

# RECONSTRUCTING THE DECISIONAL PARADIGM OF PRIVACY: CRAFTING A NEW ANTI-MANIFESTO GROUNDED ON THE SHADOWS OF THE ENABLING SCHOOL

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## ABSTRACT

*Privacy is one of the grey areas which legal scholars and courts across jurisdictions are attempting to explore. It can be understood as a 'genus' of law which is being increasingly classified into various 'species'. One of the classifications in this marketplace of ideas is the concept of 'decisional privacy'. In an era where privacy in individual actions is increasingly getting recognized, it is essential to understand whether this value can be protected against interventions by the State and Non-State actors. This Paper attempts to understand the decisional paradigm of privacy by drawing a theoretical framework which redefines the ideas of consent and harm. By following the enabling school of thought, it is established that privacy protects individual actions notwithstanding the harm caused, as long as the consent of individuals in their individual actions is present. Utilizing this theoretical framework, this Paper argues that consensual queer actions, consensual cannibalism and organ trade, as well as abortion, are protected by the decisional paradigm of privacy.*

## INTRODUCTION

“Privacy” is a developing concept across various jurisdictions. *Cooley*<sup>1</sup> had coined the term “right to be let alone” in his treatise on torts, which has been closely associated with the meaning of ‘privacy’. *Warren and Brandeis*<sup>2</sup> in their critically acclaimed work had described ‘privacy’ as a “human right”. Privacy is not a static concept. It can be understood as encompassing a “group of rights”<sup>3</sup> or in a restrictive sense as being limited to protecting a certain set of values such as information<sup>4</sup>. *Kendall*<sup>5</sup> states that “Privacy” lacks conceptual

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<sup>1</sup> Thomas M. Cooley, *Law of Torts* 29 (1880).

<sup>2</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (2001).

<sup>3</sup> J.L. Mills, *The Lost Right* 4 (2008).

<sup>4</sup> Paul Ganley, *Access to the Individual Digital Rights Management Systems and the Intersection of Informational and Decisional Privacy Interests*, 10 Int’l J.L. & Info. Tech. 241 (2002).

<sup>5</sup> Kendall Thomas, *Beyond the Privacy Principle*, 92 Columbia Law Review (1992) at 1431, 1443-48.

limits. Therefore, like Liberty as understood by authors subsequent to *J. S. Mill's*<sup>6</sup> original notion of Liberty, “Privacy” can be understood as a “marketplace of ideas”.

One such idea is a notion of understanding Privacy as a “triangular concept”<sup>7</sup>. *Khamroi and Shrivastava*<sup>8</sup> state that Privacy can be bifurcated into Zonal, Relational, and Decisional paradigms. “Decisional” paradigm of privacy, often referred to as “Decisional Privacy” or “Decisional Autonomy”<sup>9</sup> is a value which shields all independent choices of individuals from any kind of external interference. This external interference does not restrict itself to state and includes other actors as well. Decisional paradigm imparts the required autonomy on private matters, such as decisions regarding body and personal conduct<sup>10</sup>.

This Paper attempts to utilize a Legal-Philosophical approach to theoretically examine the scope of the Decisional Paradigm of Privacy. In order to construct the theoretical framework for the Decisional Paradigm of Privacy, **Part-I** of the Paper briefly engages with the conflicting ideas of “consent” and “harm”, re-examining them from a philosophical and legal perspective. It is argued that the legal values of consent or self-ownership overrides harm, even if it extends to death as long as the nature of the acts between individuals are consensual, which are protected by Decisional Privacy. **Part-II** of the Paper discusses the theoretical scope of Decisional Privacy in actions generally denoted as “Queer actions” between “individuals”. **Part-III** of the Paper scrutinizes the scope of Decisional Privacy in the case of “Abortion” as exercised by the use of “contraceptives”. Finally, **Part-IV** of the Paper scrutinizes the theoretical scope of Decisional Privacy in cases of consensual “cannibalism” and “organ trade”. The Paper concludes by stating that consensual “Queer actions”, “Abortion” vis-à-vis uses of “contraceptives”, and consensual “cannibalism or organ trade” are protected by the Decisional paradigm of privacy.

## **CARVING OUT A NEW UNDERSTANDING OF “CONSENT” AND “HARM”: FOLLOWING SHADOWS OF THE ENABLING SCHOOL**

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<sup>6</sup> Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas"*, *Social Theory and Practice* 23 (1997): 235-49.

<sup>7</sup> Kendall Thomas, *Beyond the Privacy Principle*, 92 *Columbia Law Review* (1992) at 1431, 1443-48; Kenji Yoshino, *Sodomy Laws: Law of the Bedroom*, March 23, 2003, available at [http://www.kenjiyoshino.com/articles/law\\_of\\_the\\_bedroom\\_sodomy\\_laws.pdf](http://www.kenjiyoshino.com/articles/law_of_the_bedroom_sodomy_laws.pdf) (Last visited on September 04, 2018); Anubhav Khamroi & Anujay Shrivastava, *The curious case of Right to Privacy in India*, 2(12) *ICLRQ Law Rev.* (2017) at 4.

<sup>8</sup> Anubhav Khamroi & Anujay Shrivastava, *The curious case of Right to Privacy in India*, 2(12) *ICLRQ Law Rev.* (2017) at 4.

<sup>9</sup> Bhairav Acharya, *The Four Parts of Privacy in India*, 1(22) *Economic and Political Weekly* (2015).

