
What Gender Does: Decertification of Legal Gender in India

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Abstract

This article explores the implications of decertification of legal gender in the Indian context, with a particular focus on the religious sphere. It explores the discourse on gender as it currently exists in India and suggests that imagining a future with no legal gender is a fruitful exercise. The article looks at the conception of gender as property to explore how recognition is granted to such property. It argues that the absolute withdrawal of the State from the sphere of gender may lead to persons being forced to conform to social conceptions of gender. Therefore, it differentiates between the idea of decertification and gender blindness of the State. Additionally, it argues for an approach to the idea of property that does not isolate it but recognises the ideas of interdependency, relational autonomy and non-domination. The effect of decertification on religious institutions in India is firstly understood based on the extent of State control over religion and religious institutions. The article observes that in the Indian context the relationship between the State and religion is to some extent unclear. However, the decertification exercise will make the gendered construction of religious laws difficult to maintain, especially the codified religious laws.

Introduction

In India, certain places of worship have traditionally not allowed ‘women’ to enter their premises. For example, Haji Ali Dargah, did not allow women into the sanctum sanctorum of the Dargah, or the Sabarimala Temple which restricted the entry of women who were in their ‘reproductive age’, i.e., ages 10 to 50. Both such practices were struck down by the Supreme Court of India.¹ While the former based its logic in maintaining the sanctity of female chastity, the latter had its root in the notion of impurity attached to menstruation. Not only do such practices equate menstruation with impurity but also equate it entirely to womanhood.² The judicial dicta on these issues have been challenged by some who question the interference of the State in matters

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¹ *Dr. Noorjehan Safia Niaz and Anr v State Of Maharashtra and Ors*, 2016 (5) ABR 660; *Indian Young Lawyers' Association v State of Kerala*, 2018 SCC OnLine SC 1690.

² Menstruation being understood as an experience of all women and exclusive to women is incorrect. Each person who identifies as a woman need not experience menstruation and each person who experiences menstruation need not identify as a woman. This is explained in more detail under Part I of this article.

pertaining to religious institutions. In the Indian context, the relationship between the State and religion is complex. While the Indian State does not endorse any religion, there is some State involvement in religious affairs without absolute separation between State and religion.³

In this context, this article aims to engage in an exploratory exercise to determine, what decertification of gender by the Indian State could or should look like. If the State was to withdraw from the exercise of certifying gender, what would be the implications of such withdrawal and in particular, what would it mean for religious rules, laws, and customs? This article seeks to speculate on the effect of decertification in India, especially in the religious sphere.

Sex and gender, in recent years, have been at the forefront of heated debates.⁴ While many countries are increasingly providing legal recognition to the 'third gender' there has been a call to understand gender in a wider manner which provides individuals with the freedom to choose their own identities.⁵ In India, the 'third gender' was legally recognised by the Indian Supreme Court in 2014 in *NALSA v Union of India*.⁶ The Supreme Court in this judgment recognised the right to self-determination of one's gender identity. It held that the term 'gender' was included within the understanding of 'sex' under the Indian Constitution.⁷ The ideas of self-determination and autonomy were linked to the ideas of liberty and dignity under Article 21 of the Constitution.⁸ Further, Article 19(1)(a) of the Constitution, which protects an Indian citizen's right to freedom of speech and expression, was held to protect a person's gender identity as well. Subsequently, in

³ This will be discussed under Part II of this article.

⁴ The difference, or the lack of it, between sex and gender is extensively debated and discussed. See, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1989); Toril Moi, *What Is a Woman?: And Other Essays* (Oxford University Press 1999); Mari Mikkola, 'Ontological Commitments, Sex and Gender' in Charlotte Witt (ed), *Feminist Metaphysics* (Springer 2011); Sharon Cowan, "'Gender Is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 *Feminist Legal Studies* 67. For ease of understanding, this article uses the term 'gender' to cover both gender and sex including the assignment of such identity and the identity itself.

⁵ Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to Its Meaning and Value?' (2016) 43 *Journal of Law and Society* 483; María Victoria Carrera, Renée DePalma and Maria Lameiras, 'Sex/Gender Identity: Moving beyond Fixed and "Natural" Categories' (2012) 15 *Sexualities* 995.

⁶ *NALSA v Union of India*, AIR 2014 SC 1863.

⁷ Articles 14, 15, and 16 of the Indian Constitution provide for equality before law, non-discrimination by the State, and equality of opportunity, respectively. The three articles cover 'sex' in their ambit and after *NALSA v Union of India* 'gender' has been understood within the ambit of 'sex'.

⁸ Article 21 of the Indian Constitution provides the right to life and liberty to all persons. The right to life has been interpreted to include the right to live with human dignity: *Maneka Gandhi v Union of India*, 1978 AIR 597; *Francis Coralie v Union Territory of Delhi*, 1981 AIR 746; *Bandhua Mukti Morcha v Union of India*, 1984 AIR 802. This right to live with dignity includes a wide range of rights that the Supreme Court of India has read into its framework. For example, in *Peoples Union for Democratic Rights v Union of India*, 1982 AIR 1473, the non-payment of minimum wages to the workers was held to be a denial of the workers' right to live with basic human dignity and consequently, a violation of their Article 21 rights. Similarly, in the *NALSA* judgment, the interpretation of 'dignity' under Article 21 was widened to include diversity in self-expression. The gender identity of a person was placed within the understanding of the fundamental right to dignity.

the case of *Navej Singh Johar & Ors v Union of India*,⁹ the Supreme Court read down section 377 of the Indian Penal Code, 1860 that criminalised same-sex relationships between consenting adults. Through this ruling, the Court upheld an individual's right to self-determination and dignity.

However, there is criticism from within the LGBTQIA+ community for the manner in which these cases have been argued in front of the Supreme Court and for how the court has responded to the issue.¹⁰ It has been argued that the characterisation of criminalisation of same-sex relationships and lack of State sanction over transgender identities or any other self-determined gender identity has been centred around the notion of family, love, and the romanticised idea of dignity.¹¹ However, there has been little to no acknowledgment of the State violence towards persons based on their gender, specifically when such gender is thought to be opposed to social mores or differs from the gender assigned at birth. The everyday State sanctioned detention of transgender persons, police brutality towards the queer community and discrimination and violence faced by the Dalit queer community were neither argued (or argued effectively) before nor addressed by the Supreme Court.¹²

In addition, caste is reproduced through a complex web of relationships built in the society.¹³ These relationships lay down the structure of daily lives through housing markets, employment opportunities, educational opportunities, businesses, etc.¹⁴ These kinship networks are maintained through endogamous marriages.¹⁵ Such desire for heterosexuality and caste endogamy then becomes an essential part of maintaining unequal social structures.¹⁶ The judgments such as *Navej Singh Johar* talk about the right to love freely but do not pay attention to the role of caste in queer relationships and queer lives. For example, section 377 affected the marginalised castes the most

⁹ *Navej Singh Johar & Ors v Union of India*, WP (Crl) No 76 of 2016 D No 14961/2016.

¹⁰ 'Guruswamy and Katju, Your Rainbow Doesn't Hide Your Casteism', *Akademi Mag* (24 September 2020) <<https://www.akademimag.com/guruswamy-katju-rainbow-casteism>> accessed 28 September 2020.

