perspective are aware of the internal monster ie the action self that has the propensity to do and to decide things partially, and inconsiderately. They are aware of the human internal monster that has the propensity to devalue the Value law is supposed to have, but they are not aware of the external monster, a bigger monster, that the political process, its morality, and the whole process of externalization are likely to generate. In chapter seven, we have already discussed how awkward and incompatible consequences the political process and its morality may lead to. The dangers and the subtle but enduring despotism associated with the externality or externalization process are certain, although not felt to the degree it is felt when the despotism is generated by the internal monster.[1428] The externalization processes such as institutionalization, formalization,

keep performing their rule of ruling and people will be kept ruled; he holds that it would be always the case, and, in some considerations, this should be the case, always.

[1426] The model is a model of control, and regulation, and may turn out to be a model of terrorism; with this theory, humans can be regulated, controlled, oppressed, and tyrannized – based on the nature of the political authority and the content of political morality they subscribe to, but no way human life and Freedom will be facilitated. Judges, lawmakers, political leaders, and law enforcement agencies are the masters, though, subtly. Thus, today's sovereigns are in no way less dangerous than the previous dictators; instead, they have the scope to become more dangerous because they now have the support of their people. Tocqueville states – 'While the old social state of Europe deteriorates and dissolves, sovereigns develop new beliefs about their abilities and their duties; they understand for the first time that the central power that they represent can and must, by itself and on a uniform plan, administer all matters and all men'; see Tocqueville (n 565) 1198.

[1427] Tocqueville states – 'The unity, ubiquity, omnipotence of the social power, the uniformity of its rules, form the salient feature that characterizes all the political systems born in our times. You find them at the bottom of the most bizarre utopias'; see Tocqueville (n 565) 1198..

[1428] To explain how externality may be dangerous we have to have an idea about our senses and how these senses interact. The sense of ego is a secondary sense but natural. It originates from a very basic sense of survival or prosperity. (in Gommer's term flourish; see Gommer, 'The Biological Essence of Law' (n 481); Gommer, 'The Molecular Concept of Law' (n 481); Gommer, 'The Biological Foundations of Global Ethics and Law' (n 481).) All humans are born with this sense. An associated and inevitable outcome of the sense is the sense of failure, sense of guilt or sense of self-conviction. The sense of prosper or achievement is confirmed and boasted by, generally, concrete achievement that can easily be observed, measured or sensed. Normativity is inbuilt in the sense; positivity or justification is intrinsic to the achievement. It is automatically accepted by the human system that one has achieved something is by default a testament in support of the achievement of that person and hence praiseworthy and, hence moral and the person having the achievement is morally superior. In primitive society, men used to live by cutting wood or hunting, and they would often carry the physical traces of their work through their strengthened muscular structures. This eventually attracted more women to these men, as they were considered morally superior

automatization may work by preventing internal biases, but it does not necessarily bring positive results as a whole; for instance, the replacement of the human imagination by the visualisation tool may negatively

for having demonstrated their achievements through hard work, which was reflected in their strengthened muscles. Magicians are liked by people for their demonstration of magical tricks, which presupposes the enormous hard work that the magician might have done to learn those tricks. Similarly, a dancer who attracts many people is supported by the presupposition that he or she has worked hard to reach their current stage. Similarly, a musician is also presumed to have worked hard. How do people, specially, who do not know the basic grammar of music, know that the musician must have worked hard? There are two methods by which people conclude that a musician must have worked hard: 1) the original or innate method, where the sense of music and musical grammar is already built into humans, and people unconsciously evaluate musicians based on this; 2) the fake or marketed method, where people perceive the size or shape of the musician's achievement, such as the number of audiences who like musician X, for instance. As we become more detached from the original sense, we tend to evaluate musicians through the fake method and imitate others. The larger the group of people we imitate, the greater the incentive we have to imitate. As a result, we may see some musicians achieving success without having basic musical knowledge, such as tones and grammar.

The sense of ego can add a twist to the equation. Exclusivity, uniqueness, and other similar qualities are the direct result of the ego, although they originally stem from the same sense of achievement. When we see that X is different from millions of people, we automatically presuppose his or her achievement. However, there is a contrasting occasion when B is born blind or handicapped, and he or she will be evaluated negatively because it is naturally assumed that he or she has lesser prospects for achievement. Ironically, this will give rise to a sense of prospects associated with B, such as failure and guilt. This is why we see a four-year-old boy feel ashamed in front of the public for his torn socks, or a Hindu boy feel ashamed of the religion he practices among people who follow other religions.

This heuristic or automatic supposition of value in achievement paves the way for free-riders to use loopholes to increase their sense of accomplishment artificially, illegally, or through other wrongful methods that the natural and rightly evolved sense of achievement would never endorse but rather devalue. This is why people value a tyrant who has created something remarkable, although at the expense of the loss of numerous lives and torture, hence the praise of the Leviathan. The majority of politicians generally follow this trick; they try to justify their tyranny through some marvelous structures or the size of their supporters. The concrete structure of positive law is built on the same method. The law-jon approach guarantees to keep people away from their natural and duly ordered senses. Politicians, people in the advertising industry, and marketing fields play with people's sense of ego to create an artificial sense of achievement. They generate ego by brainwashing people with an artificial sense of accomplishment.

Admittedly, updates do take place in the human senses but over a long stretch of time. So is the case in the sense of law; update takes place in an orderly manner and over a long stretch of time. Unfortunately, the politicians and their processes are too quick to create this external monster that generates a fake sense of achievement and accelerate the process of losing the original sense. In this regard see Condorcet (n 89); Wolff (n 544); Fromm (n 214). Apparently, Dworkin takes the side of the ego; his emphasis on the externality is indicative of the fact that he fails to avoid the trap of sense suppression and gaslighting. The experience of being ditched, cheated, defrauded, deprived, etc are so common that we are afraid that we will not find a single person who will claim that he or she has never gone through such an experience. see Tocqueville (n 565) 974. Therefore, the scepticism to the internal monster is ubiquitous and consequently the common urge of the people to regulate others. Political authorities, and political philosophers keep reminding us of our distrust of fellow beings and thereby justify their external regulation at the expense of the loss or suppression of the sense of law that we all have. Our biased and inflated ego wants to take revenge and our instant and acute sense of anger fuels the lawjon approach.

affect human creativity.[1429] Thus, the instrumentalization or institutionalization of some of the human faculties ie imagination, creativity, etc or human senses like sympathy, altruism, etc may lead to dangerous consequences.[1430] Therefore, the externality objection of its own does not render significant weight to the discussion of the practical authority of law.

Fortunately, the externality objection does not have enough relevance to our freejon approach, at all; the objection does not have any application to the morality of law, sense of law and the GSEC. Therefore, the freejon approach has no reason to follow Dworkin's path that he follows to immune his theory of the

[1429] Undoubtedly, there is debate in this regard – while many claim that the visualisation tool has a positive impact in the learning process, other rejects such a claim. See Guohua Fu, 'The Effectiveness of Using Multimedia for Teaching Phrasal Verbs in Community-College ESL Classes' (Doctoral Dissertation, University of San Francisco 2021) <https://repository.usfca.edu/diss/570>; Richard E Clark (ed), *Learning From Media: Arguments, Analysis, and Evidence Second Edition* (2nd edition, Information Age Publishing 2012); Adrian Kirkwood, 'Learning from Media: Arguments, Analysis, and Evidence' (2013) 28 Open Learning: The Journal of Open, Distance and e-Learning 153; Gefei Zhang and others, 'Towards a Better Understanding of the Role of Visualization in Online Learning: A Review' (2022) 6 Visual Informatics 22; Elizabeth G Porter, 'Imagining Law: Visual Thinking Across the Law School Curriculum' (2018) 68 Journal of Legal Education 8. Nevertheless, we submit that all these discussions in favour of the visualisation tools or digital tools or against them are irrelevant for our purpose. Technology may or may not enhance learning experience, help understand a system, complex structure, mathematical problem, or complex models – this is not our concern. Our concern is about the human intrinsic capacity for imagination, creativity and so on. Unfortunately, these discussions rarely focus on these. Admittedly, there are a few studies which seemingly focus on the human imagination or creativity. For example, see Enikő Orsolya Bereczki and Andrea Kárpáti, 'Technology-Enhanced Creativity: A Multiple Case Study of Digital Technology-Integration Expert Teachers' Beliefs and Practices' (2021) 39 Thinking Skills and Creativity 100791. The way in which they use the term 'creativity' has little to do with the human creativity we are discussing or the concepts explored by scholars like Constant, Tocqueville, or Fromm. In this context, 'creativity' is employed to denote the skills of reproducing or refining something based on existing patterns. This form of creativity resembles a mechanical or digital process in which machines consistently outperform humans. It deviates from the traditional understanding of human creativity, which involves originality, innovation, and unique expression. Subject to clarification, this mechanical creativity resembles the creativity of AI technology.

[1430] We acknowledge that the danger is immense, but due to the specific focus and scope of the doctoral thesis, we refrain from delving extensively into that direction. However, we will provide an instance that will sufficiently illustrate the extent of its danger. For instance, AI technology that promises to take charge of our creative and imaginative function may lead human civilization to its doomsday. Until recently, what technologies have been essentially doing is performing the concrete and organic physical function of humans more effectively and more accurately. Consequently, technologies have been substituting or complementing the functions of concrete physical organs and biological elements of humans. Despite many opposite arguments, such technologies of enabling and enhancing human external capacity have been demonstrated to be a blessing and driving force of human civilization. By contrast, the promise of AI technology is to take charge of these cognitive capacities that make humans what they are today; it gives us the promise that it would do our cognitive functions. While other technologies have been taking care of our physical functions and hence, we could invest more time in the application and development of cognitive functions, AI is luring us and tricking us not to invest our time any longer in taking care of our cognitive capacities; it is assuring us that it will do this function for us. While the development and application of other technologies have been in a proportional relationship with the development of human cognitive capacities, it is feared that the relationship will be reversed with AI. If we do not start responding now and, instead, start buying its promise, the reverse process of the development of human cognitive function will start very soon. For reasons, the blessing of human cognitive capacities that evolved over thousands of years will be devolved in some decades.

externality objections. As we have seen from Dworkin's narrative, that the solution associated with the externality objection holds coercion, necessarily, as an external element that gets its legal force from the political authorities by virtue of the reasoning of the same authorities. Thus, the political authority 'P' imposes coercion on 'C' by virtue of the reasoning of P. Legal morality does not require such external reasoning or conviction; in the freejon approach C is subject to legal coercion by virtue of C's own conviction, and hence the coercion is automatically justified. Here the roles that the political, and judicial authorities play are the secondary role; they are just facilitators. They are neither authors of the decision nor contributors to the decision; they carry forward the decision and execute it. Therefore, the only question that should be associated with Dworkin's quest for the practical authority of law is: To what extent this morality of law and its associated moral faculty or the faculty of the sense of law is sound and profound enough to make sure that at the one hand, the conviction is not just the reproduction of the conviction of the particular individual(s) that has internal regression effect, and on the other hand, it is not an outcome of the personal and institutional conviction of the political officials who are in charge just to carry it forward and execute it?