<sup>10</sup> Anubhav Khamroi & Anujay Shrivastava, *The curious case of Right to Privacy in India*, 2(12) *ICLRQ Law Rev.* (2017) at 4; Paul Ganley, *Access to the Individual Digital Rights Management Systems and the Intersection of Informational and Decisional Privacy Interests*, 10 *Int'l J.L. & Info. Tech.* 241 (2002) at 252.

**(a) Consent**

“Consent” can be understood as a product of an individuals’ “free will” and “unconstrained choice”, the choice being unconstrained by coercion<sup>11</sup>. In my understanding, voluntary ‘Consent’ of an individual is a value which provides “legitimate autonomy “to another individual, which may include a “person” or “the State” to do an action which might otherwise be violative of the autonomy, liberty, dignity or other values of an individual. While stating the preceding statement, it is important to acknowledge that “violation” of an individuals’ other values vis-à-vis an action having “lack of consent” does not necessarily amount to “violation of an existing law”. However, in my opinion it is the violation or lack of “consent” that is important for our understanding of Decisional Privacy.

Consent can be understood as a subset of autonomy, wherein an individual must possess certain mental capacities, must have an adequate range of valuable options and must enjoy independence from coercion and manipulation<sup>12</sup>. Where an individual has two options that is to abstain or not abstain from consenting to a certain act, Decisional Privacy would protect any consensual action between individuals as long as they possess the capacity to consent. Such an action where the individual with the capacity to consent is limited from abstaining or consenting to do an act, it would not amount to manipulation. Any action which violates the “consent” of an individual either through their lack or inability to give consent shall not be protected by the Privacy, let alone the Decisional Paradigm of privacy. Consent can be understood as an “**enabling school**” of thought on Decisional Paradigm as when it is present, it provides individuals protection from any external interference whether from State or any other external factor in any actions wherein harm is being caused to a consenting individual.

Consent as later used in this Paper assumes the presence of the “capacity” to give “consent” as well as the willingness or presence of an “agreement” to do an action. However, to clarify, the capacity to consent does not merely refer to an individual being above a certain legal age to be understood as an adult, but it includes the presence of mental faculties and the maturity to understand consequences of their actions. Though it can be agreed that individuals such as very young children or those with special mental faculties cannot possess the capacity to consent as is understood by law and legal scholars across many jurisdictions, it would be erroneous to fix an age like 18 or 21 years to be a blanket rule or a standard as to which ages of individuals possess the capacity to consent.

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<sup>11</sup> Marcy Strauss, *Reconstructing Consent*, 92 J. Crim L. & Criminology (2001): 211-72; Joseph Raz, *The Morality of Freedom* CH. 14. (1986).

<sup>12</sup> Joseph Raz, *The Morality of Freedom* CH. 14. (1986).

**(b) Harm**

The concept of “harm” is another value which we need to keep in mind while evaluating Decisional Privacy. Harm is often used by the State, Courts of Law and Drafters of Policies to justify “interference” in activities between individuals or any activity by an individual, even when “consent” of all the individuals or the concerned individual is present.

Another famous idea is the “Harm Principle” or “Mill’s Harm Principle” which was propounded by J.S. Mills.<sup>13</sup> The Harm Principle states that: “*The only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others.*”<sup>14</sup> Therefore, according to Mills and subsequent school of thoughts which are in consonance with Mills, “interference” can be made by a State when a consensual act is resulting into harm to others. This can be understood as a “**restrictive school**” of thought on the Decisional Paradigm as “harm” can be used as a legitimate ground for interference by the State or other individuals in consensual act when harm, *in particular*, physical harm is being caused to an individual. Here, it is important to understand that the term “others” in Mills quote would refer to a second individual in cases of two individuals, wherein the first individual is causing “harm” to the second individual.

**(c) Enabling vs. Restrictive School: The “Consent” and “Harm” Debate**

I agree with the “enabling school” that “Decisional Privacy” protects individual actions from any external interference when “consent” of the individuals is present. I believe that the “restrictive school” understanding of “harm” sets a bad precedence as harm has a very wide connotation and its ambit cannot be restricted to a certain set of actions. Therefore, allowing harm to supersede consent and justify external interference should not be permitted. Furthermore, if an individual is consenting to be harmed by another individual, then such action should not be prohibited by the Harm Principle.

There are two aspects which are encompassed by this debate. Firstly, consider if two or more individuals are engaging in any action, in which an act of one individual causes harm to the other individual. Here when the other individual is consensually permitting the first individual to cause harm to them, in such a case “Decisional Privacy” protects such actions. Therefore, what individuals do with other consenting individuals in their bedrooms is properly “private” and cannot be interfered by other external actors<sup>15</sup>. Secondly, consider the

<sup>13</sup> Arthur Ripstein, *Beyond the Harm Principle*, Philosophy & Public Affairs 34, no. 3 (2006): 215-45.

<sup>14</sup> *Id.*, 215-45.

<sup>15</sup> Scott A Anderson, *Privacy Without the Right to Privacy*, The Monist 91, no. 1 (2008): 81-107.

case of the immediately preceding scenario about individuals consensually engaging in private acts. Where the State, Judicial Authorities or any individual believe that harm is happening in such scenarios, even if it is considered harm due to existence of a statute, they should respect the fact that “consent” is present as against all individuals in their private space and should not interfere in such actions committed by individuals. The presence of consent should be understood as a legitimate ground of defence against any form of harm happening.

