

# Force of Law<sup>i</sup>: Deconstructing Abortion Laws with Emphasis on Female Foeticide

Aparna Vijayan

Assistant Professor, Department of Political Science, The Maharaja Sayajirao University of Baroda, Vadodara, India

Email id: [apuv1210\[at\]gmail.com](mailto:apuv1210[at]gmail.com)

**Abstract:** *There is an enigma surrounding the nature and application of the law. For law to proceed in tandem with the justice concerns, it is important to ensure that its possibilities are discussed within and beyond contexts, as laws serve the purpose also of building and at times, guiding, the moral consciousness of the masses. This paper seeks to engage with and explore this enigma associated in the language and functioning of the law. The attempt also is to explore the acts passed in India towards addressing the question of abortion and the problems present in the assumptions resorted to, in the very formation of the law and related bills. Through a brief exploration of this example, the author seeks to show the challenges one may encounter in addressing specific questions, of cultural and political nature, that the situation continues to pose today.*

**Keywords:** Enigma of Law, Deconstruction, Gender Justice, Abortion Laws, Indian Context

**The Enigma of Law [This title is borrowed from VII National Seminar of Balvant Parekh Centre for General Semantics and Other Human Sciences, Vadodara which was held in collaboration with The English and Foreign Languages University, Hyderabad during 2-4 November 2015 on the theme “The Enigma of Law.”]: Introduction and Scope**

Law fixes us into categories. Categorization is the primordial nature of the law and such a closure that law manifests in its rationale, codification, and being, poses potent questions to the approaches that law exercises, be it a protectionist approach or the least found corrective approach. The characterization of law aimed at fixation of bodies (here), in the name of providing identity masquerades the possibilities of finding solutions to dicey situations created by the law. On looking at it deeper, justice becomes human as it doesn't have a calculable secure metaphysical *telos*. The differential nature of body in paradox with closed nature of laws governing it, works in a violently silent or silently violent manner and puts the subject of law in *aporia* leaving us in confusion as to where we would fall in the power denomination. These are the instances when law collapses into justice or vice versa and thereby the semantic understanding of law or lawlessness is based on what's experiential and contextual and how much you take from it or go beyond it, to 'know' it. [ (Foucault (1992) [1984]. The Use of Pleasure. The History of Sexuality: Volume Two. Tr. R. Hurley. Harmondsworth, Middlesex: Penguin, intro.)] (Derrida, 1989) The implications of the liberatory potential of rights, once fixed, fixated and enclosed by law, may seem to exude a shared sense of justice, equality or say, freedom, but this impervious nature of the Law to 'identify' itself with certainty and exactitude, may bring out serious issues worth pondering over. The singularity approach towards realizing justice, which, in turn is derived out of different values based on specific moral universes creates an aporetic situation: A pertinent question that it produces is, how can a 'closed' foundation of law which functions antonymously with the open nature of Justice, deliver the latter. The inherent paradox lying in the very conception of 'enforcing the law' and 'fighting for justice', shows the linguistic

ordering of the languages of law and justice failing to operate in conjunction with each other. Whether bringing about sameness of the basic characteristic features of law and justice could solve or even address this paradox is not what is argued here. Or, to say, whether any other alternative to a systemic approach that needs laws and rules to be enforced, can win justice without fighting for, is not the argument either. But unlike the blind following of constructs and conventional paradigms that the society follows and subscribes to and a sense of devotion to not just a convenient and complacent conformity to status quo, but also deriding and dismissively mutilating a challenging philosophical undertaking of something like deconstruction; looks strange, if not, regressive.

