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Editorial

In all these sixty-seven years, the Indian Constitution has proved to be remarkably enduring and dynamic. On the one hand, our constitutional jurisprudence has pioneered innovative outcomes such as the basic structure doctrine, public interest litigation, etc., despite having waded through multiple crises. On the other hand, constitutional jurisprudence has moved back and forth between progressive and regressive outcomes. Our Constitution should be regarded a project than a complete document. New challenges surface while settled positions often require re-examination. The *Indian Journal of Constitutional Law* has strived to keep track of constitutional developments and to present scholarship that grapple with significant constitutional questions, often from a comparative perspective. This Edition of the journal is no different. It presents an impressive volume of constitutional law scholarship.

This Editorial, in the first part, will discuss key developments in Indian constitutional law, through synopses of important judgments and constitutional amendments. In the second part, the Editorial will discuss the contributions to this Edition of the Journal.

SIGNIFICANT DEVELOPMENTS IN INDIAN CONSTITUTIONAL LAW 2016-17

The last twelve months have witnessed momentous developments in Indian constitutional law. The obvious elephant in the room is the constitutional amendment that has introduced the Goods and Services Tax regime and has sought to create a single market for goods and services in a country as large and diverse as ours. The judicial output, on the other hand, presents an interesting amalgam. The Supreme Court has rendered its judgment on some pressing issues like the political crisis in Arunachal Pradesh and some persistent issues like the power to promulgate ordinances and the constitutionality of entry taxes for goods across state borders. The Supreme Court also came under severe criticism for some of its judgments such as the order that mandated obeisance to the National Anthem in cinema halls and the order that banned liquor stores on highway roads. The various High Courts have also contributed

through well-reasoned judgments on issues such as gender discrimination in religious sites, right against self-incrimination, amongst others. In light of this, we proceed to analyse some of these significant developments.

Amendments to the Constitution

The Constitution (One Hundred and First Amendment) Act, 2016 has introduced the regime on Goods and Services Tax ("GST") in India. After being passed by both houses of the Parliament and ratified by more than half of the state legislatures, the President gave his assent to this constitutional amendment on September 8, 2016. Both the Parliament and the state legislatures were given concurrent powers to enact laws on GST.[1] However, only the Parliament could levy taxes on inter-state supply of goods and services.[2] The amendment act also established the Goods and Services Tax Council (GST Council") consisting of the Union Finance Minister (as the Chairperson), the Union Minister of State for Revenue and nominee ministers from each state government (from among whom the Vice-Chairperson would be elected). The GST Council is empowered to recommend the rates of taxation and to deal with other matters of taxation.[3] The Parliament was also obligated to enact laws to compensate states for loss of revenue owing to GST for five years.[4] In pursuance, both houses of the Parliament passed the Central Goods and Services Tax Act, 2017 recently, and the GST regime was rolled out on July 1, 2017.

The Constitution (One Hundred and Twenty Third Amendment) Bill, 2017 seeks to accord constitutional status to the National Commission for Backward Classes ("NCBC"). Presently, the NCBC operates under the statutory framework of the National Commission for Backward Classes Act, 1993. Only the Lok Sabha passed this constitutional amendment in April 2017. Under the amendment, the President will be empowered to notify "socially and

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1 IND. CONST. ART. 246A(1).
2 IND. CONST. ART. 246A(2).
3 IND. CONST. ART. 279A.
4 The Constitution (One Hundred and First Amendment) Act, 2016, s. 18.

economically backward classes".[5] The amendment will also introduce provisions that lay out the composition of the NCBC and its duties. The NCBC will also be accorded the powers of a civil court while inquiring complaints brought before it.[6]

Constitution Benches of the Supreme Court

The Constitution mandates that at least five judges of the Supreme Court sit in order to decide cases involving "*substantial question of law as to the interpretation of this Constitution*".[7] In the survey period (mid-2016 to present), there have been ten judgments with benches of five or more judges.[8] Four of these judgments were referred to a constitution bench owing to the presence of "*substantial question of law as to the interpretation of the constitution*" in the case.

In *Anita Khushwaha v. Pushap Sudan*,[9] the constitution bench affirmed that the right to life under Article 21 contained an inalienable right to access justice. The Supreme Court was approached with the question of whether a case could be transferred out of Jammu & Kashmir ("J&K"), as the provisions on inter-state transfers in the Code of Civil Procedure and the Criminal Procedure Code were inapplicable in J&K. According to the court, the absence of specific enabling statutory provisions did not prevent it from ordering such transfers in the interests of justice under Articles 32 or 142 of the Constitution.

In *Nabam Rebia and Baman Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*,[10] the constitution bench was faced with the political crisis in Arunachal Pradesh. Mr. Nabam Tuki, belonging to the Indian National Congress, was the Chief Minister of Arunachal Pradesh. Factions had emerged from within the party, and a

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5 The Constitution (One Hundred and Twenty Third Amendment) Bill, 2017, s. 4.

6 *Supra* note 5, s. 3.

7 IND. CONST. ART. 145(3).

8 This data has been presented on the basis of the reported judgments in the print version of Supreme Court Cases (SCC).

9 Anita Khushwaha v. Pushap Sudan, (2016) 8 SCC 509.

10 Nabam Rebia and Baman Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 SCC 1.

disqualification of fourteen MLAs (including the Deputy Speaker) under the Tenth Schedule of the Constitution was pending. Members of the revolting faction within the party also moved a resolution for removal of the Speaker of the legislative assembly around the same time. Meanwhile, the Governor of Arunachal Pradesh intervened and passed an order bringing the session of the legislative assembly to an earlier date. He also passed a message to the legislative assembly stating that the removal of the Speaker be taken up under the helm of the Deputy Speaker, who had been disqualified by the Speaker of the legislative assembly. In the early session, the Deputy Speaker set aside the disqualification of the MLAs and passed a no-confidence motion against Mr. Nabam Tuki's government. The controversy largely revolved around Article 163 of the Constitution. Article 163(1) provides that a state's Governor shall act according to the aid and advice of the Chief Minister and the Council of Ministers, except where required to exercise her discretion. Article 163(2) provides that any question regarding whether a Governor has the discretion over a particular matter was to be determined by the Governor herself, and such decision would be final. However, the majority judgment listed a number of situations where the Governor would have discretionary authority. Anything outside these situations would amount to discretion exercised beyond the Governor's authority, and would be subject to judicial review. On this basis, the Supreme Court held that the Governor's actions in this case were outside his authority under Article 163(1), and the Governor could so act only with the aid and advice of the Chief Minister and the Council of Ministers. On this basis, the Court invalidated the Governor's actions and the steps taken in pursuance. Therefore, Mr. Nabam Tuki was reinstated as the Chief Minister of Arunachal Pradesh. Though it furthers an important cause to preserve the federal character of the Indian state, the judgment ought to have shed more clarity on Article 163(2) and the scope of judicial review.