¹¹ *ibid.*

¹² *ibid.*

¹³ See Ujithra Ponniah and Sowjanya Tamalapakula, 'Caste-ing Queer Identities' (2020) 13 NUJS Law Review 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* For example, in 2015 a matrimonial advertisement placed by a mother for her gay son became extremely popular on the Internet. The advertisement sought a prospective vegetarian (a marker of savarna ideals of 'purity') groom and stated 'caste no bar (though Iyer preferred)', Iyer being a savarna caste identity. This advertisement has been often seen as a reflection of the lack of caste discourse in the queer community where 'upper' caste identities become the face of the movement. See 'Iyer Groom Wanted for Son: Cheer It or Not, India's First Gay Matrimonial Ad Is Not "Casteist"', *Firstpost* (22 May 2015) <<https://www.firstpost.com/living/iyer-groom-wanted-for-son-cheer-it-or-not-indias-first-gay-matrimonial-ad-is-not-casteist-2256294.html>> accessed 25 October 2021; 'The Casteist Gay-Groom Ad Is a Hard Lesson for Civil Rights Activists', *The News Minute* (20 May 2015) <<https://www.thenewsminute.com/article/casteist-gay-groom-ad-hard-lesson-civil-rights-activists-32006>> accessed 25 October 2021; IANS, 'Matrimonial Ad for Gay Son Stirs Lively Debate', *Business Standard India* (24 May 2015) <https://www.business-standard.com/article/news-ians/matrimonial-ad-for-gay-son-stirs-lively-debate-feature-with-images-115052400246_1.html> accessed 25 October 2021.

as people involved in professions like sex work on the streets are the ones most susceptible to police brutalities.¹⁷ But the manner in which arguments were advanced in *Nantej Singh Johar* and the judgment that followed, focused on the perspective and voices of the ‘upper’ caste (savarna). It is also important to note that caste and gender hierarchies maintain each other.¹⁸ It must therefore be noted that an exercise like decertification in India may have caste-related implications which have to be taken into consideration.¹⁹

The legislation enacted after the *NALSA* judgment, the Transgender Persons (Protection of Rights) Act, 2019, did not have any regard for the transgender rights movement – which advocated for self-identification. Rather, this legislation requires individuals to undergo invasive medical procedures and gender affirming surgery to have their birth certificate indicate their identity.²⁰ The Transgender Persons (Protection of Rights) Rules, 2020 defines the medical intervention in a broad manner. It includes counselling, hormonal therapy, etc. as medical interventions. The Act refers to surgery but the Rules are broader. However, neither the Act nor the Rules allow for self-identification as was prescribed in the *NALSA* judgement.

The idea of self-identification in itself is not novel. Many jurisdictions have brought forth such recognitions and changes.²¹ The Yogyakarta Principles state that a person’s self-identified sexual orientation and gender identity is an integral part of their personality. Further, these principles state that mandating persons to undergo medical procedures like sterilisation, hormone therapy, gender affirming surgery, etc. to justify their gender identity goes against the ideas of self-determination, dignity, autonomy and freedom.²²

¹⁷ Ponniah and Tamalapakula (n 13).

¹⁸ *ibid.*

¹⁹ Gender and caste are co-constitutive in nature; these hierarchical systems feed into each other and maintain social hierarchies. See, ‘Castes in India: Their Mechanism, Genesis, and Development, by Dr BR Ambedkar’ <http://www.columbia.edu/itc/mealc/pritchett/00ambedkar/txt_ambedkar_castes.html> accessed 27 May 2021; Sharmila Rege, ‘Brahmanical Patriarchy: How Ambedkar Explained the Links between Caste and Violence against Women’, *Scroll.in* (21 November 2018) <<https://scroll.in/article/902839/brahmanical-patriarchy-how-ambedkar-explained-the-links-between-caste-and-violence-against-women>> accessed 1 May 2021; ‘Social Reproduction, Constitutional Provisions and Capital Accumulation in Post-Independent India’ (2015) 55 *Economic and Political Weekly* 7.

²⁰ Transgender Persons (Protection of Rights) Act, 2019, ss 6 and 7.

²¹ ‘Denmark: Changing Legal Sexual Identity Simplified | Global Legal Monitor’ <<https://www.loc.gov/law/foreign-news/article/denmark-changing-legal-sexual-identity-simplified/>> accessed 18 August 2020.; ‘Norway Becomes Fourth Country in Europe to Introduce Model of Self-Determination | ILGA-Europe’ <<https://www.ilga-europe.org/resources/news/latest-news/norway-introduces-self-determination>> accessed 18 August 2020.; ‘Malta Adopts Ground-Breaking Trans and Intersex Law – TGEU Press Release’ <<https://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>> accessed 18 August 2020.

²² Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Principle 3.

In India, Jayna Kothari in her article on the right to self-determination argues against the medical model of recognition of gender-identity. She argues that the medical model goes against the right to dignity, autonomy and freedom of persons.²³ Further, Kothari argues that the Supreme Court in the *NALSA* judgment, by ordering legal recognition of gender identities into defined categories – male, female or third gender – as a precondition to access welfare schemes, employment, etc. has made gender identity an essential part of one’s existence to enjoy civil rights.²⁴ These liberties would consist of access to a passport, ration cards, driver’s license, education, reservation schemes, voter identity cards, etc.²⁵ However, this emphasis on gender identity in accessing socioeconomic and civil rights must be questioned. Why does one need to disclose their gender identity to gain access to basic documents such as a driver’s license?²⁶ The Supreme Court, in *NALSA*, refers to gender identity as a person’s self-identification as man, woman, transgender, or other *identified* category.²⁷ It appears that for the invocation of one’s preferred gender identity such identity must be an identified category, i.e., a category that carries State sanction.

Recently, in India, a petition has been filed in the Telangana High Court by a couple asking for the introduction of ‘no religion, no caste’ columns in all official application forms to secure documents like a birth certificate.²⁸ The couple state that they do not wish to give their child any particular religion or caste.²⁹ Can a similar future be seen for State specified legal gender?³⁰

Gender has, in recent times, been looked at differently. Instead of categorising gender identities the discussion has been relocated to the conceptualisation of gender. It is being looked at as a ground of discrimination rather than as an object that belongs to a person or defines a person.³¹ The reconceptualisation of gender locates the idea in a private space subject to minimal State

²³ Jayna Kothari, ‘Trans Equality in India: Affirmation of the Right to Self-Determination of Gender’ (2020) 13 NUJS Law Review 13.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ ‘Call to Remove Gender from UK Passports and Driving Licences’, *The Guardian* (2 January 2016) <<http://www.theguardian.com/world/2016/jan/02/call-to-remove-gender-from-uk-passports-and-driving-licences>> accessed 28 September 2020.

²⁷ *NALSA v Union of India*, AIR 2014 SC 1863.

²⁸ Marri Ramu, ‘HC Notices to Centre, State on “No Religion, No Caste” Status’, *The Hindu* (Hyderabad, 28 April 2020) <<https://www.thehindu.com/news/cities/Hyderabad/hc-notices-to-centre-state-on-no-religion-no-caste-status/article31456656.ece>> accessed 28 September 2020.