B. How Sound, Obvious, and Profound the Sense of Law or Morality of Law?

Our conviction about the morality of law and its associated Principle and GSEC is not a silly faith; neither do we believe that an invisible hand will lead us to a utopian direction where personal rights and community goals will unite absolutely. It is a demonstrable fact, if not the only demonstrable fact, that can offer a remedy for the problem Dworkin faces in the quest for the practical authority of law that will logically and practically unite the community goals and personal rights. However, we must reemphasise the point that although the task of uniting community goals and personal rights is an important task in the political-legal theory of Dworkin, a theory of law does not presuppose such a task. Nerhot, Dworkin himself, and we already submitted that law does not have such a goal and neither does law needs such a goal; the goal is intrinsic to the sense of law. Therefore, in the search for the practical authority of law, the task of uniting the community goals and personal rights is just a result of an error in focus. The discussion, we have already made in the previous section and the merit intrinsic to the morality of law, substantiates that it is sufficient only to assess if the morality of law or the faculty of the sense of law is sound enough to distinguish itself from the individualist conviction and mere political conviction intended to serve interests other than the interests of law.

As we have submitted earlier, the action self and the evaluative self give the people competence to think both ways i.e. biased and neutral, generally and individualistically, selfishly and selflessly, and so on. The evaluative self, the strength or even existence of which is often seen with great scepticism, is intrinsic to

human existence and it passes through progeny, and it is evolved over time through human actions.[1431] This evaluative self gives the foundation of the interpersonal relationship, the basis of the social life (then, society works on this basis and modifies and distinguishes itself). Of course, the political community is also, to some degree, dependent on it. The evaluative self unites people into a community, while the action self acts to make sure one's interest is protected. Evaluative self being shared (GSEC) needs to come into action when the action selves of the minority are in trouble with the action selves of the majority. The evaluative self is best shared when it is driven by the sense of law or morality of law rather than by political morality, personal morality, and other morality. The morality of law has its own practical authority.

The Morality of Law: Understanding its Own Practical Authority

Since our mission is to assess the soundness of the sense of law and its associated morality, our quest must begin with reference to related senses we are generally aware of. One of the most obvious, ubiquitous, and profound senses is the sense of love through which we bind ourselves to others. It is a personal sense that, primarily, gives rise to a one-way relationship. It does not necessarily bind others, but we bind ourselves with others. The sense of hatred, in contrast, detaches us from others. The sense of religion is also a personal sense that gives rise to our relationship with the god, and thus we bind ourselves with the god. Political sense binds us with the state, political institutions and other political stakeholders. A sense of reason or rationality binds our activity and us with the process of evaluation and with the very subject matter of evaluation. This sense holds that others may have their own sense of reasoning and rationality, and these may be different in different people. Hence, this sense does not support the imposition of one's sense of reasoning and rationality on the sense of others.

The sense of law, on the other hand, by default holds that others must have the same sense and only because of this virtue (or Value) of the sense of law, it is sensibly accepted and expected that X volunteers to accept coercion when he or she acts in a way that is contrary to that sense. How does X sense that others have the same sense? The profoundness or the gravity of the sense of law is the answer to this question. However, such profoundness or gravity is not necessarily in terms of the externality of the acts but because of the intrinsic nature of the human being as he or she has become over a long period of time independent of his or her local identity ie political, social, religious, etc. Why is this independence of the local identity matter? The sense of law itself has a reason, and the reason lies in the same reason for what sense of law becomes so profound a source as obviously distinguishable from other sources. The answer lies in the very nature of

[1431] None is born in this world with a clean slate; everyone is born with cognitive, and critical capacities and over time the capacities are evolved; see Cecilia Heyes, 'New Thinking: The Evolution of Human Cognition' (2012) 367 Philosophical Transactions of the Royal Society B: Biological Sciences 2091; Haidt (n 743); Haidt (n 74).

the sense of law that suggests humans by virtue of their local identity can vary in their convictions and, hence, one's conviction can never be the denominator of the conviction of others and hereby such convictions cannot be associated with the convictions that the sense of law is intrinsically coupled with. The sense is sharply distinguished from the sense associated with the original position of Rawls.[1432] The sense of law is rather reflective of the baseline[1433] of the development of humans as humans. And to be precise it is not the biological (or concrete organic) development; it is the basic development of the abstract human body or the self.

The sense of law is as profound and compelling as the sense of love one feels for someone else. Let's think for a moment about the sense of love that binds X to Y, whom the former love. Although the sense is internal, the external authority it generates is profound. It is not as fragile as Dworkin and other positivists might think. Millions of relationships still exist and continue around the world, only because of the commitment of X to Y and the commitment is generated by an 'illusory', abstract, and 'ghostly' sense as the sense of love. The sense of love facilitates a relationship where the biology-dictated action self has a vast scope to play a profound role to counter the commitment; the biological drive of the action self continually tempts faithful partners countless times to break their commitment and seek out external partners or strangers, especially to fulfil their sexual fantasies.[1434] We admit that it happens, and it may not be an unusual case. However, the most important question that matters in this regard is – what is the proportion? How often does biology succeed to get the upper hand in comparison to the number of instances the commitment succeeds? We do not have concrete statistics, but it can be logically presumed that the

[1432] Original position presupposes humans as an entity having no biological drives, self-interest and so on. See Rawls (n 132).

[1433] Baseline, in the sense of the minimum development of humanhood or humanity. It is not possible to consider a human as developed as a human lower than this. This is the lowest level permitted to descend to; we expect that over time the lowest level will be further improved which will lead to further human development and hence further development of the law. For example, the sense of law holds that X in order to be considered as human, must not be a slave. This is one of the other minimum criteria that human beings must have to be considered humans. From this perspective, any statute or legislative document, which fails to comply with this minimum requirement, will not get the status of law.

[1434] Justin J Lehmiller, *Tell Me What You Want: The Science of Sexual Desire and How It Can Help You Improve Your Sex Life* (Robinson 2018). The author claims that such a drive is 'highly common'. 'Proof Your Partner Is Fantasizing About Someone Else' [2013] *HuffPost* <https://www.huffpost.com/entry/sexual-fantasies-the-norm_n_2554070> accessed 4 April 2023. It states – 'Just meeting another person can arouse physical or emotional attraction. This response does not turn off just because you're in a committed relationship. The Normal Bar shows that 61% of women and 90% of men fantasize sexually about people they meet. There's no stopping imagination!'. See also Susan Krauss Whitbourne, 'Why We Fantasize About Other Partners | Psychology Today' <https://www.psychologytoday.com/intl/blog/fulfillment-any-age/201411/why-we-fantasize-about-other-partners> accessed 4 April 2023.

incident where biology wins is still named as 'accidental'.[1435] In a great majority of cases, commitment succeeds, and it is evidenced by the millions of romantic and faithful relationships. How on earth, the short-sighted positivists could have ensured the continuance of such commitment had they been entrusted to regulate the relationship and the associated commitment through some concrete and external mechanism! To date, the sense of love, although might contain accidental (or even occasional) intervals, is proven to have enough external authority in maintaining the relationships for years. More importantly, the external mechanism which the positivists could prescribe could never match the success, however little it might be, of the sense of love in maintaining the commitment.

We are aware of the probable cynicism about looking at as serious an issue as the sense of law, which is supposed to have a practical significance, with reference to an emotional and internal issue like the sense of love. Dworkin also expressly rejects the prospects of love and other similar senses like altruism, brotherhood, etc in contributing anything cognizable to generate the force that the practical authority of law is supposed to be coupled with.[1436] Admittedly love is a relationship between two people whereas the law involves a relationship of millions of people who are not intimately connected. Critics may logically point to the fact that there is an oceanlike difference between these two relationships generated by two different senses.[1437] However, we submit that the aspect in relation to which the difference is shown is in no way connected to our discussion. Although one sense is substantially different from another in terms of the nature of the relationships they give rise to, we relate the sense of law with the sense of love only to demonstrate that the sense of law is a sense that cannot be missed or confused as the sense of love cannot be missed. In fact, our question and inquiry about the sense of law is substantially this ie to what extent the morality of law associated with the sense of law is distinguishable.

[1435] Richard Balon, 'Is Infidelity Biologically Determined?' (2016) 8 Current Sexual Health Reports 176; Alessandra D Fisher and others, 'Sexual and Cardiovascular Correlates of Male Unfaithfulness' (2012) 9 The Journal of Sexual Medicine 1508. The study concluded that '1.5–4% of married men had extramarital coitus in any given year'. Adrian J Blow and Kelley Hartnett, 'Infidelity in Committed Relationships II: A Substantive Review' (2005) 31 Journal of Marital and Family Therapy 217. This survey finds the rate of infidelity during the lifetime of a person is between 15-50%. Na Zhang and others, 'Sexual Infidelity in China: Prevalence and Gender-Specific Correlates' (2012) 41 Archives of Sexual Behavior 861. This survey shows that 18–20 % of marriages experience at least one incident of sexual infidelity.

[1436] Dworkin, *Law's Empire* (n 1) 215.