In *Jindal Stainless Steel v. Union of India*,[11] the Supreme Court upheld the constitutional validity of 'entry taxes', which is a levy on the inter-state movement of goods, charged by the receiving state. A nine-judge constitution bench had been constituted to examine this question, and a majority of seven judges held that imposing such

[11] Jindal Stainless Steel Ltd. v. Union of India CIVIL APPEAL NO. 3453/2002.

taxes were not violative of principles of free trade guaranteed in Article 301, and that individual states were well "within their rights" to impose it. The majority verdict, framed by Chief Justice TS Thakur, and the concurring opinions also delved into the ancillary concepts of 'non-discriminatory taxation' and 'compensatory taxes', holding that: a) only such taxes which are non-discriminatory in nature are valid; b) the specific case of an entry tax being discriminatory or not has to be examined by the respective benches hearing the same; c) The concept of compensatory tax is flawed and has no legal basis. However, the principles settled by this judgment were undercut by the introduction of the Central Goods And Services Tax Act, 2017, which will be rolled out from July 1, 2017 as per the Constitution (122nd Amendment) Bill, 2014. The GST has subsumed the levy of entry taxes - among a host of others - and the impact of the *Jindal* judgment will be primarily on retrospective cases.

In *Krishna Kumar Singh v. State of Bihar*,[12] a seven-judge bench of the Supreme Court was called upon to determine the constitutionality of ordinances that were promulgated repeatedly without having been ratified by the state legislature. In particular, the dispute concerned a series of ordinances promulgated by the Governor of Bihar, through which the Bihar Government took over several hundred private schools. None of these ordinances were placed before the State legislature as mandated under Article 213 of the Constitution. The last of these ordinances was allowed to lapse. However, the employees of these schools brought this writ petition demanding payment of salaries by the government. Justice D.Y. Chandrachud, writing the majority opinion, held that repeated promulgation without legislative ratification constituted a "constitutional fraud" and that the ordinances did not create any rights or liabilities. Further, it was held that the satisfaction of the President or the Governor in promulgating an ordinance would be subject to judicial review.

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[12] Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1.

Other Decisions of the Supreme Court

In *Board of Control for Cricket in India ("BCCI") v. Cricket Association of Bihar*,[13] the Supreme Court reiterated its earlier judgment in *Zee Telefilms Ltd. v. Union of India*[14] and held that the actions of the BCCI were amenable to judicial review under Article 226. In *Zee Telefilms*, the majority of judges on the constitution bench held that though BCCI was not "state" under Article 12 of the Constitution, parties aggrieved by its actions could pray for a writ before the High Courts under Article 226. In this case, the court accepted the recommendations of the Justice R.M. Lodha Committee, which was appointed by the Supreme Court to look into the management of the BCCI. Reviewing the actions of a private organisation, such as the BCCI, using public law standards is a step in the right direction. However, whether this allows the judiciary to essentially redraw the internal rules of an organisation has to be treated with scepticism, and is a topic ripe for debate.

In an appeal of a Bombay High Court judgment in *Hiralal P. Harsora v. Kusum Narottamdas Harsora*,[15] the Supreme Court was called to adjudicate upon the constitutionality of Section 2(q) of the Protection of Women from Domestic Violence Act, 2005 ("PWDVA"). This provision defined "respondents" in domestic violence cases, and stipulated that only an "adult male person" could be a respondent in such cases. In this Article 14 challenge, the court applied the reasonable classification test and held that the restrictive definition of "respondent" did not rationally further the legislative purpose to outlaw all kinds of violence against women in domestic settings. Therefore, the Supreme Court *read down* Section 2(q) to exclude the words "adult male person". However, two points should be noted. While this judgment has proposed its own cure for the restricted application of PWDVA, it has done so by extending the legislation to those who have historically been at the weaker end of gendered power relations in Indian society. This judgment also poses

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13 Board of Control for Cricket in India ("BCCI") v. Cricket Association of Bihar, (2016) 8 SCC 535.

14 Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

15 Hiralal P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165.

the serious challenge of PWDVA being misused against women and minors through frivolous complaints.

Possibly the most widely debated case from the past year was a PIL filed by Shyam Narayan Chouksey[16] calling for the national anthem of the country to be played before a movie in cinema theatres across the country. The Supreme Court passed an overreaching order, mandating that all citizens stand up when the anthem was played. Further directions were ill conceived, impracticable, and often contradictory. For example, it was ordered that the entry and exit doors of the theatres be shut for the course of the anthem, which was against the letter of the directions made in the aftermath of the Uphaar Cinema tragedy.[17] This particular order, and another one obligating even physically and mentally disabled persons to stand, was later clarified; but, they demonstrated the lack of application of mind evident in the judgement. The Supreme Court based its rationale on a questionable application of the theory of "constitutional patriotism". In doing so, it has effectively overruled the *Bijoe Emmanuel* case,[18] which had held that it was "*not mandatory to sing the national anthem*" and no one could *"be compelled by law to do so*", as this would be against the fundamental right to speech and expression.[19]

In *State of Tamil Nadu v. K. Balu*,[20] a three-judge bench of the Supreme Court ordered states and union territories to cease granting licenses for sale of liquor along highways. It also ordered that the existing licenses would cease by 1 April 2017, and the removal of liquor shops up to 500 m from the highways. The Supreme Court justified this intervention under Article 142 of the Constitution, which authorises the Court to do "complete justice" in any case before it. The court rejected arguments for the right to trade in liquor

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16 Shyam Narayan Chouksey v. Union of India, (2016) 5 KHC 886.

17 Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy, (2011) 14 SCC 481. In this case, a fire had broken out in the theatre during a movie screening, resulting in the death of 59 patrons, due to the lack of operational exit doors.

18 Bijoe Emmanuel v. State Of Kerala, (1986) 3 SCC 615.

19 The applicability of Article 19(1)(a) was brushed aside: "It (sic) does not allow any different notion or the perception of individual rights, that have individually thought of have no space."

20 State of Tamil Nadu v. K. Balu, (2017) 2 SCC 281

under Article 19(1)(g) by relying on the *res extra commercium* doctrine. The judgment has been criticised much on the basis that it interferes into the domain of the executive and the legislature, and for not adequately weighing the costs and benefits of such a blanket order.