²⁹ *ibid.*

³⁰ There is litigation in British Columbia for issuance of birth certificates without the gender of the child. *See* Maryse Zeidler, ‘Parent Fights to Omit Gender on BC Child’s Birth Certificate | CBC News’, *CBC* (1 July 2017) <<https://www.cbc.ca/news/canada/british-columbia/parent-fights-to-omit-gender-on-b-c-child-s-birth-certificate-1.4186221>> accessed 25 March 2021; ‘Gender-Free ID Coalition’ <<http://gender-freeidcoalition.ca/>> accessed 25 March 2021.

³¹ Cooper and Renz (n 5).

regulation. The idea has shifted from the State certifying varied gender identities to the withdrawal of the State from certifying any gender.³²

In India, the idea of decertification has not been fully explored. However, scholars in the international sphere have been engaging with this question extensively.³³ Decertification reimagines the conceptualisation of gender for all members of a polity instead of the creation of legal gender categories by the State. It is a practice that will allow all members to self-identify, possibly in a more fluid manner where people are not put into strict and fixed categories. When the State withdraws from assigning legal gender the question to be asked is whether the State then withdraws from recognising gender? Many advocates of decertification have answered this question in the negative.³⁴

The Indian Constitution empowers the State to make special provisions for women and children.³⁵ However, there is no clarity on who counts as a woman. If women are identified as people born in the female sex, then what happens to self-identified women and people from other genders who face exclusion and oppression? Further, Indian law is reliant – to some extent – on the conception of gender for its interpretation of equality legislation, personal laws,³⁶ and religious customs. Protections have been extended to women through various laws, for example the Maternity Benefit Act, 1961, the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013, etc. Even within the Hindu Succession Act, women were given a share in the family property through an amendment in 2005.³⁷ However, gender identity beyond the binary of men and women or male and female has not been envisaged.³⁸ As noted above, gender identity

³² *ibid*, Carrera, DePalma and Lameiras (n 5); Lila Braunschweig, 'Abolishing Gender Registration: A Feminist Defence' (2020) 1 International Journal of Gender, Sexuality and Law <<https://www.northumbriajournals.co.uk/index.php/IJGSL/article/view/987>> accessed 18 August 2020.

³³ Cooper and Renz (n 5); Carrera, DePalma and Lameiras, *ibid*; Braunschweig, *ibid*; Pieter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis' (2020) 1 International Journal of Gender, Sexuality and Law <<https://212.124.193.220/index.php/IJGSL/article/view/998>> accessed 11 June 2021.

³⁴ Cooper and Renz, *ibid*.

³⁵ Constitution of India, Part III, Article 15(3).

³⁶ Personal law refers to laws applicable to religious groups that govern subjects like marriage, succession, divorce, guardianship, etc. Each religious group is governed by separate sets of personal laws. For example, the Hindu Marriage Act, Indian Christian Marriage Act, Hindu Succession Act, etc.

³⁷ The Hindu Succession (Amendment) Act, 2005.

³⁸ An exception to this would be the reframing of the Equal Remuneration Act, 1976. The major principle in this legislation was the parity in remuneration between men and women. This legislation also defined both the categories as 'male and female human beings'. The recent Code on Wages, 2019 would subsume within itself the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976. The Code in its provisions dealing with equal remuneration guarantees equal wages to all genders. While the provisions in the soon to be repealed Equal Remuneration Act indicated that the law only took notice of the binary understanding of gender, the new Code goes beyond that to refer to 'all genders'. This indicates that a person cannot be given lesser pay for work of 'same or similar nature' based on their gender identity.

plays a central role for access to welfare schemes and basic documentation requirements. This was evident in the Supreme Court's recognition of transgender persons in *NALSA v Union of India*,³⁹ where the Centre and State governments were directed to legally recognise gender identities of persons as male, female or third gender to ensure access to public employment, reservations, and welfare schemes. Apart from equality legislations, religious laws and customs tend to extensively use gender markers to govern various religious aspects of the community.⁴⁰

To understand the potential implications of decertification, I will undertake the discussion in two parts. Part I will look at the propertied conception of gender to tease out the question of how recognition is granted to such property. This question will be examined through three possible forms of recognition – recognition from the State through registration, recognition based entirely on social negotiations, and recognition through State and non-State institutions who can choose to cater to certain gender groups. Understanding of gender as property will provide the framework to consider decertification as an exercise undertaken by the Indian State. It will allow one to appreciate the difference between withdrawal of the State from registering gender and recognising gender (and the oppression that comes with it). Property in its associations of both privacy and interdependency provides the groundwork to understand gender and the decertification exercise.

Part II will examine whether the rules made by religious institutions are subject to State regulation and the mandate of the Indian Constitution. In other words, it will assess the overlap between the State and religion in India. The act of decertification by the State will only bear significance in the religious context when the laws governing religion and its institutions are subject to scrutiny by the State. There has been a substantial amount of debate in the Constitutional jurisprudence of India regarding the applicability of fundamental rights enumerated in Part III of the Constitution to religious personal laws. Article 26 of the Constitution empowers religious denominations to function independently and manage their own affairs, subject to public order, health, and morality.⁴¹ Therefore, to understand the effect of decertification on religious institutions, the constitutional role of the State in religious affairs must be determined.

Religion is an extremely important as well as an intrinsic part of Indian society. Barriers to access to religious institutions, restriction on free practice of one's faith, denial of dignity within the religious mandate, are all issues that have been a part of the gender discourse in India. Laws

³⁹ *NALSA v Union of India* (n 3).

⁴⁰ Some examples are triple talaq, preventing women from entering public spaces of worship; not allowing Hindu women to perform the last rites of their family members, especially cremation; dowry; sati (which was criminalised during the colonial period).

⁴¹ Constitution of India, Part III, Art.26.

governing civil actions like marriage, divorce, succession, adoption, etc., i.e., personal laws, in India are based on the religious identity of the person.⁴² It has been argued frequently that many such personal laws are inherently gendered and binary in nature.⁴³ It must be noted that these laws have a colonial background. It has been argued that the laws governing such aspects in the pre-colonial period were based on traditions and customs that were flexible. Codification of these laws by the British resulted in regressive laws being solidified which were earlier subject to change with time.⁴⁴ However, it is interesting that even after independence personal laws were decidedly kept out of the purview of the Indian Constitution despite them being exclusionary and discriminatory towards minority communities.⁴⁵

This article acknowledges that decertification in the Indian scenario may give varied results in various other aspects of social and cultural life. However, the scope of exploration is narrow as the article is only looking at the possible implications of decertification on religious institutions and practices in India.

Part I

Who Must Recognise Gender?

The propertied conceptualisation of gender allows for the exploration of the relationship a person has with their gender. There is evidence that the ancient texts in Hinduism, Jainism and Islam (among other religions) refer to the ‘third sex’ for persons who do not fall into the male/female binary.⁴⁶ However, in the modern Indian legal framework until 2014 one could only identify as male or female. While the *NALSA* judgment introduced a third category of gender identity, State

⁴² Some examples of such laws are the Hindu Marriage Act, 1955; Hindu Adoption and Maintenance Act, 1956; Hindu Succession Act, 1956; Parsi Marriage and Divorce Act, 1936; Shariah Application Act, 1937; Dissolution of Muslim Marriages Act, 1939; Indian Christian Marriages Act, 1872; Divorce Act, 1869. However, it must be noted that laws like the Special Marriage Act, 1954 provide for civil marriages irrespective of one’s religious identity.