[1437] In fact, if not always, often the legal arena does not have any relationship between emotional elements like love and the so-called practical discipline – law. See Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions' (2010) 98 Minnesota Law Review 1997; Patricia Mindus, 'When Is Lack of Emotion a Problem for Justice? Four Views on Legal Decision Makers' Emotive Life' (2023) 26 Critical Review of International Social and Political Philosophy 88.

The aspects of the two senses that are concerned here in our discussion, stay at the same level and in the same paradigm; can these internal and so-called 'ghostly' senses practically generate enough sense to identify these senses as the senses as they are? The answer is positive; as the abstract and 'ghostly' sense of love is identifiable so is the sense of law. As the invisible force of the sense of love generates an invisible but concrete, established, and practical force on its subject, so is the case of the sense of law. To us what matters is the capacity of the self in generating the senses with their respective practical forces. The practical force of the sense of love is to make sure that X and Y remain, generally, committed to each other despite the continuous activities of the counter forces. Similarly, and logically, the practical force of the sense of law is to make sure that the commitment of the evaluative self, generally, remains intact despite the possibility of influence from different sources like the action self, political institutions, social institutions, utilitarianism, etc. To us, it is sufficient to convince that the self has this profound energy of creating a particular type of sense and the energy associated with the sense of love is a testament to how authoritative that can be and how massive an external impact it can have. Self generates a sense of love, and its impact is massive.[1438] Self generates a sense of hatred, and its external manifestation can be outrageous. Similarly, the energy of the evaluative self in generating the sense of general and shared commitment can outmatch everything, every external and institutional system. The evaluative self plays its role perfectly; it plays its role neutrally, generally, fairly, orderly, with consistency and without prejudices, and hence, its general and shared commitment and the associated morality are the practical authority of the law. People may go through a wide and diverse range of incidents, but Irrespective of the positions, financial conditions, statuses, political conditions, and so on, everyone has a similar experience that gives rise to a general and shared commitment, and this re-emphasises the practical authority of the GSEC and its associated morality.[1439]

[1438] The claim is true not only from the philosophical perspective but also from scientific, empirical, and practical perspectives. See Stephanie Cacioppo, *Wired for Love: A Neuroscientist's Journey Through Romance, Loss, and the Essence of Human Connection* (Flatiron Books 2022); Francesco Bianchi-Demicheli, Scott T Grafton and Stephanie Ortigue, 'The Power of Love on the Human Brain' (2006) 1 Social Neuroscience 90.

[1439] It simply does not matter whether someone is poor or rich, everyone has the feeling of deprivation, disappointment, lack of trust, and so on. Everyone has needs, although the needs may vary to a wide spectrum; It simply does not matter whether we are ruler or ruled, oppressor or oppressed, in the long run, our status is subject to change, and we all are likely to go through the similar experience although the incidents we go through may be widely different. As Tocqueville states: 'In democratic countries, a man, however wealthy he is assumed to be, is almost always discontent with his fortune…constantly dream about the means to acquire wealth… they share the instincts of the poor man without having his needs; see Tocqueville (n 565) 974. Thus, we want to say that their experience in relation to the factors like needs, deprivation, Freedom, urge to take revenge, procedural fairness, powerlessness, etc, which are directly connected to the formulation of the sense of law, are largely similar and hence they develop the similar, if not the same, convictions, at least in the macro level, the sense of law connected to (on the other hand provisions of the law are more connected to the conviction of micro-level). Fromm explains how and why all people are likely to have the same sense of law: 'the majority of mankind throughout its history has had

8.3 Inevitable Questions to be Answered & Confusions to be Clarified

Our main task of the thesis has already been accomplished. Now we know the practical authority of law. This subsection of this chapter deals with some questions that may be raised in relation to what we have submitted for so long about the practical authority of law. Further, this subsection will briefly deal with some of the confusions that Dworkin faces, and we have assured throughout the course of this discourse that we will be able to clarify and resolve these confusions once we have the sense of law and its associated morality.

8.3.1 Questions – Answered

Now, we have the answer that the practical authority of law is the sense of law and its associated morality ie the morality of law. The answer is likely to beg questions like: how do we get laws without reading the statute, text, and legal decisions first? What is the necessity of external institutions like the courts, legislatures, etc when we all have the sense of law? Buller asks, for instance - why do we need judges or legal experts if we all are aware of law?[1440] Although these questions are not essential questions in the quest for the authority of law and thereby the practical authority of law is not subject to these questions, these are just consequential questions and require further clarifications of the sense of law and its associated issues or elements to respond to these questions. Please note that this clarification or answer has nothing to do with the validity of the law or its practical authority, but this is necessary only for the facticity and practical convenience. Our answer to these questions consists of two parts: a general response and a technical response. The technical response is especially important, as there is a fundamental misconception regarding this point among lawyers, judges, and legal scholars, including Dworkin. Therefore, it requires a more detailed explanation.

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to defend itself against more powerful groups which could oppress and exploit it, every individual in childhood goes through a period which is characterized by powerlessness. It seems to us that in this state of powerlessness traits like the sense of justice and truth develop and become potentialities common to man as such …although there is no biologically fixed human nature, human nature has a dynamism of its own that constitutes an active factor in the evolution of the social process. Even if we are not yet able to state clearly in psychological terms what the exact nature of this human dynamism is, we must recognize its existence…Man's inalienable rights of freedom and happiness are founded in inherent human qualities: his striving to live, to expand and to express the potentialities that have developed in him in the process of historical evolution'; see Fromm (n 214) 316–317. Admittedly, in the primitive period when survival instinct was the prime and the profound instinct, everything was justified; everything ranging from killing, looting, and cheating to snatching of property, probably, nothing was condemned. However, as human sense is developed or evolved over time, humans find deeper meaning and significance in rules; as the human culture develops, they are touched by the sense of rules which in turn has evolved as the sense of law. We think and we have reasons to think that this is the dominant sense that is the life-blood of human civilization. Unfortunately, it is a matter of great regret that we are yet to recognise the sense of law and build our system from this onward.

[1440] Buller (n 2) 201. Buller asks – 'if we all know the right answers to questions of morality (political or otherwise) why do we need judges at all?'

To start with the general response, we reemphasise the fact that although we play two roles, we cannot play both these roles at the same time equally; in time, the action self plays the dominant role while at other times, the evaluative self is at its peak. Therefore, when we are parties to the suits or cases, we play the participants' role in which, generally, the action self dominates our reasoning, and hence, someone else has to play the second role ie the role of the evaluative self. Involvement of the third parties or institutions like judges, lawyers, courts, etc are expected and limited to the application of the convictions associated with the sense of law. As long as the conviction of the sense of law is concerned, exclusive dependence on the nature of the evaluative self is sufficient; we need the assistance of those external aids towards the fruition of those convictions.[1441]

In addition, judges, lawyers, and legal philosophers are to find out, link and/or to create the coherent legal provisions that best suit the sense of law in dealing with a fact in issue. This leads us to the technical response, and this is about the distinction of law from the provisions of law (**hereinafter provision**). Unfortunately, many of the legal scholars or experts confuse the provisions with the law; except for a few exceptions, almost all lawyers, judges, and legal scholars, invariably, believe that the statutes, the ordinances, the precedents, formal legislative documents etc are examples of law.[1442] Interestingly, these are not laws; these are just 'tentative or presumed'[1443] provisions of law. Dworkin's narrative also misses

[1441] We have on our side Humboldt who explains why it should be the case. From his point of view, the involvement of these external entities is a necessity for the application of a theory, but these entities have nothing to do with the formulation or justification of the theory. He states – 'In pure theory the limits of this necessity are determined solely by consideration of man's proper nature as a human being; but in its application we have to look, in addition, at the individuality of man as he actually exists'; see Humboldt (n 214) 138. Involvement of these entities is best explained by Mill: 'Unfortunately for the good sense of mankind, the fact of their fallibility is far from carrying the weight in their practical judgment, which is always allowed to it in theory; for while everyone well knows himself to be fallible, few think it necessary to take any precautions against their own fallibility, or admit the supposition that any opinion, of which they feel very certain, may be one of the examples of the error to which they acknowledge themselves to be liable'; see Mill (n 53). Apparently, as Mill states, it is an unfortunate thing that people convey less weight of their fallibility in their practical judgement and because of this unfortunate limit of human action self, we need to depend on external entities. However, the dependence must be limited to the application of the convictions; these entities must not interfere in the formulation of those convictions because we are fortunate enough that our evaluative self does this task of normative judgement quite well.

[1442] The Constitution of the People's Republic of Bangladesh 1972. Article 152(1)(c) defines law as 'any Act, ordinance, order, rule, regulation, bye law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh'. See also Joseph W Bingham, 'What Is the Law?' (1912) 11 Michigan Law Review 1; Hugh Evander Willis, 'A Definition of Law' (1926) 12 Virginia Law Review 203; PS Atiyah, 'Common Law and Statute Law*' (1985) 48 The Modern Law Review 1; Giacomo AM Ponzetto and Patricio A Fernandez, 'Case Law versus Statute Law: An Evolutionary Comparison' (2008) 37 The Journal of Legal Studies 379.

[1443] An Act or Statute may not be a legal provision at all. An Act or Statute to be considered as a provision of law, it must be reflective or in compliance with the associated sense of law. Therefore, all Acts or Statutes are tentative or prospective provisions of law until it is proved beyond reasonable doubt that the provision is associated with the sense of law. For example, the Nazi legislation was not a provision of law at all for it lacked the sense of law.

the bold line between the law and the provisions. This flaw turns his theories to be an easy target of attacks from numerous perspectives.[1444]

The freejon approach not only accepts the distinction but also submits that it is inevitable to maintain the distinction between law and the provisions of law. In the absence of the distinction, Dworkin, like all other jurists and legal experts, presents law with the herculean complexities that require herculean judges. They posit that the complexity of the law is so immense that the human brain is incapable of unlocking the complexity.[1445] The general and shared sense of law challenges the *status quo*; complexity may be and, in fact so, a feature of the provisions of law, but not of the law itself. For its very nature and functionality, the law must be comprehensible to everyone and it loses its legality if it is not understandable by the people.[1446]

[1444] For example, Buller finds two problems in his theory of deep justification, an outcome of missing the distinction between the law and the provisions of the law. First, as Buller posits, the introduction of Hercules introduces the infinite regression cycle. Second, to get rid of the infinite regression cycle Dworkin comes up with the idea of the integrity of law that is dependent on the one right answer theory; see Buller (n 2) 189.