Decisions of the High Courts

In *Noorjehan Safia Niaz v. State of Maharashtra*,[21] the Bombay High Court was faced with a petition challenging the order of the Haji Ali Dargah Trust prohibiting women from entering the sanctum sanctorum of the dargah. The Court applied the "essential practices" test to determine if the exclusion of women from entering the dargah was part of the Trust's freedom of religion under Article 25(1). The High Court held that Islamic doctrines did not recognise any essential practice that disallowed women from entering mosques/dargahs. Further, the High Court recognised that the Haji Ali Dargah was a public charitable trust. Hence, it could seek protection of being a denomination under Article 26 of the Constitution. Rejecting other peripheral justifications offered by the Trust, the Bombay High Court held that the entry prohibition was unconstitutional.

In *Sankalp Institute of Education v. State of UP*,[22] questions concerning the rights of minority educational institutions and the interpretation of the Supreme Court decisions in *T.M.A. Pai Foundation v. State of Karnataka*[23] and *P.A. Inamdar v. State of Maharashtra*[24] were brought before the Allahabad High Court. Briefly, the issue was whether minority educational institutions had a right under Article 30 of the Constitution to admit minority students through their own admission process, instead of complying with the statewide university admissions process. The court reiterated the conclusions in the above-mentioned Supreme Court judgments, and held that it was not permissible even for a minority education institution to opt out of the standardised admissions process. However, such minority institutions were free to admit only students

21 Noorjehan Safia Niaz v. State of Maharashtra, [2016] 5 ABR 660.
22 Sankalp Institute of Education v. State of UP, (2017) 1 ADJ 304.
23 T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481.
24 P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 357.

belonging to the respective minority communities from the statewide admissions process.

In *Natvarlal Amarshibhai Devani v. State of Gujarat*,[25] the accused in a corruption case brought a writ petition before the Gujarat High Court challenging the validity of the voice spectrograph test. The only evidence against the accused was a telephonic conversation, and the investigating agency had required a voice spectrograph test to match the accused's voice with the recording. On the constitutionality of this test, the court read down the Supreme Court's decision in *Selvi v. State of Karnataka*[26] noting that the voice spectrograph test did not amount to testimonial compulsion, which is unconstitutional under Article 20(3). Instead, voice spectrograph test was deemed to be "physical" and not testimonial evidence. On this basis, the Gujarat High Court held that the voice spectrograph test did not violate Article 20(3) of the Constitution. However, the Court did not authorise such a test in this case, as the test lacked statutory bases.

CONTRIBUTIONS

This Edition begins with Mathilde Cohen's fascinating article on the constitutional status accorded to cows and milk in India and the United States. She argues that cows/milk have been accorded a "quasi-constitutional" status in both these jurisdictions. Further, she makes two important arguments. *First*, she argues that bovine laws in both India and the US are tilted towards protecting the economic value/nutritional benefits from cows, rather their welfare. *Second*, she situates cows/milk as important components of exclusionary politics in both countries: exclusion along racial lines in the US and along religion/caste lines in India. Her article becomes all the more relevant in the recent times when cows are at the centre of an increasingly polarized Indian society.

Kartik Chawla's article makes the case for an implicit recognition of the "right to internet access" in Indian constitutional

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25 Natvarlal Amarshibhai Devani v. State of Gujarat, Gujarat High Court, Special Criminal Application (Direction) No. 5226 of 2015.

26 Selvi v. State of Karnataka, (2010) 7 SCC 263.

jurisprudence. In doing so, he draws from international opinions on the content and necessity of this right, and Supreme Court judgments on free speech-related issues that provide validity to a claim for Internet access.

In his article, Shantanu Dey studies the evolution of the "commercial speech doctrine" in American and Indian constitutional jurisprudence. He brings to the fore fundamental issues with the doctrine such as ambiguities in its definition and the advertisement-centric judicial discourse. Dey also engages with the question of whether commercial speech ought to be protected under the freedom of speech and expression (Article 19(1)(a)) or under the freedom of trade (Article 19(1)(g)). He argues for a "gradation model" of free speech to be adopted in India, much like under the First Amendment. He concludes his article by engaging with "reasonable restrictions" on freedoms in the Indian Constitution, and their application vis-à-vis the commercial speech doctrine.

Mohammed Zahirul's article revolves around the "political question doctrine" in Bangladesh's constitutional law. He argues for the rejection of this doctrine and naturally for a more significant role for the judiciary in Bangladesh. He builds his argument on the judiciary's active duty to promote constitutionalism in the country. Zahirul carries out a study into the origins of the political question doctrine in the United States, and its application in India and Pakistan, in addition to Bangladeshi cases and scholarship.

The note by Ivan Jos and Anandhapadmanabhan Vijayakumar details the domestic and international dimensions of privacy rights. Specifically, it traces the development of the right before the Supreme Courts of the United States and India, while discussing the content of the complimentary "right to be forgotten", and data protection regimes.

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We also appreciate the generosity of Mr. K.K. Venugopal and the M.K. Nambyar SAARCLAW Charitable Trust that has allowed us to come out with this issue. We shall always be grateful for their support for this journal since its inception. We also thank Dr. N. Vasanthi for having encouraged this initiative. Lastly, we also thank the administrative staff for the assistance they have rendered.

The Comparative Constitutional Law of Cows and Milk —India and the United States

Mathilde Cohen[*]

Abstract

India is the largest milk producer in the world, and the United States follows closely along, ranked at number three. These two dairy nations appear to have dramatically different constitutional regimes related to cows. The United States Constitution does not mention cows, but the Supreme Court has developed an elaborate case law on milk, a testament to the central place of milk and farm animals in American life, politics, and culture. Yet none of these cases exhibits concern for the welfare or working conditions of cows. It would be hard to imagine, therefore, a more different constitutional framework than that found in India. In the 1949 Constitution, there is an explicit provision addressing agriculture and cattle welfare, declaring, among other things that "[t]he State shall . . . take steps for prohibiting the slaughter, of cows and other milch and draught cattle."

This Article makes two contributions. First it argues that despite seemingly opposed constitutional regimes, important similarities can be found in the ways in which India and the Unites States negotiate cows' status. Both jurisdictions are interested in cows qua *milk producers rather than animals whose welfare is of independent value.*

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* Associate Professor of Law and Robert D. Glass Scholar, University of Connecticut School of Law. Thanks to Erin Delaney, Amy DiBona, Elizabeth Emens, Jessica Eisen, Jayna Kothari, Kristen Stilt, and Andrea Wiley as well as participants at the 2016 Harvard Law School Workshop on Animals in Comparative Constitutional Law and the Cardozo Law School Equality Roundtable who provided extremely helpful feedback on this project. For excellent research assistance, I thank Joshua Perldeiner and for library assistance, Anne Rajotte.