The *Yogyakarta*<sup>16</sup> Principles which were drafted by various international scholars and can be considered as a source of international law<sup>17</sup>, encompass the preceding two aspects. The “Sixth” Principle states that “*Decisions and choices regarding both one’s “own body” and “consensual” sexual and other relations with others*” are protected. Therefore, there should be no external interference from the State or any other external individual. Furthermore, the “Seventeenth” Principle<sup>18</sup> provides that a State should not discriminate between people on the basis of sexual orientation etc., which would include all consensual actions between two individuals relating to their sexual orientation.

Some theorists view Body at the core of privacy. *Radhika Rao* explains, the constitutional right to privacy is often characterized by the notion of self-ownership of the body, the notion that a person belongs to herself<sup>19</sup>. Self-ownership of the body or autonomy can be understood as a value linked to consent and Decisional Privacy. *Rubinfeld*<sup>20</sup> states that in Decisional Privacy, “*the right to make choices or decisions*” primarily constitutes the ‘kernel’ of autonomy. Therefore, this is the idea that shall set as guide to how the latter Parts of this Paper theoretically examine the scope of Decisional Privacy in consensual “Queer” actions, “Abortion” by the use of contraceptives, and lastly consensual “cannibalism” and “organ trade”.

*Strauss*<sup>21</sup> provides an example regarding consent and harm from the story of a Spider and a Fly. In this story, the Spider asks the Fly whether it would walk in its parlour(den). This

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<sup>16</sup> Yogyakarta Committee, *The Yogyakarta Principles*, November 7, 2006, available at [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (Last visited on September 04, 2018).

<sup>17</sup> Malcolm N, Shaw, *International Law*, 112-13 (6th ed., 2008); Statute of the International Court of Justice, Article 38(1)(d).

<sup>18</sup> *Id.*

<sup>19</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. Rev. 359 (2000); Daniel J. Solove, *Conceptualizing Privacy*, *California Law Review*, vol. 90, no. 4, 2002, at 1087–1155.

<sup>20</sup> Jed Rubinfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989), at 751; Joseph Raz, *The Morality of Freedom* CH. 14. (1986).

<sup>21</sup> Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM L. & CRIMINOLOGY (2001): 211-72.

provides a message that if the Fly does agree or “consent” to land on the web, it would be devoured by the Spider. Here, it is assumed that the Fly is aware of the consequences of landing into the web as her death by the Spider. If the Fly consents to it and lands on the web and allows the Spider to devour her, then such an act even though it causes “harm” to the extent of death, it would be protected by Decisional Privacy. In the above case, “harm” is not being caused to anyone except the individual who consented to be harmed. [‘Part IV’ will use this example and elucidate it better in case of Cannibalism or Organ Trade]

Similarly, I would advocate that in case of humans any similar activity (such as the example provided by Strauss) in the private spheres of consenting individuals would be protected as long as the individuals possess the “capacity” to give legitimate consent and provides the consent to the other individuals who are causing harm from their consensual actions. Furthermore, any “physical” harm is not being caused to any “third” persons or outsiders. This is the “nature” of the “act” which we need to keep in mind for our understanding of what is protected by Decisional Privacy.

**(d) The “Death” Question: What about Harm extending to Death?**

Self-ownership or autonomy as a value is something which should be provided the heaviest weight, even if it conflicts with our understanding of the Right to Life. As stated earlier, Decisional Privacy imparts the required autonomy on individuals to engage in Private acts including decisions regarding the “body” and “personal conduct”<sup>22</sup>.

Interestingly, the Bombay High Court in the case of *State of Maharashtra v. Maruti Sripati Dubal*<sup>23</sup> struck down Section 309 of the Indian Penal Code<sup>24</sup> which criminalized attempt to commit suicide by a person. The court held that “right to life and personal liberty” enshrined in Article 21 of the Indian Constitution also includes the “right to die”. This was initially supported by the Division Bench of the Supreme Court of India in *P. Rathinam v. Union of India*<sup>25</sup> wherein the Court upheld the High Court decision and held that Right to Die with dignity is included under the Right to Life. However, a later decision by a Five-Judge Constitutional Bench of the Indian Supreme Court in *Gian Kaur v. State of Punjab*, overruled the P. Rathinam judgment and held that “right to life and liberty” does not include within its

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<sup>22</sup> Anubhav Khamroi & Anujay Shrivastava, *The curious case of Right to Privacy in India*, 2(12) ICLRQ Law Rev. (2017) at 4; Paul Ganley, *Access to the Individual Digital Rights Management Systems and the Intersection of Informational and Decisional Privacy Interests*, 10 Int’l J.L. & Info. Tech. 241 (2002) at 252.

<sup>23</sup> *State of Maharashtra v. Maruti Sripati Dubal*, AIR 1987 CrLJ 549.

<sup>24</sup> See the Indian Penal Code, 1860, § 309.

<sup>25</sup> *P. Rathinam v. Union of India*, (1994) SCC 394.

ambit the “right to die”<sup>26</sup>. This faced great backlash from both the legal and liberalism scholars. The 210th Law Commission Report<sup>27</sup> titled “Humanization and Decriminalization of Attempt to Suicide” of the Indian Government had recommended the removal of S. 309 which criminalized attempt to suicide. The Report strongly advocated for decriminalization of the Attempt to Suicide as it was violative of the individuals’ choice to die with dignity. The Indian Supreme Court later in *Aruna Shaunbaugv. Union of India* judgment<sup>28</sup> noted that any attempt to suicide should not be punished. The Court had recommended the government to consider repealing the provision of S. 309 of the Indian Penal Code. Eventually, attempt to suicide in India was decriminalized by passage of Mental Healthcare Act<sup>29</sup> in 2017 by making §.309 inoperative.