[1445] Daniel Martin Katz and MJ Bommarito, 'Measuring the Complexity of the Law: The United States Code' (2014) 22 Artificial Intelligence and Law 337; Michelle J White, 'Legal Complexity and Lawyers' Benefit from Litigation' (1992) 12 International Review of Law and Economics 381; Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 Duke Law Journal 1; Jamie Murray, Thomas E Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (1st edn, Routledge 2018) <https://www.taylorfrancis.com/books/9781351658188> accessed 5 April 2023.

[1446] Our discussion about the sense of law is self-explanatory as to why law cannot be complex and, in fact, it is not so. In addition, there are many practical, technical, philosophical, and functional reasons which do not support law's complexity. A detailed discussion on these issues will demonstrate how the deemed complexity of law is not only a myth but also rejects the legality of law. Given the scope of the thesis we are just pointing out the bold lines reflecting the grounds that reject the traditional notion of the complexity of law:

i. The traditional notion is against the fundamental principle of law, and it does not matter what versions of law we are talking about. What our freejon approach claims and what law now-a-days claims people are in the centre of all power. No person is held legally responsible with reference to a sense of law he or she cannot not naturally hold or have the sense of. White's statement is further explanatory for this purpose – 'White argues, would be that every punishment should be justified in the eyes of the person punished. This presupposes that agents eligible for punishment are intelligent, rational, knowledgeable enough to be competent judges of [his or her decision]'; cited in Daniel C Dennett (n 99) 297.

ii. This notion renders many of the provisions of the positive law unexplainable. Numerous provisions of positive law endorse comprehensibility as a precondition of legality. Further, it can be demonstrated how strikingly futile and meaningless is the so-called notification and publication measure.

iii. Provisions of law are complex but not the law itself. When the abstract sense of law is reduced into the provisions of law, the intrinsic objectives of law are constrained. Law is supposed to save all people from a few cunning people. When law is not distinguished from the provisions of law and law is considered as complex, all people suffer for not understanding law while the few cunning people easily escape the legal obligations using the complexity of law as a weapon. In this regard, Fromm states – 'One kind of smokescreen is the assertion that the problems are too complicated for the average individual to grasp. On the contrary, it would seem that many of the basic issues of individual and social life are very simple, so simple, in fact, that everyone should be expected to understand them'; see Fromm (n 214) 275. Fromm (n 146) 275.

Therefore, although the issue of complexity is not a feature of law itself, the provisions may have this feature; there is substantial complexity, for instance, in relation to the tasks of creating or finding appropriate provisions for a particular sense of law. Nerhot states – 'the judge, as we said, first seeks the conclusion he wishes to reach…Once the goal is identified … the judge must think what typical situation justifies the application of this rule. Here, the legal apparatus may become extremely complex'[1447]. Judges come to a conclusion based on the sense of law that we all have. However, the application of the law, interpretation of it, relating the law to relevant provisions of law or creating a relevant provision, if there is no relevant provision, and other procedural aspects constitute a great complexity. Finding or making the provisions is a conscious process while sensing the law is more an unconscious process and must take note of the fact that the conscious process has a lot of limitations while the unconscious process is limitless and spontaneous. Therefore, external entities ie the judges, lawyers, courts etc are essential to deal with the complexities associated with the provisions.[1448]

How do we distinguish law from the provision of law? The distinction between the provisions and the law is identical to the distinction Nerhot draws between what the law 'says' and the legal rule.[1449] According to Nerhot, legal rule is a result of the interpretation of the law.[1450] Nerhot clarifies:

iv. Rationality works behind the setting up of the minimum qualifications required to be eligible for the legislative posts substantiate our claim. Legislators are not necessarily supposed to be experts in law; they, in the capacity of the representatives of the people, just take the decision that the general people would have taken. See Latham (n 1287) 181. Even if some of the legislators are experts that does not go along the line. Law is supposed to be evolved through the actions of the people, and it is not supposed to be made by experts.

v. In justifying our position, we can explore another point that is usually not referred to in connection to a typical legal discourse. We want to call it 'end-user issue' or 'user-interface issue'. Law, whether we consider it as a product, service, or anything else, from its users' perspective must be useable by the end users instead of the users being used by law. To take an example, let's think about a mobile phone. If people were to require the expertise of that of the electronic engineer to use the device, it would have been terrible from the perspective of the user interface of the product.

vi. The very narratives of the scholars, who think that the law is a complex issue, presuppose that law must not be complex. For example, Dworkin's introduction of Hercules was not necessary at all as long as the concern is the law –Hercules is essential only to show the explicit process that takes place in the mind of the judges when they try to justify their decision. Later Dworkin himself acknowledge that the real judges do not work in that process; instead, they work as per their intuition.

vii. The problems with Dworkin's deep justification theory, one right answer theory, etc and the challenges these theories face can be resolved by maintaining the broad line between law and the provisions of law.

[1447] Nerhot, 'The Law and Its Reality' (n 884) 60.

[1448] Bruegger is also supposed to have the sense of the distinction when he states – 'Laws are general, whereas court orders are specific directives to a particular person'; see Bruegger (n 58) 94.

[1449] Nerhot, *Law, Interpretation and Reality* (n 26) 196.

[1450] Nerhot, 'Interpretation in Legal Science' (n 22) 196.

> [T]he judgement that the judge delivers is teleological. Thinking about the goal they wish to attain, the parties pick out the legal rules necessary to attain that goal…and seek to present facts liable to make these rules operational. For his part, the judge picks out the rules necessary to secure the goal desired by the parties, and then decides whether the facts presented to him are indeed compatible with the rules chosen.[1451]

In the same vein, the freejon approach holds that the provisions of law ie statutes, Acts, and judicial decisions are the successful outcome or result of the interpretation of the sense of law. In this approach, the sense of law is the goal that everyone involved in the process of finding or creating relevant legal provisions aims to achieve. Although Dworkin does not claim that the statutes, the Acts, etc are the example of law, he tries to locate law in the interpretation of the statutes, legislative documents, and so on. Consequently, Dworkin presents law as an outcome or result of the creative constructive interpretation of these 'tentative or presumed' legal provisions ie Acts, statutes, etc. Thus, he conceives the opposite fact, unaware of the distinction between the law and its provisions, viewing the provisions as the result of the law.

We do not need any Hercules to have the touch of the sense of law and its result ie the provision, although we admit that getting the appropriate provision, in time, may be a complex and difficult task, and this is where the expertise and wisdom of the legal scholars are warranted.[1452] However, if they are not aware of the distinction between the law and the provision and the fact that the latter is the result of the former, even Hercules will not be able to resolve the confusion associated with the sense of law and the provisions. The only valid way of investigation is to understand the relationship between the law and the provisions and the gradual and spontaneous system in which a provision turns into a law for its downstream provisions will make the apparently complex work simple for the human judges.[1453]

[1451] Nerhot, 'The Law and Its Reality' (n 15) 59.

[1452] Buller also agrees with us that getting the sense of law is not a Herculean task; see Buller (n 2).

[1453] Cannot we take the opposite course ie, as Dworkin follows, getting the sense of law from the provisions of the law? Yes, we can but this is not the appropriate method. Many scholars employ this approach, resulting in the confusions associated with the sense of law and its authority. Dworkin, claims that the reverse process ie getting the law as a result of the provisions of the law, is possible. He claims, 'In the last few decades Americans debated the morality of racial segregation, and reached a degree of consensus, at the level of principle, earlier thought impossible. That debate would not have had the character it did but for the fact and the symbolism of the Court's decisions'; see Dworkin, *A Matter of Principle* (n 1) 70–71. Admittedly, the courts through their decisions or the legislators through legislating may initiate prospective provisions of the law. However, the prospective provisions of the law do not necessarily give rise to the law. A wise and prudent judge may introduce a provision of law that might not reflect any existing GSEC and hence the provision may not be relatable to any existing law, but the people may be influenced by such provision and after some time, at one point people may develop a GSEC associable to the provision. People can be influenced by anything to do something and hence there is no significance of giving special

What is the relationship between the law and the provisions? Law, as we have seen earlier, is an abstract sense of people in general and this shared sense gives rise to the shared and general commitment among all people. Provisions, on the other hand, are the arrangements, plans, actions, or action plans derived from or in effect of that general and shared commitment. Law is known to all, while the appropriate provisions are to be devised in line with the sense of law by the experts and such provisions are always challengeable by the sense of law. Thus, generally, law is the outcome of the actions of all, while the provisions are the outcomes of the actions of experts or other designated people like judges, legislators, etc. One human must not be killed by another human even if the latter thinks that he or she has justification of doing so – this is the shared and general commitment observable among the humans living around the world. The commitment may give rise to one or more provisions when it is violated – punishments of different kinds, sending the accused to the correction centre, or futuristic provisions like erasing all forms of criminality from the brain of the accused. The last two provisions can also be the effect of another commitment ie each free person has to take responsibility for his or her actions.

The sense of law expressed in the last commitment can also be a provision of its upstream sense of law expressed by the commitment that – all humans are, by default, free. As the previous examples reveal, a provision may give rise to the sense of law and, therefore, can be considered as law for its downstream provisions when the provision fulfils the requirements of law.[1454] The provision can fulfil the requirements of law when it is well-known to ordinary people and it, itself, contains a morality of law ie general and shared commitment.[1455] Law is in the sense of people. When the sense expressed through statute, judgement or texts becomes so obvious and certain that it is approved and recorded in the sense of the people, the provision gets the status of law and thus, it ends up being evolved as a sense of law.[1456] However, there are some provisions that, by default, may not qualify to become the sense of law. Such provisions always remain as provisions of law even if these provisions are well approved and well recorded by the people. Not interfering with someone's privacy is the sense of law. An Act prohibiting online phishing is the provision of the sense of law. This provision can attain the status of law when it is so well-known and well-accepted by the people that it generates a general and shared commitment of its own without having any

credit to that provision. The law becomes law only for its own sake; the law cannot be considered as an outcome of the provisions. In the same vein, it will be problematic if the law is expected to be extracted from the interpretation of the provisions of the law.