The focus is on the supposed benefits of dairying for human health and flourishing. Second, it argues that in practice the constitutional predilection for cows and milk has failed to meet its promise to benefit humans. In both countries, milk and cows feature as components of an exclusionary politics used to oppress, reinforcing inequities between racial, social, and religious groups.

Introduction

India is the largest milk producer in the world, and the United States follows closely along, ranked at number three.[1] Milk—historically, culturally, and politically—has proven to be a unique food product in that it crystalizes anxieties about class, gender norms, racial differences, and human-animal boundaries.[2] These two dairy nations appear to have dramatically different constitutional regimes related to cows and milk. But upon closer inspection, there are important similarities that raise critical questions about what is regulated when milk and cows are the objects of legislation.

Conventional wisdom holds that the United States Constitution does not extend to non-human animals.[3] And after a quick glance at the Supreme Court's elaborate case law on milk, this wisdom appears to be correct. Between the 1880s and 2000s, milk and cattle litigation has been a vehicle for the Court to articulate

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1 *See* ANDREA S. WILEY, CULTURES OF MILK. THE BIOLOGY AND MEANING OF DAIRY PRODUCTS IN THE UNITED STATES AND INDIA 14 (2014).

2 *See* Mathilde Cohen, *Regulating Milk. Women and Cows in France and the United States*, 65 AM. J. COMP. L. (forthcoming); Mathilde Cohen, *Of Milk and the Constitution*, 16 HARV. J. LAW & GENDER 115 (2017).

3 *See generally* GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW (1995) (documenting the exclusion of animal interests from legal consideration, including from constitutional protections); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000) (urging for the conferral of legally enforceable rights on animals, including constitutional rights).

central constitutional doctrines such as Congress' taxation and commerce powers, equal protection, due process, and antitrust. The frequency with which milk cases turn up on the Court's docket is a testament to the central place of milk and farm animals in American life, politics, and culture. Litigation involving cows and milk arose out of disputes concerning bovine illnesses, transportation, slaughtering, but also the price, quality, and packaging of milk products.[4] Yet none of these cases exhibits concern for the welfare or working conditions of cows.[5]

It would be hard to imagine, therefore, a more radically different constitutional framework than that found in India. In the 1949 Constitution, there is an explicit provision addressing agriculture and cattle welfare, declaring, among other things that "[t]he State shall . . . take steps for prohibiting the slaughter, of cows and other milch and draught cattle."[6] Though this provision appears in the "Directives Principles to States," which are nonenforceable guidelines for laws and policies directed toward the national and state governments, here *cows* appear to be bearers of constitutional rights. A number of states have moved forward with their own laws to strengthen anti-bovine slaughter as well as to punish the consumption and storing of beef,[7] echoing a long history of bans on the slaughter and eating of cows. This movement is not without precedent. During the British Raj (the rule of the British Crown in the Indian subcontinent from 1858 and 1947), a number of "princely

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4 *See infra*, Appendix.

5 *But see* infra note 87 and accompanying text.

6 *See* IND. CONST. ART. 48.

7 *See* Shraddha Chigateri, *Negotiating the 'Sacred' Cow: Cow Slaughter and the Regulation of Difference in India* in DEMOCRACY, RELIGIOUS PLURALISM AND THE LIBERAL DILEMMA OF ACCOMMODATION 137, 138 (Monica Mookherjee, ed., 2011) (reviewing the different types of state regulation).

states," which enjoyed some level of sovereignty, had "made cow killing or, in some cases, selling a cow for slaughter punishable by life imprisonment or death."[8]

Why compare the United States and India? Despite seemingly opposed legal regimes, three important similarities can be found in the ways in which India and the Unites States negotiate cows' constitutional status. First, in terms of constitutional methods, both jurisdictions confer to cows and milk an intermediate legal status: not quite fully constitutional yet not simply statutory. In the United States, the Supreme Court "quasi-constitutionalizes" milk by treating it as a food like no other, imbued with essential nutritional, economic, and moral values. At the same time, the Court refrains from explicitly recognizing a fundamental right to milk for all Americans. In India, cow protection figures among the so-called "directive principles of state policy" of the Constitution. These are broad directives given to the central and state governments, which not enforceable by any court. Indian cows, therefore, have a "quasi-constitutional" status which is analogous to American milk: the Indian Constitution proclaims their value, falling short of making their protection justiciable on the model of fundamental rights.

Second, in terms of substantive law, both jurisdictions are primarily interested in cows *qua* milk producers rather than *qua* animals whose welfare is of independent value. In both countries, the constitutional discourse on cows is based upon an economic understanding of the use-value of milk and dairy cattle. Both economies were still largely agrarian when this discourse developed—around the turn of the century in the United States and around

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8 Frederick J. Simoons, et al., *Questions in the Sacred-Cow Controversy*, 20 CURRENT ANTHROPOLOGY 467, 473 (1979).

independence in India. In the early twentieth century, at a time of industrialization and urbanization when many Americans needed affordable and safe sources of nutrition, the U.S. Supreme Court's dairy jurisprudence fostered the interests of the meat and dairy industry so as to make milk accessible to the masses. The Indian constitutional provision was framed in terms of public health and management of animal husbandry, in part to avoid it from being read as an attempt to assert a pan-Hindu agenda on the new secular state. Cow protection, it was said, would boost the supply of dairy foods for the benefit of the food-insecure populace (rather than protecting Hindu nationalist sentiments).[9]

Third, both in the United States where farm animals' welfare ranks at the bottom of the legal hierarchy, and in India, a multicultural state where the majority religion elevates cows to a sacred status, the constitutional framework is inattentive to cows' well-being.[10] In the United States, where the focus is on whether milk is available and safe for human consumers, constitutional interventions focus on the price and quality of milk for the sake of *human* health and welfare. In India, the same goal of protecting milk supply *for humans* is used as a religious-neutral justification to prohibit the slaughter of dairy cattle, not abuse during their lifetime. There is

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9 *See infra* notes 43-45 and accompanying text.