There are other jurisdictions which have decriminalized suicide and considered decriminalizing suicide. “Right to Life” is being extended to have the autonomy to decide whether an individual can decide “To Live and to Die?”. In light of the same, assuming that “Right to Life” encompasses an unqualified “Right to Die”, there is no conflict between “Self-ownership” or “autonomy” as Right to Life encompasses the choice of dying. Even though “suicide” means an action by only own-self of an individual, Decisional Privacy would extend to actions of one individual harming another individual to death, provided that the individual being harm consents to it and has the capacity to consent.

Therefore, I propose that where private acts of individuals are causing harm to one or more of the individuals consenting to the harm, then in such cases “consent” overrides “harm” even if harm leads to the “death” of the individual. This forms the core value of the autonomy provided by Decisional Privacy to individuals. [‘Part II’ and ‘Part IV’ of this Paper will heavily rely on this understanding]

### **DECISIONAL PRIVACY IN THE CASE OF QUEER ACTIONS**

The general notion of “Privacy” encompasses actions which one wants to protect from public scrutiny.<sup>30</sup> The *Calcutt Committee Report*<sup>31</sup> stated that Privacy enshrines “Right against the intrusion on an individual’s personal life or affairs”. Decisional Privacy protects consensual

<sup>26</sup> Gian Kaur v. State of Punjab (1996) SCC 648.

<sup>27</sup> Law Commission of India, Law Commission Report no. 210: Humanization and Decriminalization of Attempt to Suicide, Report No. 210 (October 2008), available at <http://lawcommissionofindia.nic.in/reports/report210.pdf> (Last visited on September 4, 2018).

<sup>28</sup> Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454.

<sup>29</sup> Mental Healthcare Act, 2017, § 115(1).

<sup>30</sup> Joseph A. Cannataci, *The Individual and Privacy: Volume I* 239-260 (1st ed., 2015).

<sup>31</sup> David Calcutt Committee, *The Calcutt Report of the Committee on Privacy and Related Matters* (Great Britain), 7 (June 1990).

actions between two or more individuals from any external interference whether it be from the State or any outsiders.

A joint reading of “Sixth” and “Seventeenth” *Yogyakarta Principles*<sup>32</sup> would provide that decisions regarding one’s “own body”, consensual “sexual actions” and “other actions” with individuals, including but not limited to sexual orientation, are protected by “Privacy”. It is important to note the use of the term consensual “other actions” which is separated from consensual “sexual actions”. This provides that the protection extended by Privacy is not just limited to decisions regarding your own body like abortion or sexual actions like engaging in non-heterosexual intercourse, it also includes “all” other forms of “queer” activities. *Justice Ackermann* of the South African Supreme Court in *NCGLE v. Minister of Justice* decision<sup>33</sup> held that “Privacy” upholds the right of every individual to make decisions regarding the sphere of “personal intimacy” and “autonomy”. Therefore, on the same note, all queer activities between any two or more consenting individuals cannot be subject to external interference by the State or any other external interference as per our understanding of Decisional Privacy.

*Anderson*<sup>34</sup> states that what adults do with other consenting adults in their bedrooms is properly private. It is on this light that there has been an increasing recognition of queer actions such as homosexual intercourse or intercourse between multiple individuals (which may be considered as deviate from heterosexual vaginal intercourse) being protected by “privacy” and not only the values of autonomy, equality or liberty. However, I believe that “self-ownership”<sup>35</sup> or “autonomy” which is imparted by Decisional Privacy is extended towards all forms of Queer Actions, provided that the nature of the act is consensual between two or more individuals, even if it is causing “physical harm” extending to an individual’s death. Such actions are not limited to sexual intercourse. These actions would include all actions of sadism, masochism and anything considered deviate from the ordinary course of human nature.

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<sup>32</sup> Yogyakarta Committee, *The Yogyakarta Principles*, November 7, 2006, available at [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (Last visited on September 04, 2018).

<sup>33</sup> *NCGLE v. Minister of Justice*, 1998 (12) BCLR 1517 (CC).

<sup>34</sup> Scott A Anderson, *Privacy Without the Right to Privacy*, *The Monist* 91, no. 1 (2008): 81-107.

<sup>35</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. Rev. 359 (2000); Daniel J. Solove, *Conceptualizing Privacy*, *California Law Review*, vol. 90, no. 4, 2002, at 1087–1155.

The Delhi High Court judgment in *Naz Foundation v. Govt. of NCT of Delhi*<sup>36</sup> which was subsequently overruled by the Supreme Court in the *Suresh Kumar Koushal v. Naz Foundation* decision<sup>37</sup> had held that it is not within the constitutional competence of the State to invade “private lives” of individuals and there can be no basis of “public morals” for the State to externally interfere in individuals’ actions. The court had further held that “Law cannot criminalize private conduct of consenting adults” with a pinch of salt that unless harm is caused to someone else. However, the Court still acknowledged the fact that “queer” actions such as “homosexual intercourse” cannot be subject to external interference by the State. The Supreme Court decision in *Suresh Kumar Koushal*<sup>38</sup> which upheld the constitutionality of Section 377 of the Indian Penal Code<sup>39</sup> has been challenged by six writ petitions<sup>40</sup> the judgment for which has been reserved to be announced.