To make sense of Justice through the incorporation of deconstruction, Derrida abrogates the authority of even the law to claim the basis of its own rationality as rational and anything else as irrational to dispense justice. A detour taken in order to neither dismantle nor conform, but to philosophically engage in a discursive experiential attempt at 'knowing' or not - knowing, is possible only if the constructs and myths are considered as any other narrative existing in an equally possible space as it can non - exist. To conceptualize and imbibe this inherent aporia; presents the confusion, the enigma and the impossibilities or possibilities of existence of Justice, every time. This may pose another paradoxical problem to those narratives that incisively oppose theories (like deconstruction), which is to say that, if deconstruction as a post - modern 'experience' - (Foucauldian sense of the term) cannot be adjudged as a prospective theory seeking to not just threaten the existence of laws but also to extract out any possibility of justice arising out of the contextual connotations, evidences, and protracted images of simple legal pronouncement for the crime, act, or any situation; then what certain, sure, universal construct of a solution can be provided by the critics to deal with a situation calling for multiple understandings of Justice?

After having touched upon the need to recognize why deconstruction stands significant and potent as a method of

looking at law, it becomes necessary to enter into that discourse on the law - justice interplay in the background of rights. Extensive accounts have been written profoundly on the justice concerns related to laws dealing with the subject of corporeality. Be it, death penalty, reproductive rights, rights governing one's sexuality, idea of euthanasia, the excesses of the very characteristic feature of laws in the Indian constitution regarding these issues generate debate on the concept of rights. Basing the relation between law and justice, if any, on the conceptual understanding of rights and of violence is what is sought to be undertaken here, with special emphasis on the conceptualization of a certain law. Such applications of the law are found in various entities that exist as the source of legitimacy governing people's conscience, the Constitution in India, being one such entity. The Constitution employs the language of the law, which may provide a nebulous picture in most of its provisions; but the multiplicity of meanings and the use of social morality as a parameter to interpret the constitution, makes it a valuable document. The document renegotiates with variety of streams and keeps recreating narratives. (Cowen, 1960) With the purpose of keeping the document flexible and established on principles of liberty; we had the inclusion of Fundamental rights. Even though rights - based talks have been skewed and limited to addressing justice concerns, it has never been incorporated with the intention of debilitating the masses into a category of citizens, without emphasis on the typical differences in the characteristic nature of every citizen from the other. The establishment of the constitution on the foundations of Fundamental Rights makes it possible for one to comprehend that the rationale was to base it on the bedrock of liberty, equality and fraternity, while also challenging the dominant perceptions of these values. That explains the presence of Individual rights and Community rights which in mainstream theoretical language of the law, get represented as identities. Further, the provisions for constitutional amendments and its limitations mentioned in the constitution, create many incarnates of power, that are constantly in flux, thereby constructing means that can ensure accountability. Here, in the context of understanding the purpose and functioning of the laws on abortion, one needs to bear in mind the legitimate grounds within which these discourses and narratives are located. An understanding of the contextual composition of legitimate order in the society, will provide one an anchor to understand, what do the laws on abortion seek to cater to, and what do they conveniently miss out on. Especially with a burgeoning rise of the abortion rights getting repealed in the courts of law, with respect to the latest judgement that was passed in the United States, by its Supreme Court while striking down and capsizing the Roe v Wade case and eliminating all constitutional protection to the activity of Abortion, it becomes really pertinent to revisit certain problems with the way abortion laws have been conceptualized within the Indian context.

What underlies any conception of law? In order to address this general question, one needs to extend one's thoughts in to not only the rationale behind laws but also the process of law - making. The mainstream understanding of law caters to 'looking' at body as a natural and physical object within which the self is located and 'sex' is a phenomenon existing prior to all the discourses concerning the self, simply

distinguishable from other kinds of human interactions. [Refer Judith Butler, Gender Trouble: Feminism and the Subversion of Identity for a detailed reading of how the bifurcation and distinctions between sex, gender and desire are created and projected in a certain manner so as to ensure that the fundamental assumptions on which these constructions are made sustain by getting identified and attributed as the 'natural'. This fundamental assumption is what Butler questions]. The law looks at body as an object that has to identify itself as something; be it healthy - disabled, male - female, and the like. The meanings of *body* and the *self* acquire meaning precisely through an interplay of contexts, a dynamicity that is sustained at the hands of the horological and the chronometric dimensions of a certain rule or set of rules. Thus, the law presents to us paradoxes which appear as a matter of interpretation in every context. This contextual analysis, then makes it challenging and also open to multiple possibilities on how to apply the law. Such an application of the law is bound to limit and leave out large portion of debates and discussions outside the scope of the legal, which also in turn allows for open limitless possibilities for all its future applications.