[1454] Just to make sure we should not think that the provisions can be the justification of any law; law is justified by its intrinsic Value.

[1455] By default, there is another requirement that - it is not subject to Freedom.

[1456] However, it should be clarified that the provision becomes law by virtue of the sense of law generated among the people. We must not say that the provision itself is the authority behind the sense of law.

necessity of referring to the original sense of law. Now, let's consider that if anyone violates his or her commitment ie infringement of privacy or phishing online, he or she will have the responsibility to serve imprisonment – this is a provision. This will remain as such even if it is known and approved by all. Why? Because the sense of law is identical to the general and shared commitment but not inevitably identical to the result or effect of the commitment. Not interfering with privacy or not phishing both are commitments. Conversely, the imposition of responsibility is not a commitment but an effect of the violation of commitment.[1457]

Referring to the generality of the sense of law that goes beyond the national or political boundary one may question – how practical and sound is the sense of law application of which is limited within the national or political boundary? We submit that the political limitation of the application is neither intrinsic to the sense of law nor compatible with the sense of law; the political limitation is just an outcome of a political blunder driven by the unawareness about the sense of law and the weird political misconception of law. However, the prospects of the sense of law are likely not to be restrained by the current political limitation in the application of the law. Once cultural rules or religious rules were used to dominate the legal landscape as the cultural rules or religious rules were transcribed as legal rules accordingly their application was culture or religion bound.[1458] Accordingly, when political rules are, consciously or unconsciously, taken as legal rules their application is logically meant to be limited by the political boundary.[1459] Once we will have the sense of law dominating the legal landscape, the political limitation of its application will also disappear. In fact, on many occasions where the sense of law is profound for instance in case of death, rape, etc and

[1457] Now one me be critical on this point: murder is a crime it is well known, and it is the law. However, the consequential provision that mandates imprisonment as the appropriate punishment for this act is not considered a part of the law itself. Is not it a loophole of the freejon approach? For instance, one judge, being partial in favour of the convicted murderer, award an imprisonment of only one day and then the judge or other political officials claim that they have this special authority or expertise to determine what is the appropriate form of imprisonment for the convict and in such a case they are not bound to listen what people say about the extremely short term of the imprisonment. Will not such a trend be identical to what happens today ie few political officials have the monopoly to decide the legality of law? It is true that the common people lack special knowledge to decide what will be the appropriate length of imprisonment for a particular crime, but they all have similar abilities in dispensing GSEC. They will have control over the legal decision through their GSEC. Their GSEC leads to the conviction that all should bear equal responsibility for a particular kind of offence. Therefore, If X is given a sentence of 10 years in prison while Y is given only 2 years for the same incident, then this is certainly a violation of the law, not merely a violation of the provision.

[1458] Still, in many places this is the case. For example, in Bangladesh, Hindus are regulated by their 'religious' law and the application of the law is limited to the Hindu. Again, we should clarify the 'Hindu law' is not the law. Theoretically, this is just religious rules. However, if we see the colonial history behind the Hindu Law, then it is more political rule.

[1459] However, with the emergence of digital technology, flaws of such concept of political concepts of law are increasingly surfaced. See David R Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367.

where the political rules are not unduly sneaked into the sphere of law, the application of the sense of law is already crossed the political boundary of the nations, if not the application reached to the universal level.[1460]

8.3.2 Confusion – Clarified

Dworkin might not be conscious about the distinction between the law and the provision, but his narrative indicates that he is often touched by a similar sense of distinction and that is reflected in his discussion depicting the distinction and relation between the rules and the principles. Dworkin states:

> The rule might have exceptions… [but in case of principle] We do not treat counter-instances as exceptions…A principle like 'No man may profit from his own wrong'…states a reason that argues in one direction, but does not necessitate a particular decision our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, … the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant…Principles have a dimension that rules do not — the dimension of weight or importance. … it makes sense to ask how important or how weighty it is …If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid…be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules …supported by the more important principles…It is not always clear from the form of a standard whether it is a rule or a principle.[1461]

Let's try to make sense of his paragraph by applying our awareness about the distinction between the law and the provision, and considering his principle as Principle of law, and his rule as the provision. Provision may have exceptions because it needs to have enough scope for necessary adjustment to make sure that it

[1460] One may naively ask – actions taken against murders committed in Bangladesh and in Italy are not by the same political authority – therefore how can we say the law against murder has application beyond the political boundary? Briefly, our response to him or her is – he or she is still confusing politics with law and he or she is searching for the authority of law in politics. Bromwich, reflecting on Mill, states – 'The people and their acts are a legal and necessary medium through which the system reforms itself. Their minds inevitably come to be prepared as, sometimes together, sometimes apart, they live out the reforms which they themselves have approved'; see John Stuart Mill, *Considerations on Representative Government* (The Floating Press 2009). Cited by Bromwich, see Mill (n 53) 26.

[1461] Dworkin, *Taking Rights Seriously* (n 1) 43-45 (ebook page number).

reflects the associated sense of law properly.[1462] On the other hand, as we have already mentioned earlier, Principle is a Valued entity and hence it is not evaluate-able and hence, one Principle cannot be given a superior Value to another Principle and hence, if one Principle is applicable, it will be applied, and if it is not applicable it will not be applied in relation to a certain issue, and there is nothing in between ie an exception. Dworkin is also correct in presenting that the Principle ie 'No man may profit from his own wrong' gives us the reason or justification for the decision that judges make. He is also correct that the Principle does not prescribe a particular decision. The particular decision is shaped by the provisions. The Principles present conviction directed in one direction and the rules or provisions must reflect the conviction in shaping the particular decision. A Principle of law may not be taken into consideration in a particular case because it does not cohere with the fact in issue and the question of coherence is not a question of evaluation of the Principle. This is why Dworkins is absolutely correct when he states that the 'principle of our law' must be taken into consideration when it is relevant (ie cohere with) to the matter in issue. He is absolutely touched by the sense of distinction between the law and the provisions when he says that the Principle has a 'dimension of weight or importance'; Principles have their own intrinsic Value and hence, it is not subject to evaluation and it is only subject to coherence. On the other hand, rules or provisions do not have any such weight or Value and hence are subject to evaluation and hence when two rules conflict with each other, one will survive through the activity of evaluation. As we have already said, evaluation necessarily needs a standard and the Principles of law are the standards; Dworkin gets it absolutely correct. If there is no standard or Principles relating to a particular issue, rule does not exist and must not exist; the matter in issue is not something that is within the plot of law, at all.[1463] Issues need not be brought into the plot of law forcibly; as long as we are following the freejon approach, Freedom is secured and we do not need the assistance of law.

When Dworkin has such a precise sense as to the distinction between the law and the principle of law, how come he confuses one with another? Unfortunately, this is the fact; in time his confusion reaches a rampant level.[1464] This is why he asks – 'How can people who have the text of a statute in front of them disagree

[1462] The interpretation of the abstract sense of law into provision always includes some difficulties such as linguistic, methodological, etc. It is an activity of interpreting an abstract and, often, unconscious sense into the concrete and conscious provisions.

[1463] Dworkin has the similar sense – 'Since principles seem to play a role in arguments about legal obligation … Unless at least some principles are acknowledged to be binding upon judges, requiring them as a set to reach particular decisions, then no rules, or very few rules, can be said to be binding upon them either'; see Dworkin, *Taking Rights Seriously* (n 1) 56 (ebook page number).

[1464] Dworkin, *Taking Rights Seriously* (n 1) 54-55 (ebook page number). Dworkin states – 'these principles …The question will still remain why this type of obligation (whatever we call it) is different from the obligation that rules impose upon judges, and why it entitles us to say that principles and policies are not part of the law but are merely

about what it actually means, about what law it has made?'[1465]. This is just one of many instances where Dworkin not just confuses the law with the provisions, but also comes up with some absurd observations. The question is related to the decision in *Elmer's case* and Dworkin tries to support the dissenting opinion of Judge Gray who finds law in the literal interpretation of the statute.[1466] Gray's position was criticised by law students and teachers as the position 'is an example of mechanical jurisprudence'[1467]. Dworkin criticises them and states – 'there was nothing mechanical about Judge Gray's argument…It might be wiser in the long run for judges to assure testators that the statute of wills will be interpreted in the so-called literal way, so that testators can make any arrangements they wish'[1468]. This statement supports Nerhot's conviction against Dworkin that the latter considers reality is given; Dworkin, like many other positivists, believes that legislators will know in advance all the varieties of problems and situations that people may face.[1469] Why is Dworkin so confused? The answer lies in his last statement of the above-quoted paragraph – 'It is not always clear from the form of a standard whether it is a rule or a principle'. Dworkin clarifies that he does not know the difference between the law and the provisions.

What might prevent him from identifying the difference? His political morality, his lawjon approach, and his inability to comprehend the morality of law and the associated principles of law prevent him from knowing. Why cannot Dworkin relate Principle with the sense of law? He fails to see the relationship of Principle with law because he is confused with the principles themselves - he like many other scholars find that some principles are related to law while other are not; some are more important while others are not.[1470] They are generally confused as sometimes judges ignore principles while, on other occasions, judges not

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extralegal standards… generally we cannot demonstrate the authority…particular principle as we can sometimes demonstrate the validity of a rule by locating it in an act of Congress or in the opinion of an authoritative court'.

[1465] Dworkin, *Law's Empire* (n 1) 16.

[1466] Dworkin, *Law's Empire* (n 1) 16–17.

[1467] Dworkin, *Law's Empire* (n 1) 16–17.

[1468] Dworkin, *Law's Empire* (n 1) 18.

[1469] We find Dworkin's observation too impractical. There would not have been any problem in relation to property distribution had people started to behave in a way other than what people always do. Unfortunately, people have emotions and people cannot behave mechanically. Emotion creates trust without which a person cannot lead a normal life. How can we believe that the loved person whom we are going to deliver our property to, will kill us and why should we believe that? How absurd it would be that, as Dworkin suggests, X, who wants to bequeath his property to Y, would write in his will: 'On my death, my property will be transferred to Y provided that Y does not kill me'! Above all, the most practical argument is this: are we expecting that the people will keep knowing about the trend of the judges in deciding a case? What can be more absurd than this? Even If, at all, the law wants to take this policy, it will be prejudicial for the human relationship.