One of the landmark cases to understand whether Privacy vis-à-vis presence of consent protects autonomy of individuals to do certain actions is the House of Lords judgment in *R v. Brown*<sup>41</sup>. In this case, five men had engaged in consensual sadomasochistic homosexual acts for a period of over ten years. Due to a police operation, these activities were revealed and all the individuals were arrested. None of them had complained against each other. They were tried and convicted for “unlawful and malicious wounding” and “assault occasioning actual bodily harm”. The key question before the House of Lords was that whether the fact that these individuals “consented” to the sadomasochistic acts was a valid defence. However, the majority answered this question in *negative*, holding that “harm” was caused to the bodies of some individuals and therefore, “consent” was irrelevant to the operation of criminal laws. *Lord. Mustill* in his dissenting judgment<sup>42</sup> stated that the degree of consent could negate the criminality of the acts. His dissent is an example of the “enabling school” of thought which discards the “Harm Principle” and puts consent at a higher ground than harm to demonstrate the wrongfulness of external interference by the State and outsiders, in this case for the acts being queer in nature. The Law Commission Report<sup>43</sup> in England had criticized the *R v.*

<sup>36</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (per A.P. Shah, CJ.).

<sup>37</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

<sup>38</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

<sup>39</sup> See the Indian Penal Code, 1860, § 377.

<sup>40</sup> *Navej Singh Johar v. Union of India*, W.P (Cr.) No 76/2016; *Akkai Padmashali v. Union of India*, WP (C) 572/2016; *Keshav Suri v. Union of India*, WP(Cr.)88/2018; *Arif Jafar v. Union of India*, WP(Cr.)100/2018; *Ashok Row Kavi v. Union of India*, WP(Cr.) 101/2018; *Anwesh Pokkuluri v. Union of India*, WP(Cr)121/2018.

<sup>41</sup> *R v. Brown*, [1993] 2 All ER 75 (per Philips, CJ.).

<sup>42</sup> *R v. Brown*, [1993] 2 All ER 75 (per Hecht & Enoch JJ.).

<sup>43</sup> Law Commission of UK, Eighth Programme of Law Reform, Report No. H.C. 227-274 (July 2001), available at [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc274\\_8th\\_Programme.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc274_8th_Programme.pdf). (Last visited on September 4, 2018).

*Brown* judgment for the way “consent” was being developed. However, the final Report issued no legislative recommendations and reforms.

In the landmark judgment decided by Texas Supreme Court in *Twyman v. Twyman*<sup>44</sup>, the plaintiff Shiela had filed a case for divorce on the ground of unintentional infliction of pain against her husband William. William liked having elements of Sadism and Masochism (S&M) in sexual intercourse. In certain instances, Shiela consented to acts of sexual intercourse involving S&M with William. The court ruled in favour of Shiela and additionally held that the case should be remanded and Shiela can try and claim damages under “intentional” infliction of pain. The Court observed that S&M was a deviate sexual act. *Chief Justice Philips* in his partly concurring and dissenting opinion held that consensual S&M acts should not be subject to the tort of intentional infliction of pain as the act happened within the “private” confines of home. However, *Justice Hecht* joined by *Justice Enoch* in their separate dissent also held that the tort should not be extended in such cases. I believe that the majority was wrong in extending the possibility of the tort of intentional infliction of pain being added as joinder due to the fact that the S&M acts between Shiela and William happened with Shiela’s consent and there was no evidence to show that William coerced or manipulated Shiela using his position as her husband to engage in S&M acts. Furthermore, from a Decisional Privacy point of view, William’s queer acts would be protected from external interference as long as consent was provided by Shiela and it did not collapse.

The England and Wales High Court of Appeal in *R v. Wilson*<sup>45</sup>, however, took a different approach than the majorities in *Brown* and *Twyman* judgments. Similar to Lord Mustill’s dissent in the *Brown* judgment, the Court in *Wilson* held that “consensual” sadomasochistic acts between husband and wife were not a matter for the courts to interfere with. The court explicitly used “Privacy” to defend the consensual act, although it is important to note that while the act was “queer” in nature, the court explicitly stated that there should not be any interference in “matrimonial” activities or activities which happen between husband and wife in the confines of their home. This understanding can be extended beyond just matrimonial confines.

The New York Supreme Court Appellate Division in *Jovanovic* decision<sup>46</sup> had overturned conviction of *Jovanovic* who had conducted S&M intercourse and acts with a woman named

<sup>44</sup> *Twyman v. Twyman*, 855 S.W.2d 619, 1993.

<sup>45</sup> *R v. Wilson*, [1996] Crim LR 573.

<sup>46</sup> *People v. Jovanovic*, 263 A.D.2d 182, 700 N.Y.S.2d 156.