10 At the subnational level, both in the United States and in India, certain states have adopted constitutional and statutory provisions that may be more or less protective. Six American states enacted limitations on the space restrictions of confined animals, including calves, through voters' initiatives and legislative bills: Arizona, Oregon, Colorado, California, Maine, and Michigan. *See* Terence J. Centner, *Limitations on the Confinement of Food Animals in the United States*, 23 J. AGRIC. ENVIRON. ETHICS 469, 473 (2010). Yet, when animals are the objects of constitutional or legislative attention at the state level it is typically not to promote their welfare, but the interests of food producers and consumers. The majority of U.S. states expressly exempt farm animals, or certain farming practices, from their anti-cruelty provisions, making it nearly impossible to provide even meager protections. On India, see Chigateri, *supra* note 7 at 138.

an obvious form of speciesism behind this common milk-centric perspective: constitutional rights are afforded to humans, not non-human animals. The constitutional question remains whether milk is available to *us*, affordable for *us*, healthy for *us*, human consumers.

Yet, this Article argues that in practice the constitutionalization of milk and cows may *not* be beneficial for us, its intended human beneficiaries. Or at least not equally beneficial, as certain humans are more harmed by cows and milk's prominence than others. In both the United States and India, the prioritization of cows and milk in constitutional discourse has reinforced inequities between racial, social, and religious groups. Milk and cows are hot button political issues, used to exclude and oppress minorities. In the United States, the quasi-constitutionalization of milk has sanctioned its federal subsidization and omnipresence in dietary guidelines, school snacks and lunches, as well as various food assistance programs. Yet milk is an inadequate food for about a quarter of Americans who are "lactase impersistent"—that is, who have low levels of the enzyme lactase, which is necessary to digest milk.[11] Lactase impersistence, commonly known as "lactose intolerance," is disproportionately found certain racial and ethnic minorities such as Native Americans, African Americans, Asian Americans, and Latino-Americans. These groups which, historically, have been the victims of systemic discrimination and still suffer from actual, structural, and symbolic discrimination are also those most harmed by milk's privileged legal position. In India, the concept of the sacred cow in Hindu religions, which arguably motivated the 1949 Constitution's cow protection provision, helped to mobilize forces in the

[11] Andrea S. Wiley, *"Drink Milk for Fitness": The Cultural Politics of Human Biological Variation and Milk Consumption in the United States*, 3 AM. ANTHROPOLOGIST 506, 510 (2004).

independence movement against the British colonial power. The doctrine of the sanctity of the cow encompasses a wide variety of beliefs and practices, but at its core, it requires that the cow be protected from slaughter and that its products, in particular milk, be cherished as purifying substances. In other words, while cows' flesh (beef) should not be eaten, cows' milk should be avidly consumed. Cow protection served as a rallying cry in the emancipation from the British, but it was also a symbol of the dominant caste pan-Hindu identity at the expense of beef-eating minorities, especially Muslims and non-dominant castes.

This Article proceeds in three parts. I begin in Part I by analyzing the United States and India's constitutional law when it comes to cows and milk. Despite apparently vastly different outlooks on the ontological status of cows, both legal frameworks primarily treat them as economic objects. In Part II, I claim that in both constitutional discourses milk has been constructed as an essential element of the national diet, leading to a boom in milk production and the accompanying deterioration in cows' quality of life. Part III argues that the constitutionalization of cows as milk machines not only harms non-human animals, but also certain segments of the human population.

Part I. Constitutionalizing Cows and Milk: An Economic Agenda

This Part presents the U.S. and the Indian constitutional landscapes pertaining to cows and milk. Though the two countries embrace seemingly opposed constitutional *Gestalts* on the issue, their regulation of cows and milk is similarly driven by an economic agenda.

A. The U.S. Bovine Jurisprudence

The United States Constitution is a notoriously short document, known for establishing a tradition of "negative" rights against the government rather than "positive" rights obliging the government to take certain actions. It is silent on the subject of animals. Raising animals for meat, milk, or eggs is apparently not a matter of constitutional law. Yet between the 1880s and 2000s, the Supreme Court has issued dozens of opinions on the merits on cases involving cattle and milk.[12] In previous scholarship I referred to the Supreme Court milk case law as a "dairy jurisprudence,"[13] but the inclusion of cases pertaining to cattle more generally rather than just milk warrants the expansion of the category and a correspondingly broadened name, "bovine jurisprudence."

Though cows and milk are not mentioned in the Constitution, historically, litigation over cattle, especially dairy products, has been a vehicle for the Justices to articulate central constitutional doctrines such as Congress' taxation and commerce powers, the states' police powers, equal protection, due process, the delegation of legislative or judicial power to administrative officials, the states' licensing powers, the taxing powers, eminent domain, and antitrust principles. The frequency with which cows and milk cases turn up on the Court's docket is a testament to the central place of beef and dairy cattle husbandry in everyday American life, reflecting the Justices' own economic and societal food ideology. Through this bovine jurisprudence, I argue that the Supreme Court bestowed milk a quasi-constitutional status.

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12 *See infra*, Appendix, listing the cases upon which this Article focuses.
13 *See* Cohen, *supra* note 2.

What do I mean by "quasi-constitutional" in the context of milk?[14] The concept of quasi-constitutionality is popular in Canadian and European constitutional theory, but lacks a unified meaning among American constitutional scholars.[15] In addition to formally recognized constitutional rights, either enshrined in the text of the Constitution or elevated to the rank of "unenumerated" rights by judicial interpretation, the Court has recognized a number of rights or principles without taking the step of constitutionalizing them. Interpreting the notion of constitutional law broadly, those can be called "quasi-constitutional." Examples include the right to public education, a healthy environment, public health, and perhaps even national security. Though the Supreme Court is unlikely to use a substantive due process theory to declare these constitutional rights proper any time soon, they are (or were for a time) so frequently articulated in constitutional terms both inside and outside of the courts that they have acquired a quasi-constitutional status. Outside

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[14] For a fuller exploration of quasi-constitutionality in the context of milk, see Cohen (2017), *supra* note 2.

[15] *See* HAROLD HONGJU KOH, THE NATONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70 (1990) (defining "quasi-constitutional custom" as "a set of institutional norms generated by the historical interaction of two or more federal branches with one another [that] represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters"); William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 1992 (arguing that the Supreme Court's use of canons of statutory construction such as clear statement rules to restrict congressional powers have created "quasi-constitutional law" in certain areas). *See also* for applications to specific areas, Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 IOWA L. REV. 713 (1977) (considering cases in which reviewing courts override normal principles of statutory interpretation in order to protect environmental interests, which are nonetheless not recognized as constitutional rights); Mark. D. Rose, *Multiple Authoritative Interpreters of quasi-constitutional federal law: of tribal courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 2000 (arguing that tribal courts are empowered to provide independent interpretation of constitutional rights and federal law).

the courts, discussions take place through the political process, for example by proposals to amend the Constitution,[16] or within the legal community by way of advocacy in favor of constitutionalization. What truly sets apart quasi-constitutional principles from other aspirants to constitutionalization is their articulation in constitutional terms is frequently found in judicial discourse.