⁴³ Indira Jaising and de Silva de Alwis, ‘The Role of Personal Laws in Creating a “Second Sex”’ (2016) 48 *International Law and Politics* 1085; ‘Personal Laws versus Gender Justice: Will a Uniform Civil Code Solve the Problem?’ [2015] *Economic and Political Weekly* 7; ‘What India Needs Is More Gender Just Laws, Including Personal Laws, for Its Women’, *CJP* (12 June 2017) <<https://cjp.org.in/what-india-needs-is-more-gender-just-laws-including-personal-laws-for-its-women/>> accessed 18 August 2020.

⁴⁴ Christine Keating, ‘Framing the Postcolonial Sexual Contract: Democracy, Fraternalism, and State Authority in India’ (2007) 22 *Hypatia* 130.

⁴⁵ *ibid.*

⁴⁶ Sara Hylton, Jeffrey Gettleman and Eve Lyons, ‘The Peculiar Position of India’s Third Gender’, *The New York Times* (17 February 2018) <<https://www.nytimes.com/2018/02/17/style/india-third-gender-hijras-transgender.html>> accessed 8 December 2021; Leonard Zwilling and Michael J Sweet, ‘“Like a City Ablaze”: The Third Sex and the Creation of Sexuality in Jain Religious Literature’ (1996) 6 *Journal of the History of Sexuality* 359.

sanction over gender still remains important, especially for access to one's civil rights. Indian society has also continued to discriminate against and ostracise persons who do not fall within the binary idea of gender.⁴⁷ Consequently, gender identity is assumed to always be in line with the gender assigned at birth. Therefore, the conflict between gender assigned at birth and gender identity has been bypassed by the law. The perception of assigned gender in law is much like tangible property, where it is understood to be bounded and fixed. The principle of *numerus clausus* in property law can be understood in the context of assigned gender where the State only recognises certain limited identities.⁴⁸ This article seeks to argue that decertification of gender is an alternative form of relationship between gender and the State. The likening of gender to property, while providing an avenue for self-ownership (an aspect which will be discussed subsequently), brings out the question of certification and recognition of property. If gender is reimagined as property that a person can own then it must be asked if this property requires recognition and who must provide such recognition.

The recognition of such gender property could be left in the hands of the State much like the existing paradigm, which could result in an increasing number of gender 'boxes' and possible exclusion when one does not fit into any of the categories. That is, legal recognition from the State becomes a reason for exclusion or oppression for some. The *NALSA* judgment preceded *Naveet Singh Johar* which read down section 377 of the Indian Penal Code, 1860. This meant that trans women, specifically those who were engaged in sex work, who were in theory recognised by the State as 'third gender', were also susceptible to criminalisation as men subject to the perception of the local State actors. In India where currently there is no mechanism in place to understand gender in all its complexity, State recognition ultimately trickles down to local actors of the State who engage in the exercise of determining a person's gender. This determination is very specific to the class, caste, and gender location of the State actor and the person in question. Further, caste and gender being structures that preserve each other,⁴⁹ the gender-based determination often occurs from the lens of Brahmanical patriarchy which often ostracises and isolates gender identities that do not fall into savarna male or female categories.⁵⁰

⁴⁷ See, 'India's Intersex Community Faces Job Discrimination, Forced Surgeries, and Sexual Abuse', *Global Citizen* (16 August 2019) <<https://www.globalcitizen.org/en/content/india-intersex-discrimination-forced-surgery/>> accessed 8 December 2021; Shreya Raman, 'Denied Visibility In Official Data, Millions Of Transgender Indians Can't Access Benefits, Services', *IndiaSpend* (11 June 2021) <<https://www.indiaspend.com/gendercheck/denied-visibility-in-official-data-millions-of-transgender-indians-cant-access-benefits-services-754436>> accessed 8 December 2021.

⁴⁸ *Numerus clausus*, in property law refers to the limited kinds of rights that can be termed as 'property' by the Courts.

⁴⁹ 'Social Reproduction, Constitutional Provisions and Capital Accumulation in Post-Independent India' (n 19).

⁵⁰ Savarna refers to groups of people in different social classes who fall within the Hindu caste system. The Avarnas, on the other hand, are people who were excluded from the caste system as outcasts and are a marginalised group.

Using the example of adverse possession in property law, Jessica Clarke argues that law in itself does not constitute any natural order but is the enforcement of pre-existing conditions and private arrangements within a society, the theory she refers to as performance reification.⁵¹ Similarly, it can be argued that gender is based on performance. Thus, repeated presentation of a gender identity over a period of time which has gained acceptance in the society and has obtained tolerance and approval must be accepted by the State, much like the idea of adverse possession in property law.

It must be considered whether leaving the identification of gender to individuals and social institutions will result in increasing the societal burden on individuals to conform to certain entrenched notions of gender. If gender is to be accepted based on the societally approved appearance or performance, for instance the assumption that presence of breasts, long hair, soft features, etc. are integral qualities of being a woman, then the State would reify only limited forms of gender. This would require persons to conform to societal expectations. Therefore, even self-identified gender would require ‘proof’ of such identity in the public sphere.

In the UK, the uproar caused by the proposed reform to the Gender Recognition Act, 2004 (GRA) that allowed for self-identification of gender without medical diagnosis, is an example of societal pressure to conform to certain forms of gender performance.⁵² It must be noted that the argument that the GRA reform would ‘allow’ trans women into women-only spaces does not fully understand the relationship between the Equality Act, 2010 (EA) and the GRA. The EA requires single sex service providers to treat persons on the basis of the gender role they present. However, it provides for an exception in cases where exclusion is a ‘proportionate means of achieving a legitimate aim’. Such exception does not differentiate between women recognised under the GRA and women who are not provided such recognition. That is to say, reform under the GRA would

Further, Brahmanical patriarchy has been defined as the need for effective sexual control over women to maintain not only patrilineal succession but also caste purity, the institution unique to Hindu society. See ‘Building Blocks of Brahmanical Patriarchy’ [2015] *Economic and Political Weekly* 7; ‘Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State | *Economic and Political Weekly*’ <<https://www.epw.in/journal/1993/14/special-articles/conceptualising-brahmanical-patriarchy-early-india-gender-caste>> accessed 28 July 2022; Diya Bose, ‘The Biopolitics of Third Gender Category in India’ <<https://escholarship.org/uc/item/77h4d7f5>> accessed 8 December 2021.

⁵¹ Jessica A Clarke, ‘Adverse Possession of Identity: Radical Theory, Conventional Practice’ 84 *Oregon Law Review* 92.

⁵² ‘Women’s Rights and the Proposed Changes to the Gender Recognition Act’, *Oxford Human Rights Hub* (17 August 2018) <<https://ohrh.law.ox.ac.uk/womens-rights-and-the-proposed-changes-to-the-gender-recognition-act/>> accessed 11 June 2021; ‘The Gender Recognition Act Is Controversial – Can a Path to Common Ground Be Found?’ *The Guardian* (10 May 2018) <<http://www.theguardian.com/world/2018/may/10/the-gender-recognition-act-is-controversial-can-a-path-to-common-ground-be-found>> accessed 27 May 2021.

still be subject to the provisions under the EA.⁵³ Further, entry to spaces like bathrooms does not depend on official documents but negotiations within the society. This would mean that any woman who conforms with socially approved gender performance would gain entry to these spaces. This in fact means that focus on documentation in such spaces is misplaced as it overlooks the fact that access to places like bathrooms, changing rooms, etc. is almost always based on the understanding of gender accepted by the society. The exclusion in such cases is also suffered by gender non-conforming women.⁵⁴ People opposing this reform have argued that it would allow predatory men to breach spaces meant for women.⁵⁵ Bathrooms have been the centre of this debate where opposers fear the breach of such spaces and the sexual violence that comes with it. However, the requirement for the State to reify socially negotiated genders may result in increased pressure to conform and police one's appearance.