Ruzcek. Ruzcek claimed that “*Jovanovic had hogtied her for nearly twenty hours, violently raped and sodomized her, struck her repeatedly with a club, severely burned her with candle wax, and repeatedly gagged her with a variety of materials.*”<sup>47</sup> On evidence, it was found that Ruzcek herself was interested in private S&M intercourse and acts with Jovanovic and had consented to these acts. His charges of kidnapping, sexual abuse and assault were reversed by the Court. Therefore, consent by an individual who was fully aware of the possible consequences was used as a valid ground of defence by the Court to protect Jovanovic from full criminal liability. Some scholars like *Bergelson*<sup>48</sup> opine that the majority in court defied logic and the conventional understanding that consent is not a valid ground of defence against S&M acts. I agree with Bergelson to the extent that the “consent” derived by the Court does not have been legitimate as Ruzcek could have faced S&M acts to which she did not consent, or could not have legitimately expected such acts to occur. This judgment seems to extend the idea of deriving “consent” beyond the idea of consent than what is understood in the enabling school. However, in cases of S&M acts between individuals where consent towards all the acts is present, harm shall not be a valid ground for justifying external interference, even if such S&M acts extend to Death. So long as valid consent is present, Decisional Privacy will protect such S&M acts from scrutiny by the State.

All the above four cases involve scenarios where consent is present or proved by the court. It is observed that the courts which gave judgments against external interference including the dissenting opinions, are reluctant to interfere in “consensual” private activities of individuals. *Rachels*<sup>49</sup> states that individuals tend to act differently when they are within the confines of private sphere and therefore, might do acts which may be considered a deviation from what is considered regular. Therefore, in cases of “queer actions” I would like to conclude this Part by stating that all forms of queer actions, even if harm is happening, would be protected by Decisional Privacy so long as consent is present.

## **DECISIONAL PRIVACY AND ABORTION**

### **(a) Protection of abortion by Decisional Privacy**

The “Sixth” *Yogyakarta Principle*<sup>50</sup>, states that decisions regarding one’s “own body” are protected by Privacy. Rao’s views that “body” is at the core of “privacy”, that the right to

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<sup>47</sup> *Id.*

<sup>48</sup> Vera Bergelson, *Consent to Harm*, 28 PACE L. REV. 683 (2008).

<sup>49</sup> James Rachels, *Why Privacy Is Important*, Philosophy & Public Affairs 4, no. 4 (1975): 323-33.

<sup>50</sup> Yogyakarta Committee, *The Yogyakarta Principles*, November 7, 2006, available at [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (Last visited on September 04, 2018).

privacy is characterized by the notion of self-ownership of the body, the notion that a person belongs to herself<sup>51</sup> are important in the context of Abortion. In this Part, abortion shall refer to abortion through the use of “contraceptives”. *Anderson*<sup>52</sup> states that Decisional Privacy provides a greater degree of protection to decisions involving the use of contraceptives.

*Saletan*<sup>53</sup> says that a state has no legitimate interest by requiring a woman to notify her spouse regarding her exercise of abortion. A woman’s decision to have abortion is protected by privacy. *Harwick* and *Hodson*<sup>54</sup> state that a woman’s privacy protects her from interference by her husband or the father of the child when she wants to exercise abortion. Furthermore, her right to privacy and autonomy always outweighs her husband’s autonomy as she is the one who carries the foetus. *Ruth Ginsburg*, Former Associate Justice of the US Supreme Court was quoted<sup>55</sup> stating that the emphasis must be not on the right to abortion but on the “right to privacy” and “reproductive control”.

Therefore, Decisional Privacy will provide a woman with the required autonomy to protect her choice of exercising abortion using contraceptives. I will now briefly examine US judgments concerning “abortion” and the “right to privacy” in order to understand whether “abortion” is protected by Decisional Privacy.

### **(b) “Abortion” and “Right to Privacy” in US Jurisprudence**

In the landmark judgment of *Griswold v. Connecticut*<sup>56</sup>, the US Supreme Court implicitly recognized privacy and held that a married couple has the right to use birth contraceptives. Despite the existence of state laws criminalizing the act, this right is a constitutional right and cannot be taken away. The court held the statute criminalizing the use of contraceptives was unconstitutional. In a subsequent judgment of *Eisenstadt v. Baird*<sup>57</sup>, the US Supreme Court further held that if “*the right of privacy in question inhered in the marital relationship*” in the *Griswold* judgment, then it would be “equally impermissible” to stop “non-married individuals” from using contraceptives. The court further stated that “*it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into*

<sup>51</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. Rev. 359 (2000); Daniel J. Solove, *Conceptualizing Privacy*, California Law Review, vol. 90, no. 4, 2002, at 1087–1155.

<sup>52</sup> Scott A Anderson, *Privacy Without the Right to Privacy*, The Monist 91, no. 1 (2008): 85-86.

<sup>53</sup> SLATE, *Right to Wife: Why Does Judge Alito Treat Women Like Girls?* November 3, 2005, available at <http://www.slate.com/id/2129321/?nav=mpp>. (Last visited on September 04, 2018).

<sup>54</sup> Thayer Hardwick & Hillary Hodson, *Abortion*, 13 Geo. J. Gender & L. 109 (2012) at 115.

<sup>55</sup> International Business Times, *Roe v. Wade Anniversary 2016: Facts, Quotes About the Supreme Court’s Abortion Decision*, January 22, 2016, available at <http://www.ibtimes.com/roe-v-wade-anniversary-2016-facts-quotes-about-supreme-courts-abortion-decision-2273391>. (Last visited on September 04, 2018).

<sup>56</sup> *Griswold v. Connecticut*, 381 U.S. 479.

<sup>57</sup> *Eisenstadt v. Baird*, 405 U.S. 438.

*matters so fundamentally affecting a person as the decision whether to bear or beget a child.*”, thus focusing on the importance of valuing “individual decisions” and exercised “privacy” to defend “individual autonomy”. Therefore, the US Supreme Court increasingly recognized that “abortion” or “use of contraceptives” was protected by the “right to privacy”.