The Supreme Court has identified some rights, such as public education, as candidates for constitutionalization, only to expressly reject them.[17] Yet even those forsaken principles have remained stubbornly persistent in constitutional adjudication, belying their non-constitutional status. Others, such as public health, are more diffuse in the case law, not being explicitly thematized as potential constitutional principles. Yet, there was a time when public health was an operative constitutional standard. Health law scholar Wendy Parmet, for instance, has shown that the Court "constitutionalized" public health during the ante-bellum and Reconstruction periods, using the notion to define and circumscribe the states' police powers.[18] During the heyday of bovine jurisprudence, milk's status

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[16] Environment quality amendments to the Constitution surfaced in the late 1960s and had their heyday in the 1970s. *See* J.B. Ruhl, *The Metrics of Constitutional Amendments: and Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999). There have been a couple of proposed education amendments, including one introduced by Jackson, Jr. in every Congress from 1999 to 2012 "regarding the right of all citizens of the United States to a public education of equal high quality."

[17] Education provides a case in point, the Court famously declared in *Brown v. Board of Education*, "[t]oday, education is perhaps the most important function of state and local governments." Brown v. Board of Education, 347 US 483, 493 (1954). Yet it later denied it constitutional status. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (denying appellant claims that unequal education funding violated a fundamental right and the Equal Protection Clause all while singing a paean to education.).

[18] Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST., 476, 478, 502 (1996) (arguing that public health was later "deconstitutionalized" by the New Deal

was reminiscent of that granted to public health. In much the same way that the Court had used public health as an excuse to find a broad governmental authority to protect the health, safety and welfare of the population, it held that ensuring a steady and affordable milk supply for the American public was an interest strong enough to justify the federal and state governments' frequent interventions in the production, pricing, and distribution of milk.

How did so many milk cases reach the Supreme Court? Beginning in the mid-nineteenth century, in the face of a series of sanitary and economic crises affecting the safety and profitability of milk,[19] both state and federal governments began to intervene massively in milk production and regulation. In the late 1800s, milk was no longer consumed locally, on the farm or its surroundings, but began to travel to urban centers. Milk found in cities was often of poor quality—spoiled due to lack of refrigerated transportation and storage, contaminated with bacteria and viruses, and adulterated by intermediaries seeking to maximize their profit margins. Public health reformers mobilized as a result of mounting rates of milk-related infant mortality.[20] Starting in the 1860s and throughout the late nineteenth century municipal, state, and later federal legislation sought to prohibit milk adulteration and ensure quality milk supply in the cities.[21] The judiciary was soon confronted with

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Court when it no longer needed the concept to separate the public from private spheres of authority).

19 The post-World War I depression, followed by the Great Depression accelerated drop in milk prices.

20 *See* RICHARD A. MECKEL, SAVE THE BABIES: AMERICAN PUBLIC HEALTH REFORM AND THE PREVENTION OF INFANT MORTALITY, 1850–1929 5 (1990) (recounting the American campaign against infant mortality in the period between 1850 and the Depression of 1929).

21 City ordinances appeared in Boston, New York, and other large cities, soon followed by state legislation. *See* MECKEL, *supra* note 2020 at 68 (pointing out that between 1880-1895 twenty-three American municipalities passed or strengthened ordinances governing the sale of milk and recounting.). The 1906

the enforcement of and challenges to the new regulations. From the late 1800s until the 1970s, state and federal courts had repeated occasions to review state and federal milk safety legislation pertaining to such issues as pasteurization,[22] milk containers,[23] bovine illnesses,[24] inspection areas,[25] the state's role as a licensor of milk dealers,[26] and so on. The constitutional question raised was typically whether the new health and safety laws were valid exercises of police powers on the part of the states or legitimate uses of the commerce powers on the part of Congress.

Food and Drug Act was the first major federal law to address food safety, ending piecemeal legislation and inconsistent state standards. While the Act is often presented as a consumer-protection measure, in fact many food and drug manufacturers pushed for the passage of the statute in the hope of securing advantage over domestic competitors and expanding markets to interstate and foreign commerce. *See* Ilyse D. Barkan, *Industry invites regulation: the passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUBLIC HEALTH 18 (1985) (arguing that industrial support prompted congressional action).

22 For an overview of early state court decisions dealing with pasteurization, see James A Tobey, *Court Decisions on Pasteurization*, 42 PUBLIC HEALTH REPORTS (1896-1970) 1756 (1927).

23 Dean Milk Co. v. City of Madison, Wis.' et al., 340 U.S. 349 (1951) (holding a Madison, Wisconsin ordinance, which required that milk to be sold in the city had to be produced within a twenty-five mile radius to facilitate inspection unconstitutional as a violation of the dormant commerce clause and insufficiently restrictive way of meeting safety goals.); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding a Minnesota statute prohibiting the sale of milk in plastic nonreturnable containers as an environmental and energy conservation measure.).

24 *See, e.g.*, Adams v. Milwaukee, 228 U.S. 572 (1913) (upholding a City of Milwaukee ordinance requiring a tuberculin test for milk drawn from cows outside of the city because they cannot be inspected by the health officers); Mintz v. Baldwin, 289 U.S. 346 (1933) (upholding a New York order requiring that out-of-state cattle brought in the state for dairy or breeding purposes have a certificate certifying that the animals are free of Bang's disease.).

25 H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) (striking down New York Commissioner of Agriculture's decision to deny a Massachusetts corporation's license application to operate a fourth milk plant in New York as a burden on interstate commerce); Dean Milk Co., 340 U.S. 349 (1951).

26 *See* Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346 (1939) (upholding the Pennsylvania Milk Control Board's authority to require licensure for milk dealers so long as the effects of the requirements were local and thus not burdening interstate commerce.).