Alternatively, recognition of gender (or gender property) can be left to different private institutions to cater to the persons of their choosing. Here, such institutions that provide different services can, based on their internal rules, specify the gender they provide services to. Similarly, even institutions run by the State could provide gender specific services, for example in India the National Commission for Women, a body set up by the State, provides services like grievance redressal to women. Such bodies may continue to function even if the State does not register or certify gender. Here, the State, despite not registering gender, may actively be involved in recognition of gender-based exclusion and discrimination. That is to say, the State could require all such State and non-state institutions to accept self-identified gender.⁵⁶ For instance, an entity that caters to women must then accept all women who identify themselves as such.

While thinking of gender as property is a useful analogy when understanding questions of certification and decertification, the conceptualisation of gender as property is not without issues. The idea of property points to the fact that it is something that 'belongs' to a person, something that is integral to one's personhood. But gender is far more complex than simply a propertied conception.⁵⁷ With such conception comes the question of recognition and validity of such property. Accordingly, this article also aims to discuss the relationship a gender property holder

⁵³ For more detailed discussion, see Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?' (2020) 83 *The Modern Law Review* 539.

⁵⁴ *ibid.*

⁵⁵ Charlotte Jones and Jen Slater, 'The Toilet Debate: Stalling Trans Possibilities and Defending "Women's Protected Spaces"' (2020) 68 *The Sociological Review* 834; 'The Gender Recognition Act Is Controversial' (n 52).

⁵⁶ Davina Cooper and Robyn Emerton, 'Pulling the Thread of Decertification: What Challenges Are Raised by the Proposal to Reform Legal Gender Status?' (2020) 10 *feminists@law* <<https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/938>> accessed 7 January 2021.

⁵⁷ Cooper and Emerton describe gender as 'far more networked, social, and heterogeneous' than property, *ibid.*

has with the collective and the State. That is to say, the aim is to look at a conception of property that does not merely refer to the sense of ownership over property but looks at property as an interdependent relationship. This would mean that while decertification, in the manner it is imagined in this article, would require the State to not register gender at birth and in identity documents, it will still require the State to protect people against oppression and discrimination. This would require the State to withdraw from gender assignment without compromising the dignity and safety of individuals.

Property and Relational Autonomy

A counter to the idea of decertification is that lack of legally assigned gender would restrict the State from formulating welfare policies for the genders that need them. Promotion of social justice among the members of a nation takes place through welfare policies. It has been argued that such policies are made when the members of the nation contribute to them by virtue of a shared sense of culture and belonging, for example, the acceptance of affirmative action policies by the general public.⁵⁸ Iris Marion Young criticises this approach and argues that such an assumption is problematic at a moral level as this would mean that the members of the nation have obligations of justice only to those whom they identify as co-nationals.⁵⁹ This approach would preserve the privilege carried by beneficiaries who are identified as co-nationals and exclude those not so identified from benefits. She argues that basing welfare obligations on identification would lead to exclusion.

A parallel can be drawn while analysing the value in the State's withdrawal from assigning legal gender to people. Welfare legislation should not depend on such assignment, especially with gender. Creation of 'groups' appears to be ineffective; groups would imply the need to carry specific characteristics to be allowed membership. Alison Stone argues that intersex persons evidence that socially and scientifically approved male and female biological traits may not always go together.⁶⁰ Therefore, gender must be understood as a cluster concept, where one might satisfy some features that cluster together to identify as any particular gender. However, one does not need to satisfy any arbitrarily chosen *necessary* features to claim any gender identity.⁶¹ She argues that this makes gender a matter of degree which can be understood as a spectrum.⁶² Categorising

⁵⁸ Iris Marion Young, 'Self-Determination and Global Democracy: A Critique of Liberal Nationalism' (2000) 42 *Nomos* 147.

⁵⁹ *ibid.*

⁶⁰ Alison Stone, *An Introduction to Feminist Philosophy* (Polity Press 2007).

⁶¹ *ibid.*

⁶² *ibid.*

gender more often than not will lead to exclusion of people who do not fall within the specific categories.

Further, the difference in the value of gender property held by persons is not a naturally occurring phenomenon, but is the result of historical injustices and oppression. Welfare legislation for specific genders does not go a long way in addressing these injustices and the argument that there is a need for legal assignment of gender for the purposes of such welfare legislation falls short of addressing the loss of identity caused through such assignment. When gender is self-identified then the individual carries the control over their identity. Therefore, when it comes to welfare legislation, what must be enquired into is the purpose behind the legislation. It must be determined whether the welfare measure is to be accorded to an arbitrarily constituted group or to persons who face different forms of oppression.⁶³

Decertification, in the most extreme form, would result in absolute withdrawal of the State from all matters concerning gender. However, while lack of legal assignment may allow a person to gain control over their identity, they may still face cultural oppression based on the gender identity they *appear* to carry. Therefore, it is important to understand that self-identification or self-determination does not refer to the idea of freedom as complete non-interference from the State.⁶⁴

Young suggests a relational understanding of autonomy where individual autonomy does not entail being left alone but recognises individuals to be interconnected and interdependent by virtue of their economic, social, or historical interactions.⁶⁵ Nedelsky also argues that interdependence or dependence must not be seen as antithetical to the idea of autonomy and gives the example of childrearing where the infant develops individual autonomy through its relationship with its parents.⁶⁶ Autonomy and freedom instead must be analysed from the lens of non-domination, i.e., protection from arbitrary interference and lack of subjugation. The State must ensure non-domination and that each person is free to choose and develop their gender without the fear of oppression.

The popular understanding of the idea of property relates to boundaries that prevent external interference. However, replacing the idea of boundaries with active interdependent relationships (similar to the idea of creating a ‘safe-space’) where the holders of the autonomy to self-identify are free to develop (or not develop) the gender(s) of their choice unburdened by the threat of

⁶³ See, Cooper and Emerton (n 56).

⁶⁴ Young (n 58).

⁶⁵ Young (n 58).

⁶⁶ Jennifer Nedelsky, ‘Law, Boundaries, and the Bounded Self’ [1990] Representations 162.

‘intrusion’, is an effective way to understand decertification. The idea of decertification should be modelled in a manner where such relationships are facilitated and developed between the self and the State. The State, while withdrawing from assigning gender for the individual, will or should continue to provide protection to such individuals and recognise the hardships they face on account of their gender identity. Where gender is reimagined as something people are free to develop and preserve it removes the need to gain legal assent, an assent which may even become the source of future discrimination.

Therefore, the exercise of decertification should not be taken to its extreme logical conclusion to be understood as absolute abdication of duty by the State. While it should provide autonomy to people through self-determination and understanding the value of interdependent, supportive social relationships, it should ensure protection from discrimination.