[1470] Daci (n 1337); Alpa (n 1337); Xuan Shao, 'What We Talk about When We Talk about General Principles of Law' (2021) 20 Chinese Journal of International Law 219; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 The Yale Law Journal 823.

only take note of them but also prioritise them.[1471] One confusion gives rise to another confusion – he confuses legal morality with political morality, the law with the provisions and consequently, he confuses Principles of law with other principles that have their source in society, politics, religion, and so on.

What is the distinction between principle and the legal principle? We know the law is the General and Shared Commitment of the evaluative self. Legal principles must have four key features: inter-personality, generality, sharedness, and recognition of the principles by the evaluative self. Thus, although 'not to tell a lie' is a principle, it is not a legal principle because it lacks the first feature. The principle is still in the sphere of Freedom and hence not enforceable by law. On the other hand, the Principle that – promise must be honoured – is a legal principle as it complies with all four features. X is a Muslim and a man of principles, and he follows the principle of not taking any interest. This principle is not a legal principle as it lacks features of legal principle. Other points of distinctions are well reflected in Dworkin's own statement that refers back to our sense of law and its associated morality:

> The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained. If it no longer seemed unfair to allow people to profit by their wrongs, or fair to place special burdens upon oligopolies that manufacture potentially dangerous machines, these principles would no longer play much of a role in new cases, even if they had never been overruled or repealed. *Indeed, it hardly makes sense to speak of principles like these as being 'overruled' or 'repealed'. When they decline they are eroded, not torpedoed*.[1472]

His statement is a testament that how close he is to the sense of law and the morality of law. Unfortunately, however, only to be derailed in the latter moment and make all these confusions. The lawjon approach and its inevitable requirement of externality trick him to ignore the silence where the sense of law is more profound and therefore the consequence is further confusion. Why is breaking the speed limit set by the English Railway Transport regulations a legal wrong? We have already seen that Dworkin believes that it

[1471] Dworkin, *Taking Rights Seriously* (n 1) 55-57 (ebook page number). Dworkin states – 'There must be some principles that count and others that do not, and there must be some principles that count for more than others. It could not depend on the judge's own preferences amongst a sea of respectable extra-legal standards, … Judges are not free, however, to pick and choose amongst the principles and policies that make up these doctrines — if they were, again, no rule could be said to be binding. Consider, therefore, what someone implies who says that a particular rule is binding. He may imply that the rule is affirmatively supported by principles the court is not free to disregard, and which are collectively more weighty than other principles that argue for a change'.

[1472] Dworkin, *Taking Rights Seriously* (n 1) 59 (Ebook page number) (emphasis added).

is because of the legislation that provides such an act as wrong. Why should we accept Dworkin's argument as there is no violation of morality of any sort? Dworkin is silent here. Why are murder, rape, etc crime? Why slavery is legally immoral? Why is legislation validating the segregation of races immoral? Dworkin is silent – in all these cases. Or it is better and more appropriate to say that Dworkin, including others, who hold a similar view, has no answer.[1473] They all are silent in these questions, and they love to maintain the silence. Nerhot states – 'it is indeed law that creates the facts and that the foundation of law is the law itself … Man is not a thief by nature; he is a thief in the light of the law'[1474] Dworkin's answer (which is equivalent to silence) is that murder, rape, or slavery – 'this is wrong by itself'.[1475] We cannot afford the continuation of silence; the silence must be broken. We must have answers in place of the silence because this answer leads to the sense of law.[1476] Those following the lawjon approach can afford the ignorance of not having answers associated with the silence, just as we can easily ignore the existence of oxygen because we live in an ocean of oxygen. The Freedom, the GSEC or the sense of law and its associated morality is so profound in association with these acts that no one cares about asking the relevance of these to those questions. This carelessness deprives us of the opportunity to see the actual picture. Dworkin's greatest confusion regarding freedom, whether he considers it as a conflicting virtue with his sovereign virtue of equality or as a subordinate component of equality, can be explained by the same reasoning: the failure to recognize that we live in an ocean of Freedom. The Freejon approach does not find any conflict whatsoever between Freedom and equality. Other related confusions of Dworkin, including that of the other legal scholars, have appropriate explanations and solutions in the freejon approach.[1477]

[1473] Stuart P Green, 'The Conceptual Utility of Malum Prohibitum' (2016) 55 Dialogue: Canadian Philosophical Review / Revue canadienne de philosophie 33; G Lamond, 'What Is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609; Jeffrey Kennedy, 'CRIMES AS PUBLIC WRONGS' (2021) 27 Legal Theory 253; Richard L Gray, 'Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes' 73 Washington University Law Quarterly 1369; Michael L Travers, 'Mistake of Law in Mala Prohibita Crimes' (1995) 62 The University of Chicago Law Review 1301; 'The Distinction between "Mala Prohibita" and "Mala in Se" in Criminal Law' (1930) 30 Columbia Law Review 74.

[1474] Nerhot, 'The Law and Its Reality' (n 884) 61.

[1475] Dworkin, *Taking Rights Seriously* (n 1) 24-26 (ebook page number).

[1476] In addition, methodologically, it is dangerous to take things for granted. Hare states – 'there are dangers in just taking for granted that something is wrong …this leads to a prevalence of very bad arguments with quite silly conclusions; see RM Hare, 'What Is Wrong with Slavery' (1979) 8 Philosophy & Public Affairs 103.

[1477] The Freejon approach, for instance, can explain the abstract moral judgements that are automatically inferred in the hard cases; see Dworkin, *Freedom's Law* (n 1) 2–3. On the question of the right to civil disobedience Dworkin considers integrity-based civil disobedience as the strongest type of right and to exercise it one does not need any other condition to be met because the right is based on principle. On the other hand, the policy-based right of disobedience is not as strong as that of the former unless supported by any additional justification. Dworkin fails to give us any answer as to the higher authority of principle; see Dworkin, *A Matter of Principle* (n 1) 107–108. We have explanations. Again, Take the example of his supposed tyrant rule that declares any form of sex punishable by the death penalty. In such a case, as Dworkin holds, the basic requirement of political morality is infringed to understand it or to explain it we do not necessarily need to refer to the idea of equality or to the idea of right; see Dworkin, *A Matter of Principle* (n 1) 370. Dworkin fails to show us why it is the case, but we have an answer. Again, Dworkin

chooses the community of principle while rejects the default community and the rulebook community and then, inevitably, he faces the question – 'which principles the community should adopt as a system'. Dworkin does not have a particular answer apart from referring it back to his illusive morality; Dworkin, *Law's Empire* (n 1) 209–211. Dworkin states – 'Any judge will develop, in the course of his training and experience, a fairly individualized working conception of law on which he will rely, perhaps unthinkingly… the judgments will then be, for him, a matter of feel or instinct rather than analysis … Most judges will be like other people in their community'; see Dworkin, *Law's Empire* (n 1) 256. Ultimately, the statement supports our position that the sense of law and its authority lies within. Again, the gravity of the externality requirement forces Dworkin to state – 'When we say that individuals have a right to be protected against assault, [we mean] the community as a whole has a duty to provide adequate protection in some way'; see Dworkin, *Law's Empire* (n 1) 173. The Freejon approach has a better and more justified way of explaining one's rights. The Freejon approach can take the right from the natural perspective instead of looking through the prism of the political and positivists' legal structure. The protection is already there as the concept of Freedom requires that, in its natural condition, everyone must mind his or her boundary of Freedom and, thus, none must interfere in the Freedom of others ie assault is a bodily interference. When this natural condition is threatened or violated only then the question of Law or politics comes into surface. There may be a counter question: X crosses the boundary. Now as per our theory X accepts that he or she should suffer coercion for it. Why not X do it on his or her own? Why should Y, Z or the community need to force it on X? If this is ultimately the case that Y, Z or community has a role, they are expected to play a role. If this is the case, isn't there an agreement (political) already inherent in the process? Isn't there a political arrangement or commitment playing a role in the background that promises that if either of them crosses the boundary of their respective Freedom other will have the duty to take action ie impose coercion? Our answer is negative: the process is not political at all; it is facticity. Our claim is substantially different from that of Dworkin's, who says Y, Z or community gets the authority/duty/right to punish X because X is evil. But our holding is different – we know the fact that an individual's role changes - as an actor and as an evaluator. In action role his or her morality is personal with inward regression therefore he or she is not the right person to adjudicate his or her action in the interpersonal space. Therefore, the duty to adjudicate is shifted to Y, and Z, and they adjudicate not with new rules or as per their wish but as per the GSEC of the X himself. Again, there may be a counter argument: is not the same question applies here – why should Y and Z would do it for X.? Is it not referring to a political arrangement among them? Our answer is negative again: the arrangement is definitely interpersonal but not political because there is a normative question involved and hence the arrangement in the background is purely legal neither political nor social or religious or other things. Above all, what matters is the fact that the courts deal with only those features of the incidents which constitute the plot of law.

Conclusion

The freejon approach has been introduced and the prospect of the approach has been demonstrated. Thus, the two central objectives set out at the beginning of the thesis have been accomplished. The thesis has not only introduced and explained the foundation, mechanism, and major features of the freejon approach, but has also shown its comparatively higher compatibility and coherence than its counterpart, the lawjon approach. However, we do not claim to have invented the Freejon approach. The approach has been here out there with all possibilities and prospects to be applied and followed, but unfortunately, it has remained unexplored and unused. Almost all, if not all, jurists and legal scholars at some point in their lives, consciously or unconsciously, come across or take note of this approach, even if it's just for a brief moment. Although these encounters may have been random, slight, and momentary, many of them might have caught a glimpse of the approach. Nevertheless, no one has the incentive or motivation to explore it; no one has the *prima facie* grounds or insight to take note of it seriously. This explains why the approach remains unnoticed, unutilised, and neglected. Freedom, the very foundation of the approach, has been always the source of disinterest and scepticism about the approach. More specifically, as demonstrated in the thesis, partial conceptions or misconceptions about Freedom have always restricted us from exploring, comprehending, and harnessing the benefit of the approach.