Though bovine jurisprudence came about as a by-product of the wave of health and safety legislation that emerged during the Progressive Era, it prospered because milk soon became the object of extensive economic regulation. Milk has long been a cornerstone of American agriculture—today it comprises a whooping 11% of the total value of agricultural production.[27] This economic importance is reflected in the vast number of cases and statutes pertaining to the commerce of milk.[28] In the face of the post-World War I depression, followed by the Great Depression and the accelerated drop in milk prices which ensued, both the state and federal governments began to intervene massively in milk production and marketing.[29] Their typical goal was to ensure that milk prices remained stable to protect the livelihood of dairy farmers and further Americans' growing milk-drinking ways.[30] Initially, the courts interpreted the federal government's authority to regulate milk markets with little latitude, leading to a proliferation of state legislation. With the jurisprudential

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[27] *See* WILEY, *supra* note 1 at 14. *See also* Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860-1940*, 36 LAW & SOC'Y REV. 51, 60 (2002) ("The value of milk and milk products was 19% of gross farm revenue in 1939, or roughly double the value of wheat, corn, and the other grain crops combined").

[28] For a presentation of the case law see generally see Wright & Huck, *supra* note 27. For a relatively recent example of federal legislation, see The Fluid Milk Promotion Act of 1990 (stating "(3) the dairy industry plays a significant role in the economy of the United States, in that milk is produced by thousands of milk producers and dairy products (including fluid milk products) are consumed every day by millions of people in the United States; . . . (5) the maintenance and expansion of markets for fluid milk products are vital to the Nation's fluid milk processors and milk producers, as well as to the general economy of the United States;")

[29] *See, e.g.*, James T. Cross, *Legal Aspects Leading to Milk Control Law*, 5 N.Y. ST. B.A. BULL. 211 (1933).

[30] At the federal level the solution was a program of federal milk orders authorized by the Agricultural Marketing Agreement Act of 1937. The goal was threefold: to provide producers a minimum return, to ensure equality among handlers (i.e., milk processors who are also sometimes milk distributors), and to guarantee consumers a steady supply of milk. Since then federal milk orders have proliferated.

shift of the Supreme Court toward a broader understanding of congressional powers in the late 1930s,[31] milk cases became a major battlefield for the delimitation of federal-state relations. By then the dairy industry had become one of the nation's most potent political lobbies. Typically, the Court sided with those parties (be it the federal or state governments, local or out-of-state dairy producers, farmers or dealers and distributers) which, in its view, promoted the production of greater quantities of milk for Americans.

The quasi-constitutionalization of milk in the United States appears centered upon an economic view of animal-human relations. It is the economic prosperity of dairy farmers and, therefore, of the milk-drinking nation, which must be fostered. When it comes to India, it seems at first sight that the picture is reversed, cows' welfare being at the forefront of the constitutional framework.

B. The Indian Ban on Cow Slaughter

There is a long history of cattle regulation in India. For a Hindu, the killing of a cow is a sin, which renders the killer ritually impure. Cultural geographer Frederick Simoons reports that in the 1920s cow killing was punishable by a prison sentence, even in Muslim areas such as in Kashmir, where a Sikh ruler had established earlier on the death penalty for cow killing.[32] The Constitution

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[31] In West Coast Hotel Co. V Parrish, 300 U.S. 379 (1937) and in a number of decisions which followed, the Supreme Court famously reverted course from its previous, *Lochner* era jurisprudence, and began upholding state and federal economic legislation, in particular New Deal legislation, recognizing broader congressional powers to regulate the economy. The shift is often referred to as "The switch in time that saved nine."

[32] Frederick J. Simoons et al., *Background to Understanding the Cattle Situation of India: The Sacred Cow Concept in Hindu Religion and Folk Culture*, ZEITSCHRIFT FÜR ETHNOLOGIE, Bd. 106, H. 1/2, 121, 132 (1981).

adopted in 1949 makes the protection of cows a national constitutional objective. Article 48 reads:

> *The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and other milch and draught cattle.*

On its face, the provision is religiously neutral, attempting to erase the spiritual and cultural dimension of the cow in the history of India. The post-independence Indian constitutional order, under the leadership of then Prime Minister Nehru, aimed to keep law and religion separate. The Hindu lobby had pushed for a general prohibition on cow slaughter, but Nehru threatened resignation unless the constitutional ban was given a secular, and limited, character.[33] Yet, a full understanding of the condition of cattle and the legal protections afforded to cows in India cannot overlook the devout Hindu conception of the cow as it manifests itself both in religious and everyday behavior. Hinduism, the professed religion of over 80 percent of Indians today,[34] is often described as a "way of life," highlighting the "profound tension that penetrates to the core of Indian constitutionalism, where 'the State is secular … but the people are not.'"[35]

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33 T.N. Madan, *Whither Indian Secularism?* 27 MODERN ASIAN STUD. 667, 687 (1993) (emphasizing the role of Nehru in the secular character of Article 48.) *See also* Subrata Kumar Mitra, *Desecularising the State: Religion and Politics in India after Independence*, 33 COMP. STUD. SOC'Y & HIST. 755, 770-771 (1991) (reporting that a few later when the Indian Parliament considered a wide-ranging Cattle Preservation Bill in 1955, Nehru rejected it on procedural grounds and went as far as to offering his resignation if his position on the secular state was not accepted.)

34 According to the religion census of 2011, Hindus comprised 78.35 per cent of the total population.

35 GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 35-6 (2003).

To summarize the history at the risk of oversimplifying, cattle played a major role in the economy of the Aryan people who settled in what is currently northwest India during the second millennium BCE.[36] They were a source of meat, milk, leather, plow traction, but also of sacrificial victims in Vedic rituals. Though there is some disagreement among historians, the emergence of *ahimsa* (non-violence) and the sacred cow concepts are situated around 400 BCE, during a time of profound social and religious upheaval. The sanctity of the cow had become a central tenet of the Hindu faith by the 6th century CE. Not only are cows worshipped in Hinduism, but their products are seen as protective and purificatory, from the dust found in their hoofs and skin, to their hair and bodily excrements, including milk, urine, and dung, which figure, along with curd and ghee as the "five products of the cow" used in ritual purification.[37] In cooking, the purity of the cow is communicated through milk products, explaining the ubiquitous use of ghee (clarified butter) as a cooking oil in Indian cuisine. As Frederick Simoons explains, "[t]he effectiveness of the 'five products' derives from the view that the cow is higher in ritual status than all humans, including Brahmans, and that even a cow's excrement is purifying to men."[38] Cooking foods in milk or ghee bestows them with purity even when prepared by non-dominant castes. One of the most striking expressions of the sacred cow doctrine is the *goshalas* ("places for cows"), that is, the shelters for the aged and infirm cattle.[39]

Despite this long religious history, when discussing the language of what became Article 48, members of the Constituent Assembly

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36 *See, e.g.*, Simoons et al., *supra* note 32.