Decertification and Gender Blindness

State intervention in determining a person’s gender identity fixes that gender identity (conceptualised as property owned by the self which they are capable of developing) at a particular point of time.⁶⁷ However, the idea of decertification or the act of the State not assigning a legal gender must not be conflated with the liberal idea of gender blindness.⁶⁸ The latter would advocate for the operation of structures and institutions while not looking at the inequalities caused by social categories and structures of gender. Decertification does not advocate for the non-recognition of such inequalities. The idea of the paradox of rights⁶⁹ or the dilemma of difference⁷⁰ comes into play here – inequality exists in both ignoring differences and in recognising them. Minow argues that employment, education, benefits, and other opportunities should not be dependent on one’s ethnicity, gender, disability, race or other such markers. Yet, non-recognition of such markers will continue to create unequal structures where people who are traditionally oppressed by such markers continue to be oppressed.⁷¹

In India, this paradox can be observed in the debate surrounding period leaves. A prominent Indian journalist, Barkha Dutt, argues that provision of period leaves will create a gendered

⁶⁷ Cooper and Renz (n 5); Davina Cooper, ‘A Very Binary Drama: The Conceptual Struggle for Gender’s Future’ (2019) 9 *feminists@law* <<https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/655>> accessed 11 June 2021.

⁶⁸ Braunschweig (n 32).

⁶⁹ Wendy Brown, ‘Suffering Rights as Paradoxes’ (2000) 7 *Constellations* 208.

⁷⁰ Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American law* (Cornell Univ Press 1994).

⁷¹ Braunschweig (n 32).

workplace.⁷² She states that such policies are counter-productive, especially because women have fought hard to not be gendered in the workspace on the basis of menstruation.⁷³

Her concern is that asking for recognition of discomfort or illness primarily faced by women in the workspace might lead to employers alienating women from employment opportunities and other workplace activities. However, the attempt to solve issues of gender discrimination through the negation of gendered experience will result in instances of gender discriminatory policies (or lack of welfare policies) being insulated from reform while structural oppression remains unaddressed. Ensuring equitable workplaces may not be achieved by gender-blind policies. An employment space which refuses to acknowledge the health-related issues some people suffer during menstruation is an example of how the liberal idea of gender blindness will create structures that put the non-dominant genders at a disadvantage. Decertification, on the other hand, advocates the State withdrawal from assigning gender and from creating categories to put people into when gender cannot be categorised. Welfare policies like period leaves can still be enforced by institutions despite the lack of State assignment of gender identity and can focus on individuals who menstruate rather than all women or only those who are identified by the State as women.

Additionally, legislation like the Equality Bill, 2021, drafted by the NGO Centre for Law and Policy Research,⁷⁴ could prohibit policies and practices which exclude certain genders from access to valuable goods. The Equality Bill lists protected characteristics which include categories such as caste, race, sex, sexual orientation, gender identity, gender expression, etc.⁷⁵ The Bill requires that the State or any private person should not discriminate directly or indirectly against any person based on any of the protected characteristics.⁷⁶ Gender identity has been defined as an individual's assertion of their gender and includes gender expression which is each person's presentation of their gender through physical appearance, including dress, hairstyles, accessories, cosmetics,

⁷² 'Barkha Dutt Sparks Tweet War after Opposing "Period Leave" Policy', *Free Press Journal* (11 August 2020) <<https://www.freepressjournal.in/india/barkha-dutt-sparks-tweet-war-after-opposing-period-leave-policy>> accessed 28 September 2020; Barkha Dutt, 'Opinion | I'm a Feminist. Giving Women a Day off for Their Period Is a Stupid Idea', *Washington Post* (4 August 2017) <<https://www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea/>> accessed 28 September 2020; Radhika Santhanam, 'Should Women Be Entitled to Menstrual Leave?', *The Hindu* (21 August 2020) <<https://www.thehindu.com/opinion/op-ed/should-women-be-entitled-to-menstrual-leave/article32407772.ece>> accessed 28 September 2020.

⁷³ Dutt, *ibid*.

⁷⁴ The Centre for Law and Policy Research is a not-for-profit organisation 'dedicated to making the Constitution work for everyone through law and policy research, social and governance interventions and strategic impact litigation'. See <https://clpr.org.in/>.

⁷⁵ Equality Bill, 2021, Centre for Law and Policy Research, s.2(pp).

⁷⁶ *ibid*, s.3.

mannerisms, speech, behavioural patterns, names, and personal references.⁷⁷ The Bill also provides for protection against discrimination in employment, educational institutes, etc.

However, it is to be noted that religious laws, customs and rules play a significant role in gender-based categorisation and discrimination in Indian society. The impact of decertification on religious institutions will depend on the inter-relationship between the State and religious institutions. If there is active State engagement with religion, especially through codified laws, it is likely that the religious laws and rules will have to take into account the reality of a State that has decertified legal gender.

Part II

Religion and the Indian State

To understand the effect of decertification on religious institutions, one must first determine the quantum of State intervention in religion. The Indian Constitution guarantees certain enumerated fundamental rights to Indian citizens (there are some rights like equality before law and liberty, under articles 14 and 21 of the Constitution respectively, which are granted to all persons irrespective of their citizenship). Any law made by the State must not infringe the fundamental rights guaranteed by the Constitution. However, the definition of law itself has brought with it differing interpretations and exclusions. The Constitution under Article 13 states that *laws in force* before the commencement of the Constitution shall be void to the extent of their inconsistency with the fundamental rights guaranteed under the Constitution.⁷⁸ Additionally, the State is disallowed from making *laws* that abridge the rights accorded through fundamental rights.⁷⁹ ‘Laws in force’ has been defined as laws passed by the legislature or any other competent authority before the commencement of the Constitution whereas the definition of law includes an ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India.⁸⁰

Can religious practices and personal laws be termed ‘law’ for the purpose of Article 13? If yes, then such practices and laws can be assessed against the touchstone of fundamental rights. If not, then religious institutions that enforce such practices and laws are free to operate in their independent

⁷⁷ *ibid*, s.2(t).

⁷⁸ Constitution of India, Part III, Art. 13(1).

⁷⁹ *ibid*, Art. 13(2).

⁸⁰ *ibid*, Art. 13(3).

sphere without State intervention, for the most part at least. The Supreme Court of India has been indecisive on the question of personal laws being subject to Article 13.⁸¹ Therefore, the answer to this question is unclear. While the Supreme Court has previously adjudicated upon personal laws by reference to fundamental rights,⁸² there have also been instances of the Supreme Court refraining from reviewing personal laws and religious practices.⁸³

In the case of *Narasu Appa Mali v Union of India*, the Supreme Court ruled that personal laws are not subject to fundamental rights as the definition of 'law' did not include personal law. The previous definition of law, in the Government of India Act, 1915, included personal laws. However, the Supreme Court highlighted that the Constituent Assembly had deleted personal laws from the definition while drafting Article 13.⁸⁴

This argument has been countered to state that the definition of *law* under Article 13 is not exhaustive; the use of the term *including* gives the definition a wide scope to include personal laws within its ambit. Even when it comes to customs and practices, they have been differentiated from personal laws to state that while personal laws can be sourced from customs and practices, they are not interchangeable terms.⁸⁵

However, the Supreme Court and various High Courts have often failed to undertake a nuanced examination of the intention of the framers of the Constitution with regards to the above stated debate. According to Christine Keating, the Constituent Assembly deleted personal laws from the ambit of fundamental rights as part of a *post-colonial sexual contract*.⁸⁶ Many women in the Constituent Assembly had argued for personal laws to be subject to fundamental rights, as many components of personal laws were discriminatory to women.⁸⁷ This suggestion caused an outrage in the Constituent Assembly.⁸⁸

⁸¹ Mihir Desai, 'Courts' Flip-Flop on Personal Law', *Combat Law* (December 2004) <<http://www.indiatogether.org/combatlaw/vol3/issue4/flipflop.htm>> accessed 18 August 2020.