The thesis has demonstrated that our ability to conceptualise Freedom and, thus, seize the opportunity to distinguish it from a wide range of general and legal terms or concepts like solipsism, authoritarianism, despotism, totalitarianism, opportunism, rationalism, power, privilege, license, immunity clears away all the clouds associated with the concept of Freedom and gives us the impetus to explore the prospects of the freejon approach. Freedom is more about being a person as a human person; it is more of an inevitable component supporting one's existence as a human being. The freejon approach with its actual concept of Freedom provides not only the theoretical framework or foundational and guiding philosophy for law but also draws a tentative yet functional distinguishing line between the law and other normative systems, ie morality, political morality, social morality, ethics, culture, religion. In addition, by acknowledging the very fact that law is not a system completely disconnected from other human normative systems, the freejon and its derived, associated, and guiding philosophy has depicted the relationship of law with other normative systems and demonstrated the functional and theoretical separateness of law while still acknowledging its connection to other human systems.[1478] The dynamic, genuine, and comprehensive

[1478] Freejon approach and related and related philosophy are not separate. One is the result of another; one supports, guides, and causes another. Freejon gives rise to its own philosophy and the philosophy guides the approach; both are flourished as reason for another – both are flourished as a single organic entity, and this is how the order of things not only maintained but also justifies each other and come into being.

nature of the freejon-associated theoretical framework, by default, provides, sufficient space to accommodate all the genuine plots affecting human life in their original and meaningful order.[1479] This, eventually, allows us to see how these plots and their essential components are connected, disconnected, and limited in their scopes. This enables us to comprehend not only the scope of Freedom and its relationship with the normative systems including the law but also to comprehend the equation between the law and other normative regimes. The freedom-derived framework is the framework in which all the normative discipline gets their logical, coherent, and meaningful expression.

On the other hand, lawjon neither gives rise to any such theoretical background nor is it associated with any such theoretical framework. It does not follow any comprehensive theoretical framework, nor does it refer to any framework to follow. Its field of action consists of random and scattered processes motivated and governed by unfounded assumptions, heuristic decisions, immediate responses and reactions, and sadistic convictions. Lawjon is incapable of understanding the unique nature of any normative system, nor can it identify the relationships among normative systems. It treats the systems as a hodgepodge or chaos of all systems, with increased emphasis and priority given to the political and social systems. The same is the situation on the question of understanding the law. More shockingly, having the sense of law does not matter to the scholars governed by the lawjon approach largely because they have failed to have a comprehensive sense of law. They have failed because they have never tried to explore it. They have never tried because they find the lawjon associated assumptions, responses, and heuristic findings are more intriguing and instantly rewarding as these give rise to results having external impacts, although it does not matter if the impacts are negative or counterproductive. This is why slavery, and the Nazi massacre, appears to them as just some minor and inevitable by-products of law; such impacts, themselves, are not strong enough to challenge the legality of the law and the practical authority associated with such law.[1480] This is, further, indicative of the naivety of the approach in comprehending the legal morality associated with the sense of law.

The appropriate expression of law and its associated sense emerges only when we follow the freejon approach as the approach unlike its counterpart, does not allow us to start from anywhere. When our purpose is to comprehend the sense of law and its associated rationale, authority, and so on, our journey cannot start from anywhere, and neither can the accumulation of some scattered and surface-level information serve our purpose. Our journey must be inward to have the sense of the senses humans have; however, it does not mean that we rule out the necessity of the outward journey. What we have submitted in this thesis is that

[1479] Meaningful in the sense of accomplishing worldly functions.

[1480] This is why scholars including Dworkin do not see any reason not to consider such laws as laws. To them these are just bad laws, but still laws.

law is not a political rule, social rule, religious rule, and so on. It is not completely detached from all these aspects either. We should not be naive enough to discuss law completely detached from these elements, nor have we done so in this thesis. Nor should we have the audacity, as Dworkin does, to view law solely through the lens of political morality, as it would be a grave mistake of the highest order. Everything is connected to everything, but in an order, and to understand the order, we have to understand what law is or what the compelling sense associated with it is. Only in that case will we be able to put law and other normative regimes in an order that will make sense, and the law will have its due regard and authority without the political, religious, social, and other stings attached to it. Thus, the approach intrinsically leads us to the comprehensive sense of law that has evolved over time as the consequences of the actions of the evaluative self. The profoundness of the general and shared commitment of the evaluative self gives rise to the practical authority of law which is supported by the associated legal morality, a morality evidently distinct from other moralities and which has its source in the human moral faculty evolved over time as the faculties of music, language, etc.

The second objective of assessing the prospects of the freejon approach in resolving the fundamental legal questions and confusions has also been accomplished as the approach has proven to be successful in explaining and dealing with the issues Dworkin faces in his quest for the practical authority of law. The thesis has taken Dworkin's propositions, challenges, questions, and confusions in association with the practical authority of law as a test case to assess the prospects of the freejon approach. To this end, we have, specifically, demonstrated freejon's ability to refine his focus, make sense of his objectives and, thereby, redirect his quest to ensure that the pursuit of the practical authority of law remains not only on the correct path but also properly reflective of the spirit extractable from his 'sense of law'[1481] and its narrative. To make sure that we are executing our task correctly and without keeping any scope of misjudging or misstating Dworkin, we have presented his narrative in both the theoretical frameworks – the framework that is supposed to be provided by the lawjon approach and the freejon's framework. Further, we had to do it, as Dworkin himself states on numerous occasions, until and unless any theory is put into a framework, its real meaning, nature, and objective cannot be comprehended correctly.

Although the lawjon approach does not offer a comprehensive framework, we presented Dworkin's narrative within a hypothetical framework or template that the approach could potentially prescribe. This was done because we had no reason to believe that Dworkin had any other theoretical framework or template in mind apart from the one, if any, that the lawjon approach could potentially provide. As the

[1481] Just to clarify it again, in the absence of his comprehensive sense of law, the thesis has taken note of the sense of law Dworkin is touched by randomly and, in times, unconsciously.

thesis has presented Dworkin's narrative in the assumed framework, which is essentially nothing but some unfounded assumptions, reactions, formal templates etc, Dworkin has been inoculated against lawjon's stings that Dworkin seems unaware of. In the absence of a comprehensive framework and, thereby, not having the privilege of being guided by the principles of coherence and having the privilege of not being sufficiently constrained by any consideration that meaningfully challenge the elements of positivism Dworkin affords, without facing sufficient challenges, present a theory that contradicts his own narrative and the sense of law he randomly and unconsciously touched by. In this process, he manages to delude himself to believe that he is following a framework, in fact, without following any framework whatsoever. Thus, mishaps happen; his theory is stung by a framework-less sadistic approach, unbeknownst to him.

He can afford to reject almost anything without risking the charge of violating theoretical consistency. Similarly, he can also afford to accept almost anything without the support of any framework, coherent grounds, or facing standard questions.[1482] In such a case, the lawjon approach not only appreciates such a move but also motivates such a move. The lawjon tricks Dworkin into believing that he could not do anything with the substance. Lawjon's background assumptions convince Dworkin that there is an abundance of principles and moralities available to uncover the substance. This leads him quickly move to devise a mechanism and propose a theory of identifying and applying the principles and moralities that will make sense in the atmosphere of law as presented by the lawjon. When the question of application and or action or practice of law is concerned, he like all other legal experts finds the lawjon's template is more practical and ready to use because of its externality, and instant reward, although illusory. He cannot rely on the legislature, but at the same time, he cannot deny them as he has to stick to the concept of parliamentary supremacy. Therefore, his intention is more to set the right process or mechanism and he works less on the substance.[1483] As the nature and the prospects of freejon approach have increasingly unfolded in the thesis, the true nature of the irrelevance and shortcomings of his theory in the mould of lawjon has become clear. With the freejon-associated framework gaining more meaning and coherence, the flaws, weaknesses, and irrelevance of the lawjon approach have become increasingly evident.

The thesis has demonstrated that Dworkin's narrative finds its best expression and meaningful coherence only when it is put in the theoretical framework or philosophy the freejon is associated with. For instance, the thesis has convincingly shown how the meaning and significance of his quest for the practical authority

[1482] For example, he simply dismisses the significance of moral faculty, metaphysical elements, and the importance of having a sense of law as a prerequisite for any pursuit in the field of law. Conversely, he readily accepts that slavery, murder, and so on are immoral without feeling the need to provide a rationale for why this is the case. Of all his acceptances, the worst of all, as the thesis has demonstrated, is the acceptance of political institutions and political morality at the centre of discourse deciding the practical authority of law.

[1483] Apparently, it would be more appropriate to claim that he did not work on the substance.

of law becomes more coherent when the quest is put in the context of freejon approach instead of its alternative approach. Dworkin's practical authority of law under the lawjon approach is the outcome(s) of the objective quest to identify an authority that ensures the law possesses greater enabling force, primarily in terms of external force, compared to other normative systems. Simultaneously, the law must possess sufficient disabling force to safeguard against arbitrary and tyrannical legal actions by political officials. Thus, the authority of law is contingent upon striking a balance between these dual objectives, making Dworkin's quest essentially aligned with the law's inherent objective. Eventually, a law is, as Dworkin thinks, good when the law can strike a sufficient balance between these dual objectives. The thesis has demonstrated that from the beginning of the background of its focus Dworkin's journey is misleading and does not make any sense if we can comprehend the sense of law correctly. Sense of law, for instance, does not necessarily tangle with any particular objective as such; instead, putting law subject to any particular objective is detrimental to its sanctity and authority. Furthermore, the sense of law demonstrates that the quest for the authority of law has nothing to do with distinguishing good law from bad law, as such classification of law is sheer absurdity. Instead, authority is more closely connected to the question of law and non-law. The equation is very simple – a rule supported by the legal authority or the sense of law is the law; otherwise, the rule is anything other than law.