The US Supreme Court further in the landmark judgment of *Roe v. Wade*<sup>58</sup> held that a woman had the constitutional right to abort a child and that a statute restricting this right was unconstitutional. The court laid the foundation that right of privacy was founded in the US Constitutions’ Fourteenth Amendment's concept of personal liberty and restrictions upon state action. While the woman’s “right” whether to “decide” having an abortion is not absolute, it is protected by “privacy”. Similarly, the US Supreme Court in *Doe v. Bolton*,<sup>59</sup> which was released on the same day as *Roe v. Wade*, held that laws restricting abortion only in cases of rape, the possibility of severe or fatal injury to the mother, or severe foetal deformity was unconstitutional. In *Bolton*, by 8:1 majority, *Justice. Blackmun* for the majority reiterated that woman’s right to “abortion” was protected by “right to privacy”. He further held that “the right to privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” Therefore, the Court again strengthened and recognized that “privacy” and “autonomy” encompassed by privacy, protect a woman’s right to use contraceptives or abortion.

Another decision in *Bellotti v. Baird*,<sup>60</sup> is important to note. In this case, the US Supreme Court by 8:1 majority held that privacy extends “right to abortions” to minors, although the court declined to extend full rights to abortion as of an adult woman to an unmarried pregnant minor as they lack the capacity to decide. In such cases, an unmarried pregnant minor would have to obtain approval from her Parents or a State Judge. I disagree with the Court that a minor would necessarily require her parents or a Judge’s approval to abort, as right to privacy extends the required autonomy to minors for exercising abortion so long as they possess the capacity to consent.

Therefore, to conclude this Part, “abortion” is protected by Decisional Privacy and Decisional Privacy imparts the required autonomy or self-ownership to a female for exercising abortion using contraceptives.

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<sup>58</sup> *Roe v. Wade*, 410 U.S. 113.

<sup>59</sup> *Doe v. Bolton*, 410 U.S. 179.

<sup>60</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979).

## DECISIONAL PRIVACY IN “CONSENSUAL CANNIBALISM” AND “ORGAN TRADE”

### (a) Understanding Decisional Privacy in cases of Cannibalism and Organ Trade

Privacy protects the decisions of an individual over her own body from any external interference<sup>61</sup>. As long as consent from an individual is present, they can allow their body parts to be harmed whether it is through cannibalism by another individual or through removal of an organ. Self-ownership<sup>62</sup> or autonomy over self which is provided by decisional privacy allows an individuals’ decision over cannibalism or sale of their organs to be protected.

Consider the earlier example of the Spider and the Fly by Strauss<sup>63</sup> where the Fly is aware of the consequences of landing into the Spider’s den. If the Fly consents to landing on the web, she would be devoured by the Spider. In such a scenario, if Fly “consents” to land, her decision to be devoured as well as the Spider’s action of devouring would be protected by Decisional Privacy. Here, even though “harm” is happening to the extent of causing “death” of the Fly, the “autonomy” or “consent” of the Fly to be devoured overrides her right to life. As discussed earlier, right to life encompasses an individuals’ right to die. By choosing to die, the Fly is exercising both her ‘autonomy’ and ‘right to life’ within the private sphere. [Refer to ‘Part I’ for further understanding] In a similar light, the actions between two individuals involving one individual to devour the other are permitted as long as the individual being devoured is consenting, and the individual devouring the other individual has the mental faculties or maturity to understand the consequences of their actions.

There is another idea of protecting Cannibalism from external interference. Consider a situation of two individuals with the mental faculties to consent enter into a contractual relationship”. In a traditional contract<sup>64</sup>, what is required is that there should be an agreement between two individuals from doing or abstaining to do something, in exchange of a consideration which does not necessarily require it to be monetary in nature. In such a case, if an individually consents to being eaten either partly or wholly (potentially resulting in death) by the other individual or through removing and selling their organ to another individual by

<sup>61</sup> Yogyakarta Committee, *The Yogyakarta Principles*, November 7, 2006, available at [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (Last visited on September 04, 2018).

<sup>62</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. Rev. 359 (2000); Daniel J. Solove, *Conceptualizing Privacy*, California Law Review, vol. 90, no. 4, 2002, at 1087–1155.

<sup>63</sup> Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM L. & CRIMINOLOGY (2001): 211-72.

<sup>64</sup> Sidney W. DeLong, *What Is a Contract*, 67 S. C. L. Rev. 99, 162 (2015).

entering into a legal relationship with them, then such an action can be enabled Decisional Privacy and the doctrine of “Privity of contracts”<sup>65</sup>. It is important to note that any jurisdictions considering such contracts to be void agreements (due to the possibility of criminalization of homicide) have no effect to this example as long as consent is given primacy over harm.

Lastly, one can make an argument against Consent or Autonomy<sup>66</sup> by extending coercion, undue influence and manipulation to extreme situations such as poverty. Consider an example that ‘John Smith’ is an individual with full mental capacity to consent. Someone in Jack’s family is hospitalized and he requires money to treat their family member. John comes across ‘Zeus’, an individual who desires to feed on human flesh and has full financial capacity to assist John. Assume that John agrees and consents to offer his body partly or wholly to Zeus in exchange for consideration without there being a formal contract and Zeus accepts his request. Now if John allows Zeus to devour him partly or wholly, then John’s financial condition can be no defence on the grounds of coercion, undue influence or manipulation as John who was a consenting individual, was fully aware of his actions and consequences. A similar potential ground on public interest justifications can be that enabling such acts will increase Organ Trafficking. However, I believe that this as a potential “harm” ground in the context of society should not be a justification, if individuals with the capacity to decide how to own their body exercise their autonomy to engage in Cannibalism or Organ Sale/Trade, as Decisional Privacy imparts on them this autonomy by the nature of the act being “consensual”.