⁸² *Anil Kumar Mhase v Union of India*, 1994 5 SCC 704; *Madhu Kishwar v State of Bihar*, 1996 5 SCC 125; *Githa Hariharan v Reserve Bank of India*, 1999 2 SCC 228; *Daniel Latifi v Union of India*, 2001 7 SCC 740; *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*, 1996 8 SCC 525.

⁸³ *Krishna Singh v. Mathura Abir*, AIR 1980 SC 707; *Maharshi Avdesh v. Union of India*, 1994 Supp (1) SCC 713; *Ahmedabad Women Action Group & Ors. v. Union of India*, 1997 3 SCC 573.

⁸⁴ *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84.

⁸⁵ *ibid*, para 26.

⁸⁶ Keating (n 44).

⁸⁷ For example, Renuka Ray argued for the application of equality provisions to religious personal laws.

⁸⁸ Members like Mohammad Ismail, Naziruddin Ahmed, Pocker Bahadur resisted the State interference in personal laws stating that such interference will cause disharmony, 'Constituent Assembly of India -- Debates' <<http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C23111948.html>> accessed 27 May 2021.

The structure of a family, in the Indian context, is governed by the notion of gender, caste, and religion. The institutions of marriage and property rights are firmly rooted in gender and caste relations. Caste and gender together constitute each other and the patriarchal order.⁸⁹ Therefore, allowing the State to interfere in the private sphere would risk the unravelling of the social order of Indian society.

Consequently, the call for subjecting personal laws to fundamental rights was rejected to preserve the fraternity within the Constituent Assembly. Christine Keating argues that the preservation of fraternal relations at the cost of allowing discriminatory personal laws to function is the post-colonial sexual contract entered into by the members of the Constituent Assembly.⁹⁰ Keating develops this idea through critical contract theory expounded by theorists like Rousseau, Pateman, and Charles Mills. She builds her argument on Pateman's claim that while the social contract disrupted paternal patriarchal rule it reaffirmed the rule of sons and brothers over women and established a fraternal patriarchal order. Keating argues that the rhetoric of fraternity within the Constituent Assembly and its democratic discourse prevented women from realising freedom in the private sphere to preserve the *brotherhood of men*.⁹¹

However, it can be argued that the Constituent Assembly was not completely averse to State regulation of personal laws; the Constituent Assembly, arguably, wanted to defer the discussion on personal laws even though the proposal at the time was rejected. This is assumed from the placing of the establishment of a Uniform Civil Code as a Directive Principle of State Policy (Directive Principles).⁹² However, the debate surrounding the Uniform Civil Code has become more complicated over time, and is beyond the scope of this article.

Further, the placement of *including* within the definition of law under Article 13 appears to keep the possibility of reading personal law into the constitutional framework open for future judicial pronouncements. There seems to be no reason to exclude personal law from the definition of *laws in force* if personal laws can be termed as *laws* under Article 13.⁹³ Article 13(2) of the Constitution does not allow the State to make laws in contravention of the fundamental rights. The Bombay High Court in *Narasu Appa Mali* stated that since the definition of *laws* includes customs and

⁸⁹ Dr BR Ambedkar, 'Castes in India: Their Mechanism, Genesis, and Development' (n 19).

⁹⁰ *ibid.*

⁹¹ Keating (n 44).

⁹² These Directive Principles are unenforceable but are treated as guiding principles for the State. Directive Principles refer to the social goals that the Constituent Assembly envisioned for the Indian State to achieve. These principles are not enforceable rights like fundamental rights but are expected to be used as guiding principles to interpret questions of constitutional importance.

⁹³ Desai (n 81).

practices and the State cannot make customs and practices, personal laws are included in the definition of *laws in force*.⁹⁴

In the current framework, at least codified personal laws, customs and practices have been tested on the touchstone of the fundamental rights guaranteed by the Constitution. The status of uncodified personal laws in the constitutional framework remains unclear. The guarantee of freedom of religion and conscience in the Constitution is also subject to morality, public order, and health.⁹⁵ Therefore, it is evident that despite the contours of State regulation of religion and customs being unclear, some degree of State control is exercised in matters of religion, religious institutions, customs and practices. The extent of State control over religious institutions becomes important to understand the effect of decertification on religious norms and rules. If religious institutions exist in an independent sphere, then State policies regarding gender will not affect such institutions.

How will Religion Respond to Decertification in India?

Within religious institutions, gender identity underlies norms on entry into places of worship,⁹⁶ the method of divorce granted by the husband to the wife,⁹⁷ guardianship of a minor child,⁹⁸ etc. If the State refrains from registering the gender of a new-born child, then it is possible that religious institutions may not be able to apply gendered customs, rules and laws freely. However, it is also a possibility that the religious institutions could adopt their own framework to determine a person's gender and construct laws in relation to these genders. Such a possibility will depend on the extent of State intervention within religious institutions. In such a case, the mechanisms developed to determine the gender of a person will be subject to the constitutional provisions such as the right to privacy granted to each person within Article 21 of the Constitution.⁹⁹ That is to say that institutions may not be able to employ mechanisms that go against the rights granted to persons under the Constitution to dignity, privacy, life, etc. depending on how such rights are interpreted by the courts.

⁹⁴ *Narasu Appa Mali* (n 84) para 15.

⁹⁵ Constitution of India, Part III, Art. 25(1).

⁹⁶ *Indian Young Lawyers' Association & Ors v The State of Kerala & Ors* (n 1).

⁹⁷ *Shayara Bano v Union of India*, AIR 2017 SC 609.

⁹⁸ *Githa Hariharan v Reserve Bank of India* (n 82).

⁹⁹ *Justice KS Puttaswamy v Union of India*, WP (C) 494/2012.

In the recent case of *Arunkumar and another v The Inspector General of Registration and Ors*¹⁰⁰ The Madras High Court upheld the marriage between Sreeja, a trans woman, and Arunkumar, a cisgender man. The marriage was solemnised in accordance with the Hindu Marriage Act, 1955 (HMA) but the Registrar of Marriages, Tuticorin had refused to register the marriage, stating that a trans woman cannot be a 'bride' under section 5 of the HMA.¹⁰¹ Interestingly, the HMA does not define terms such as 'bride', 'groom', 'wife', or 'husband'. The Court read the meaning of bride within the HMA in a flexible manner and held that such words cannot be assigned fixed definitions. Further, the Court cited the *NALSA* decision along with *Navej Singh Johar* to state that the freedom of self-determination, self-expression and autonomy granted to transgender persons through these judgments allow for the recognition of a transgender person's right to marry. The Court stated that any discrimination on the ground of sexual orientation and /or gender identity will be a violation of a person's right to equal protection under the law per Article 14 and a violation of their right to life and personal liberty under Article 21. A person's right to determine their gender identity was held to be a part of their personal autonomy. Such autonomy is protected from State regulation. It also held that a person's right to marry anyone of their choice is protected under Article 21 of the Constitution.¹⁰²

If the State does not assign legal gender, then the legislation made by the State could be devoid of gender markers as such, depending on the variant of decertification adopted by the State. The question that follows is regarding welfare legislation – what happens to legislation meant to protect minority gender groups? A broader framework to prevent discrimination, such as the Equality Bill, 2021 may be useful in this event. The Equality Bill, as discussed previously, provides for protection from discrimination based on any personal characteristics of the person in question. Such protected characteristics are broadly defined and gender within this definition has been understood to be self-identified.