### Laws on Abortion in India:

With the granting of citizenship, we got disembodied under the ambit of law. This disembodied 'Self' now, takes in Body as a category. In the context of abortion, women, here, are looked at as sexed bodies. How is it, then, possible to take in women within the law as citizens? This throws open the question as to what is desirable when it comes to addressing matters of prime concern like female foeticide.

- Is sameness just or difference just?
- How shall the inclusion of gender - related injustice redressal issue become an agenda of laws? Will laws ever be able to deal with the ever - dynamic subject of the body politics? Can law provide substantive solutions, if any, to such complexities into which body politics can categorize you into?

This paper shall seek to explore in detail how the existing legal measures were concerned with these aforementioned questions:

### The Medical Termination of Pregnancy Act (1971): A critical overview of the Law

The Medical Termination of Pregnancy Act (MTP) was passed in 1971 amidst parliamentary rhetoric of choice and women's rights; though clearly intended as a population control measure. A skewed sex ratio was the major reason when 'body' came under the scrutiny of law. Abortion had become an issue there was an ever - growing practice of killing of female fetuses after sex - determination. Should women be given the right to abort? If denied, it is a denial of right over one's own body. If granted, the problem of consensual activity of female foeticide becomes difficult to address, thereby legitimizing the use of right over one's body to determine the right over the foetus.

With the passing of the 'Prenatal Diagnostic Practices (Regulation and Prevention of Misuse) Act' in 1994, amongst the many criticisms that were raised against the act,

the Forum Against Sex Determination and Sex Preselection opposed it vehemently owing to ambiguities existing in the practice of the Act. The following recommendations were made with the purpose of addressing this imprecision.

- All ultrasound equipment which can be used for sex determination should get registered, under this act.
- The future techniques of sex determination should also be brought under the ambit of this law.
- The act should not punish women, if deemed responsible for the act of abortion.

These recommendations barely sought to cover the lacunae in the practical implications of the 1994 act. Following were the inexactness involved in the recommendations proposed above:

- It becomes impossible to bring in all ultrasound equipment as registered equipment under this law because they are also used for purposes other than sex determination.
- The lack of provisions for bringing in all abortions (irrespective of the sex of the foetus) under the legal scrutiny will remain an impediment in keeping a check on the misuses of the law in future, especially with newer techniques of sex determination coming in.
- If laws desirably took 'body' as an important aspect into consideration, i. e. if law looks at the foetus as a body, will it be able to deal with the negative implications of the steps taken only to end female foeticide? This would mean condoning the murders of male fetuses.
- The individual v/s the sexed body binary brings in with it lot of complexities for the law while deciding whether it was an act of female foeticide or an individual choice of abortion. The woman as an embodied self, here, exposit a fragmented identity of that of an individual as well as a sexed body. The inclusion of the 'body' in the way law looks at the foetus, tends to substantiate the act of aborting female foetus as a forced/ consensual activity carried out by the woman to cater to the socio - cultural patriarchal norms. Such a fragmented identification of the foetus as a sexed body de - capacitates any possible avoidance of injustices occurring like female foeticide, owing to systemic conventions set down by patriarchy.
- There are multitude of reasons for carrying out abortion. The law looks at woman as an embodied self in certain cases and as a disembodied self in other cases. Such politics of embodiment causing violation of the rights of the self, becomes instrumental in remaining silent to different kinds of socio - cultural injustices meted out against women. This leaves the excesses caused by the systemic atrocities non - addressable by laws.