### **(b) Examining Decisional Privacy in Cannibalism**

In the landmark German case of *Meiwes*<sup>67</sup>, the victim Brandes had explicitly consented to Meiwes his intention to be killed and eaten by Meiwes. When trial was fought against Meiwes, he admitted to killing and eating 20 kg of flesh from Brandes’s body and furnished proof of Brandes’s consent including videotapes. The principle defence against the crime of murder exercised by Meiwes was that the victim’s consent. The Three-Judge Bench of the German Court dismissed the Prosecutor’s plea for a murder charge on the ground that while killing the victim, his full instructions were followed by Meiwes and furthermore, the victim himself had consented to the killing. Therefore, the court instead gave him a lighter

<sup>65</sup> Jesse W. Llienthal, *Privity of Contract*, 1(5) HARV. LAW REV, 226-232 (1887); *Dunlop Pneumatic Tyre Co Ltd. v. Selfridge & Co Ltd.*, [1915] UKHL 1.

<sup>66</sup> Joseph Raz, *The Morality of Freedom* CH. 14. (1986).

<sup>67</sup> Vera Bergelson, *The Right to Be Hurt - Testing the Boundaries of Consent*, *George Washington Law Review*, Vol. 75 (2007).

conviction for eight and a half years. It observed the act as something between two extremely disturbed people who both wanted something from each other<sup>68</sup>. On appeal from both parties, the Federal Constitutional Court remanded the case for a retrial and noted that in conviction a greater punishment should be given to Meiwes. Meiwes was ultimately convicted for murder in 2006<sup>69</sup>. In our understanding of Decisional Privacy, Meiwes should be protected by Privacy against external interference by State as the victim consented to cannibalistic death by Meiwes. Both the German Court and the Federal Constitutional Court are therefore wrong in punishing Meiwes for the cannibalistic act in their domestic law as consent of the individual being devoured (Brandes) was established in the case.

The English case of *R v. Dudley and Stephens*<sup>70</sup>, is another example of a cannibalism case where a boy fell unconscious for long due to lack of food and drinking seawater. Two out of three remaining individuals killed the unconscious boy and decided to eat him. The court held that necessity was no defence in this case. In this case, I would argue that consent would not be a valid defence as the boy lacked the capacity to consent because of unconsciousness. Though the case presented the court with a hard case, in such a scenario there cannot be consent and such acts of cannibalism would not be protected by Decisional Privacy. However, where an individual has the capacity to consent and provides it to the individual harming them, such cases will protect the other individual who is causing harm from external interferences by the State or any Non-state actors by virtue of Decisional Privacy. The principle in the legal maxim “volenti non-fit injuria” or “to a willing person, injury is not done”<sup>71</sup> can be extended to such cases where Cannibalism or Organ Trade happens.

## CONCLUSION

Decisional Privacy provides protection to individuals from any external interference be it from the State or any outsider. It is independently sufficient as a value to protect various private acts of individuals. “Autonomy” or “self-ownership” as a value is enabled by Decisional Privacy and both these values aroused together to provide protection to private individual acts. In the Paper, it was observed how Consent or Self-Ownership constitutes a

<sup>68</sup> The Guardian, *The German court finds cannibal guilty of murder*, May 10, 2006, available at <https://www.theguardian.com/world/2006/may/10/germany.lukeharding> (Last visited on September 04, 2018).

<sup>69</sup> Meiwes judgment, Federal Court of Germany, BGH, 26.05.2004 - 2 StR 505/03; CNN, *Perverse Cannibal Killer Gets Life*, May 9, 2006, available at [http://www.cnn.com/2006/WORLD/europe/05/09/cannibal.trial/index.html?section=cnn\\_latest](http://www.cnn.com/2006/WORLD/europe/05/09/cannibal.trial/index.html?section=cnn_latest) (Last visited on September 04, 2018).

<sup>70</sup> *R v. Dudley and Stephens* (1884) 14 QBD 273 (QB).

<sup>71</sup> Black’s Law Dictionary 1575 (6th ed., 1990); Vera Bergelson, *The Right to Be Hurt - Testing the Boundaries of Consent*, *George Washington Law Review*, Vol. 75 (2007) at 165.

kernel of Decisional Privacy which shields all forms of Queer Acts, Cannibalism or Organ Trade, provided that the acts are consensual in nature. Furthermore, Abortion through the use of contraceptives is protected by Decisional Privacy. Physical harm cannot be used as a justification against consensual acts in all the above cases to justify external interference, even when the act results in 'Death' of an individual as "self-ownership" encompasses both 'autonomy' and the 'right to die' vis-à-vis right to life. Thus, in conclusion I would hold that "Decisional Privacy" understood in light of the earlier debate on consent and harm, theoretically protects all forms of consensual Queer Acts, Abortion and Cannibalism or Organ Trade as long as the individual being harmed [wherein "harm" may extend to "death" and the individual being harmed possesses the "capacity" to "consent"] consents to the harm.