Religious institutions, to the extent of their codified laws and their customs, may not be able to construct laws and rules which are gender specific. For example rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 states that women are not allowed to enter and offer worship in public places of worship during the periods where women by custom or usage are not allowed to enter temples (i.e. the period of menstruation).¹⁰³ This rule will not

¹⁰⁰ *Arunkumar and another v The Inspector General of Registration and Ors*, WP (MD) No 4125 of 2019 and WMP (MD) No 3220 of 2019.

¹⁰¹ This section lays down the necessary conditions for a valid Hindu marriage.

¹⁰² *Shafin Jahan v Asokan KM and Ors*, CrI A 366/2018 (arising out of SLP (CrI.) 5777/2017).

¹⁰³ Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, rule 3(b).

stand in a regime where no legal gender exists unless decertification is implemented in a manner whereby religious institutions are free to create their own rules to identify the gender of a person. When the State cannot certify gender then it is possible that it cannot justify rules such as rule 3(b).

If the legislation cannot use gender groups to regulate entry into temples, then it will have to use alternate qualifiers. Perhaps, the law would prohibit persons who menstruate from entering the temple during such period. Practically, such a law will be difficult to implement as identification of people who menstruate would resort back to the normative assumptions and ideas about gender. Further, it must be considered that this law would be subject to judicial review where it will be tested against the touchstone of fundamental rights. Creating a category of ‘menstruators’ and barring their entry from a religious space would then invite questions of whether such classification is reasonable and if it has a rational relation to the object of the law.¹⁰⁴ It must be noted that religious institutions could still invoke the freedom to conduct their own affairs, and even rationalise the rule being in place as a benefit to menstruating persons who face fatigue and are better off resting in their private quarters, or the rule not being in place but for the special nature of the deity.¹⁰⁵ The removal of State imposed gender identities, however, could potentially make it difficult for religious institutions to regulate the participation of the members of the polity in their affairs. When gender is not assigned by the State and the laws formulated by the State do not refer to gender groups then these laws will have to depend on characteristics other than gender, for example using menstruation as a characteristic and not women as a category. This would mean that religious laws, depending on the amount of State intervention, would also have to use such alternative markers. It has been repeatedly argued that gendered personal laws and religious rules often have discriminatory connotations,¹⁰⁶ for example the rule for restitution of conjugal rights, prohibition of menstruating women from accessing public spaces (especially places of worship), property rights, etc. Therefore, if one is to remove the invocation of gender or gendered categories from religious laws, rules and customs then the implementation of such laws would be difficult, given that such laws may not stand against the Constitutional provisions.

The status of religious institutions and religious laws in a decertified State could be varied. This is also a result of an absence of specific laws preventing discrimination, such as the Equality Bill,

¹⁰⁴ Article 14 of the Constitution guarantees equality. The test of reasonable classification is a test that falls under Article 14 review. It must be noted that the aforementioned law would be hit by various other fundamental rights challenges in addition to an Article 14 review.

¹⁰⁵ Arguments of such nature were in fact made in *Indian Young Lawyers' Association & Ors v The State of Kerala & Ors* (n 1).

¹⁰⁶ Desai (n 81).

2021. While decertification could mean that religious organisations may no longer be able to enforce gendered norms, it can also be the case that decertification as an exercise would by-pass religion in its entirety. The result of such decertification will also depend on the political and cultural point at which such policy reform is adopted. In a culture that is deeply rooted in religion and where the fabric of the society strongly holds on to the structure of family and faith despite their patriarchal and casteist undertones, such a policy reform will be difficult to implement in the religious sphere. The same is evident from the aftermath of *Sabarimala* which resulted in violence and protest from the general public.¹⁰⁷ However, decertification has the potential to generate laws that have a better understanding of gender and gendered experiences people face across the board. While categorisation of gender makes laws easier to implement it must be understood that exploring decertification in India would allow one to understand the role of gender, sexuality, caste and religion in post-colonial India and its legal system.

Conclusion

Decertification in the Indian context seems to be a proposition that might attract many differing opinions and debates; it would require revision of a range of laws, welfare and discriminatory alike. However, there is some value in greater exploration of the effects of decertification on different aspects of the legal system to fully assess the merit in proposing the adoption of such measures by the State. When gender is looked at as a private possession of an individual it must not be confused with the idea of non-interference. Decertification, at least in the form this article envisions it, does not equate to the idea of ‘gender-blindness’. Deeper understanding of gender inequalities and the solutions to address these inequalities can only be reached through meaningful relationships and communications which cannot take place in isolated spheres with impermeable boundaries. While decertification requires the State to withdraw from assigning legal gender, it does not require the State to not recognise gender (and the oppression caused by it).

Decertification in this article is viewed through the lens of non-domination whereby the State and its members, while not dominating the will of other members in determining, developing,

¹⁰⁷ TA Ameerudheen, ‘Kerala: Hindutva Violence Post-Sabarimala Entry Shows Careful Planning, Say Observers’, *Scroll.in* (7 January 2019) <<https://scroll.in/article/908430/kerala-hindutva-violence-post-sabarimala-entry-shows-careful-planning-say-observers>> accessed 8 December 2021; India Today Web Desk, ‘Sabarimala Row: 1 Dead, Normal Life Disrupted as Violence Grips Kerala’, *India Today* (4 January 2019) <<https://www.indiatoday.in/india/story/sabarimala-row-updates-one-dead-life-disrupted-1422899-2019-01-03>> accessed 8 December 2021; ‘Sabarimala Violence: Politically Sensitive Kannur Boils Over’, *The Times of India* (5 January 2019) <<https://timesofindia.indiatimes.com/india/sabarimala-violence-politically-sensitive-kannur-boils-over/articleshow/67394049.cms>> accessed 8 December 2021.

cultivating and performing gender, also ensure the welfare of all members through interpersonal meaningful relationships. The idea of privacy and autonomy as isolated from the collective is reimagined to mean privacy and autonomy developing from interactions with the collective. This interaction, while making space for individual development of gender, also ensures that there is a sense of collective responsibility towards each other. Each person is facilitated by the collective and by the State to own their gender property and to determine and develop their gender identity in a manner they deem fit. While the State does not involve itself in this determination and development of gender identity it does not withdraw itself from the duty of recognising structural disadvantage faced by the owners of the properties considered to hold relatively less value.

The effect such exercise will have on the religious sphere can be determined by understanding the relationship between the Indian State and religious institutions. While codified religious laws will have to comply with the decertification of legal gender by the State the status of uncodified laws remains unclear. Religious institutions could exercise autonomy regarding the gendering of persons and gendered spaces, they could also be regulated and limited through State policy on gender and gender based discrimination along with the pre-existing Constitutional mandates.