The following were the new propositions made in 2014 to bring about amendments in the existing Medical Termination of Pregnancy Act, in the Medical Termination of Pregnancy (Amendment) Bill:

The draft bill proposes to amend the 45 - year old law to allow abortion to be carried out for a foetus beyond the gestation period of twenty weeks to twenty four weeks, on special conditions of pregnancy involving substantial risks to the health of the mother or child, or if alleged by the pregnant woman to have been caused by rape. The rising incidents of sexual crimes, the urgent need to empower

women with their sexual rights and the need to bring into account the technological advancements used for pre - natal diagnosis of defects, the amendment became an a priori to broaden the scope for addressing problems created by the 1971 law. The national medical narrative, for the first time in 2008 in the Mehta case, took note of the fact that with the advent of medical technology, pre - natal diagnosis of defects had come a long way and that some defects could be revealed even after the 20 - week period. Rapid technological advancements from ultrasound to magnetic resonance imaging to high - end foetal monitoring devices taking the pre - natal diagnosis far ahead the illegal sex determination calls for reconsidering the necessity to amend laws keeping scientific advancements in mind. From the dilemmas posed by the rapidly developing technologies, it became clear how the nature of law essentially seeks to categorize, de - categorize and exclude sections of the society, especially when the character in question is looked at as an embodied self as opposed to being the disembodied citizen. (Derrida, 1989)(Butler, 1990)The larger question that one could then raise is over the challenges one faces in the cultural versus personal/individual spaces that then go on to define the political.

However violent or less violent law claims itself to be, the possibility or impossibility of justice remains suspended. It then appears enigmatic to see, how, on a contrasting level, abstractness, subjectivity, and changes have defined epistemology of law. This conflicting position and struggle experienced in this gendered perspective of analyzing laws, keeps alive the enigma, substantiates the aporia and stretches its existing dimensions to demystify the floating foundations on which law is placed, thereby keeping active the debate and the paradoxicality inherent in 'fighting' for justice. Freud's "Ego and the Id", perhaps rightly says how it is the idea that makes the body accessible as a body' instead of the body preceding and giving birth to the idea of the body. The laws, while catering to the latter principle i. e. looking at the body and providing meaningful associations of 'man' and 'woman' to it after viewing the body from socio - cultural systemic perspective; tends to invariably subscribe to the patriarchal notions of identifying 'man', 'woman' and other sexed categories with certain pre - conceived meanings. This leads us to a dead end when law, on the one hand appears promising while opening up larger possibilities with suitable amendments, of ensuring safe abortion; and on the other hand, it consolidates the patriarchal dimensions of looking at individual as sexed bodies with a priori cultural associations. Perhaps, while dealing with judicial concerns in grave matters; like female foeticide, such a juxtaposition of laws and the way state looks at individuals as sexed bodies alternatively creates a closed foundation of law, which needs to be addressed perhaps by resorting to alternative understandings of the body and the self. These aforementioned concerns should be able to provide one insight into plausible legal alternatives and guidelines in the context of abortion, for many future unknown complexities. This site shall essentially constitute and continue to mould the moral - political spaces that will weave the fabric of a democratic society.

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## Author Profile

**Aparna Vijayan** is an Assistant Professor of Political Science and a Doctoral Scholar with the Department of Political Science, The M.S. University of Baroda, Vadodara for over seven years. Her areas of interest include Political Theory, Political Thought: Western and Indian, State Politics in India, Democracy, Classical Greek Thought, Anthropocene, and Gender Studies. Her doctoral research is in the area of Indian Political Thought and specifically concerning the nature of Religion, State and Violence through an analysis of contending perspectives of various thinkers. The author is credited to have contributed to curriculum development and course structuring of the discipline in various departments for related courses in the University and also to other reputed academic bodies such as Indira Gandhi National Open University (IGNOU).

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<sup>i</sup> Force of Law is taken from Jacques Derrida's "Force of Law: The Mystical Foundation of Authority", 1989.