The thesis has demonstrated how the misleading journey of Dworkin leads him in the wrong direction and ends up relying on the political institution and political morality on the question of the practical authority of law. This eventually made his quest for the practical authority of law essentially an outward journey that eventually reemphasise his trust in the external political authority and to content and justify the actions and convictions of such authority he has to engineer an artificial concept named political morality. We have successfully shown how futile and incompatible Dworkin's journey and its findings are. In this stage, freejon has come to Dworkin's rescue. The freejon approach not only gives explanations and clarifications of the legal issues and confusion but also helps shape the questions themselves in the most meaningful and coherent way. The freejon has shown its functionality and beauty reshaping what Dworkin would actually need had he consistently and consciously comprehended the sense of law and followed the freejon approach. We have made it clear that the journey would have been inward, along the line of the sense of law. The thesis clarifies what Dworkin actually intends to look for when his quest is for the practical authority of law. The quest for the practical authority of law is all about the comprehension of the sense of law, being conscious about the moral faculty, and being convinced about the profoundness of the convictions of the moral faculty. His actual intention is to assess the soundness and profoundness of legal conviction that can easily distinguish itself from a merely personal conviction and the political official's convictions that undermine or mislead the legal conviction. Freejon approach serves this purpose

successfully. The energy of the evaluative self in generating the sense of general and shared commitment can outmatch everything, every external and institutional system. The evaluative self plays its role perfectly; it plays its role neutrally, generally, fairly, orderly, with consistency, and without prejudices, and hence, its general and shared commitment and the associated morality is the practical authority of the law.

Apart from the confusions and issues associated with the question of the practical authority of law, the freejon has already proved to be effective in resolving other challenges, issues, and confusions Dworkin's theory faces. Now, there should not be any difficulty in distinguishing the principle from the policy, and consequently, there should not be any major difficulty in distinguishing the law from the policy. The former is inherently associated with the principle of law, while the latter is an essential component of politics. Further, we have shown how his awareness of the distinction between choice-sensitive issues and choice-insensitive issues could easily help him understand the clear dividing line between the political atmosphere and legal atmosphere and, hence, understand that political morality can never be an essential component of the law. The thesis has clarified how Dworkin was mistaken as he considers law as the result of the provisions of law ie statute, Acts, etc. Instead, we have not only demonstrated that the equation is rather the opposite but also clarified the exact relationship between the law and the provisions of the law, and this clarification is likely to defuse all questions against his one-right-answer position. The freejon approach has proved its competence by clarifying how Dworkin takes a self-contradictory and illusive stance when the integrity of law means to him the integrity of the legal principles. Refuting this absurd idea of legal integrity, the freejon has shown that the integrity of the law, in fact, is the integrity of the conviction of the evaluative self. Freejon's success in dealing with issues is a testament that the approach would be equally effective in dealing with and resolving other confusions and issues that keep Dworkin in the darkness. For instance, we have enough reason to believe that the freejon approach is likely to resolve Dworkin's all confusions and complications associated with the relationship between equality and Freedom.

Freejon's success in explaining and resolving Dworkin's struggles is a testament that the approach is likely to succeed in resolving and explaining other problems, and confusions the legal arena has been traditionally facing, currently facing, and likely to face in the future. The thesis has provided evidence to support the notion that the freejon not only has the potential to explain the major disagreements concerning the proposition of law but also demonstrates that these disagreements are, in fact, not disagreements at all; the propositions of law (as distinguished from the propositions about the law) are general and shared. Therefore, the freejon, for instance, should be able to explain the disagreements that prevail between natural law theorists and legal positivists. For instance, the conventional natural law theorists claim that law must be supported by morality while commendable positivists like Hart and Kelsen prefer to separate morality from the law. By the time our thesis has clarified and explained the reason behind their disagreements. Both

groups are correct in their convictions, yet they are mistaken in their perspectives, which are formed from a partial or misleading sense of the law and its morality. The natural law theorists are correct in asserting that the law must encompass morality; however, their perspective hinders them from identifying the specific morality they are referring to. Now we know that they are talking about the intrinsic morality of law, although they are not conscious of it. On the other hand, Hart and Kelsen are correct that law should not necessarily be linked to morality, however, unfortunately, their perspectives and the lawjon's theoretical templates keep them in delusion as to which morality they are excluding. Now we know they are excluding contextual morality. Gardner, Raz, and many others posit that the source of the law's authority is the law itself. By contrast, Dworkin, Finnis, Fuller, Kaufman, Radbruch, and many others claim that the law's authority is generated from its merit or normative values. Freejon is capable of explaining how both groups are correct; when their convictions and associated narratives are placed within the theoretical framework of the Freejon approach, no disagreements arise between them.

Freejon has the prospects of solving the lawjon-derived conventional problems such as slavery, criminalization of homosexuality, objectification of women, the holocaust, structural racism, discrimination, and issues concerning abortion, prostitution, Freedom, health, well-being, etc. The traditional challenges such as the threat of the rise of dictators and the draconian laws, the fear of the persecution of minorities by the majority, and the domination of the strong over the weak, are re-emerging and recurrent realities of all time.[1484] It is demonstrated that the lawjon has never succeeded in dealing with these problems; instead, the lawjon has traditionally proven to exacerbate these problems. The freejon is the only solution to counter these problems. Beyond traditional problems, Freejon holds strong prospects for addressing contemporary and emerging issues, including legal challenges associated with the application of modern technologies in diverse fields such as medicine, biology, and information technology.

[1484] This is not only true in theory but also in reality. Europe, for instance, has experienced a significant period of peace and democracy (comparatively better than other parts of the world) following the horrific events of the Second World War. Many individuals of that generation, who witnessed the horrors of the war, have since passed away. This helps to explain why authoritarianism is on the rise in Europe. See Robert Menasse, 'Opinion | As Nationalism Rises, Europe Dies' *The New York Times* (8 October 2019) <https://www.nytimes.com/2019/10/08/opinion/nationalism-rise-europe.html> accessed 27 October 2022; Associated Press, 'Report: Authoritarianism on the Rise as Democracy Weakens' (*VOA*, 30 November 2022) <https://www.voanews.com/a/report-authoritarianism-on-the-rise-as-democracy-weakens/6856151.html> accessed 10 May 2023; 'European Democracies Must "Revitalize" amid Authoritarian Rise: Report' (*POLITICO*, 22 November 2021) <https://www.politico.eu/article/european-democracies-must-revitalize-amid-authoritarian-rise-report/> accessed 10 May 2023; 'West European Politics Is Undergoing a "Worldview Evolution" Structured by Authoritarianism' (*EUROPP*, 13 August 2021) <https://blogs.lse.ac.uk/europpblog/2021/08/13/west-european-politics-is-undergoing-a-worldview-evolution-structured-by-authoritarianism/> accessed 10 May 2023; https://tribune.com.pk/author/1074, 'The West Slides to the Right | The Express Tribune' (18 February 2023) <https://tribune.com.pk/story/2401907/the-west-slides-to-the-right> accessed 10 May 2023.

Freejon has the potential to redefine law as a new type of technology that is best suited to navigate this technology-driven new reality. AI technology, for instance, presents the risk of the devolution of human cognitive capacities. The Freejon approach can not only counteract this devolution process but also enable humans to continue utilizing the technology instead of being controlled by it. Freejon has its foundational strength to accept the challenge of the 'new reality'[1485] and ensure the use of the new technology towards further development of cognitive capacities by facilitating human Freedom and nurturing human originality. By delving deep into human nature and behaviour, and by recognizing the intrinsic motivators and regulators that naturally influence human nature and behaviour, Freejon has the potential to facilitate human life and relationships most effectively.

Finally, just to reemphasise that we are not making any superficial claim, it is important to acknowledge the limitations we encountered while writing the thesis. Our exposure to both Anglophone legal theory and continental legal theory has convinced us that, particularly in the realm of philosophy of law, continental European scholarship has made a substantial and robust contribution, if not more robust than its Anglophone counterpart. Due to time and language constraints, we have regretfully overlooked the valuable insights of renowned continental European scholars such as Bobbio, Habermas, and others. As a result, we may have missed the opportunity to address significant arguments that these perspectives could have presented, challenging various aspects of the freejon approach. Above all, we have always faced the limitation of not being able to comprehend everything that others say on one hand, and the more serious limitation of lacking the capacity to identify the gap between what one says and what one actually intends to say on the other hand. This situation is further complicated when one is in pursuit of an objective; his or her narrative keeps losing its true expression in order to comply with the objectives

Nevertheless, we think these limitations are unlikely to significantly impact our main argument: the imperative of abandoning the burdensome lawjon approach and embracing the freejon approach instead. The thesis has convincingly demonstrated the futility and danger of adhering to the lawjon approach while highlighting the immense potential of its alternative, the freejon approach. The lawjon has failed in the past, it fails now, and its failure will be even greater in the future. The ubiquitous application and the overrating of the lawjon approach are not due to its own strength, but rather it is due to dogmatism, insecurity, a lack of innovative mindset, and a lack of motivation to delve deep into human nature and these weaknesses of the legal arena allow the reign of the lawjon. X wants to learn to swim. But it is quite difficult for X to learn it. X takes an effective and easy strategy: avoiding deep water altogether. X pretends that he or she is

[1485] People often have a general and naive belief that the introduction of new technology leads to the emergence of a completely new reality. However, this perspective offers only a limited view of reality. In truth, reality is always both new and not new; it exists as a recurring cycle, and human imagination is well aware of this fact.

swimming while, in fact, he or she is walking. This is exactly what the lawjon does. When we want to learn to swim, we must go into deep water. This is the freejon approach that not only inevitably takes us to deep water but also motivates us and provides us with the tools to put our Freedom in Freedom expressing actions, for instance, learning to swim in our own unique way; the approach also provides us with the instructional framework to ensure we don't drown in the process. Thus, the freejon, its foundation -Freedom and framework, not only facilitates but also invites further discussions, debates and criticisms on this issue we have addressed in this thesis, and this is the only way we can comprehend things in their very nature as they are in the worldly reality. Since the blocked system of lawjon does not allow any such possibility, lawjon has nothing genuine to offer in a quest for law and about law. In contrast, freejon's ability to confront those challenges, and its readiness to effectively respond to those discussions and debates will determine its fate. Therefore, as long as the freejon has the prospects demonstrated in this thesis, all discourses of and about law, including the criticisms of the freejon itself, begin with the freejon approach, not before or without it because there is nothing, humans can claim agency of, before or without Freedom.

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