37 *See* Frederick J. Simoons, *The Purificatory Role of the Five Products of the Cow in Hinduism*, 3 ECOLOGY OF FOOD & NUTRITION 21 (1974)

38 *See, e.g.*, Simoons et al., *supra* note 32 at 121, 130.

39 *See* Simoons et al., *supra* note 32 at 121, 133.

attempted to focus on the cow as an economic concept belonging to the debate on agriculture and development in general.[40] When the Hindu members of the Constituent Assembly mentioned the religious aspects of cows in Indian culture, it was typically to bolster economic arguments. For instance, representative Shibban Lal Saksena declared, "I personally feel that cow protection, if it has become a part of the religion of the Hindus, it is because of its economic and other aspects."[41] Pandit Thakur Dass Bhargava asserted that historically, even in the Muslim-ruled Mughal empire, "cows' slaughter was not practised in India; not because Muslims regarded it to be bad but because, from the economic point of view, it was unprofitable."

The economic argument for cow protection boiled down to the following: the cow does more good to the Indian nation alive than dead, supporting agriculture through its labor and manure, and benefiting the health of the populace with its milk. The contention was not totally novel, as a cow protection movement premised on remarkably similar economic justifications had existed since the 1880s.[42] Since then, the slaughter of cattle had been periodically condemned as contributing to famines and the increasing poverty of the country. Yet, for the first time this utilitarian discourse came to

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40 Though the debates transpire religious motivations, e.g., Seth Govind Das declaring: "The Muslims should come forward to make it clear that their religion does not compulsorily enjoin on them the slaughter of the cow." *See* 7 Constituent Assembly of India (Nov. 24, 1948).

41 7 Constituent Assembly of India (Nov. 24, 1948).

42 *See* Cassie S. Adcock, *Sacred Cows and Secular History: Cow Protection Debates in Colonial North India*, 30 COMP. STUD. SOUTH ASIA, AFRICA & THE MIDDLE EAST 297, 301-2 (2010) (presenting the founding text of the cow protection movement, Dayanand Saraswati's *Gokarunanidhi*, first published in 1881, which developed the argument that cows were essential to the prosperity and the health of the Indian people and that when cows are protected, milk is plentiful and inexpensive, which allows the poor to consume more dairy products and less grain, with benefits to their digestion).

the forefront of constitutional lawmaking on a national scale. At the Constituent Assembly, protecting "cattle wealth" was presented as key to the agricultural development and economic welfare of the newly independent, and still mostly agricultural nation—to this day, milk production comprises 17% of the total value of agricultural production.[43] Expanding the country's cattle population, drafters argued, would provide much needed animal traction for agriculture, increase milk production, and maximize manure to fertilize lands. Milk was seen as essential to solving the hunger problem. The last major famine in India had occurred in 1943, preceding independence in 1947, but the challenge of feeding a growing nation was very much on the drafters' minds.[44] During the debates, Seth Govind Das thus admonished that the campaign to grow more food "cannot succeed so long as we do not preserve the cows,"[45] unfavorably comparing India's milk production per capita at the time (7 ounces) to countries such as New Zealand (56 ounces), Denmark (40), the United States (35), or France (30).

Though the final wording of Article 48 is not limited to protecting "useful cattle," it is far from providing universal cattle protection. Only bovines appear covered, and among bovines, only those which have economic value, "cows and calves and other milch and draught cattle," are to benefit from the slaughter ban. In other words, Article 48 does not protect cattle that neither produce milk

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43 *See* WILEY, *supra* note 1 at 14. *See also* CHRISTOPHER L. DELGADO & CLARE A. NARROD, IMPACT OF CHANGING MARKET FORCES AND POLICIES ON STRUCTURAL CHANGE IN THE LIVESTOCK INDUSTRIES OF SELECTED FAST-GROWING DEVELOPING COUNTRIES Annex I (2002), *available at* http://www.fao.org/wairdocs/lead/x6115e/x6115e0b.htm#bm11.2.1 (last accessed, January 12, 2015)

44 *See* JEAN DRÈZE & AMARTYA SEN, THE POLITICAL ECONOMY OF HUNGER: VOLUME 1: ENTITLEMENT AND WELL-BEING 16 (1991).

45 7 Constituent Assembly of India (Nov. 24, 1948).

nor can be bred nor used for agricultural work. Most strikingly, the Constitution does not protect buffaloes, which nonetheless generated 50% of India's milk supply in the 1940s, as drafter Pandit Thakur Dass Bhargava points out,[46] and currently produce 58% of the total milk supply.[47] As will be discussed below, this disparity suggests that religious motivations inspired drafters more than they were willing to admit—buffaloes do not share in cows' sacred status in Hinduism.[48]

Called to interpret Article 48 in 1958 in *Hanif Quareshi*, the Supreme Court of India initially maintained the primarily economic vision of cow protection.[49] The case had been brought by Muslim butchers and dealers who claimed that a series of bans on cow slaughter (including buffaloes) enacted at the state level in furtherance of Article 48 violated their freedom of religion, their right to equal protection, and their right to carry on their occupation. The Court dismissed the first two claims, finding that the sacrifice of cows is not a mandatory practice in Islam and that butchers could be validly classified in separate groups depending on the type of animals they handled.[50] But it accepted a version of the trade argument,

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46 *See* 7 Constituent Assembly of India (Nov. 24, 1948).

47 *See* WILEY, *supra* note 1 at 58.

48 *See* Stanley A. Freed & Ruth S. Freed, *Sacred Cows and Water Buffalo in India: The Uses of Ethnography*, 22 CURRENT ANTHROPOLOGY 483 (1981) (presenting the religious and the techno-environmental positions on the composition of the Indian cattle population).

49 Mohd. Hanif Quareshi & Others vs The State Of Bihar, [1959] 1 SCR 629 (upholding a total ban on the slaughter of cows of all ages but not on she-buffaloes, breeding bulls, and working bullocks after they had ceased to be capable of yielding milk or breeding or working as draught animals).

50 In doing so, the Court was applying the "essential religious practices" doctrine it had began to develop a few years earlier in cases such as Commissioner, Hindu Religious Endowments vs Lakshmindra, [1954] S.C.R. 1005 and Ratilal Panachand Gandhi vs State of Bombay, [1954] S.C.R. 1055. According to the doctrine, only practices considered "essential" to a religion are protected under Articles 25 and 26 of the Indian Constitution (which declare freedom of religion and the freedom to manage religious affairs to be fundamental rights). This

reasoning that the degree of interference with butchers' freedom should be tied to cattle's varying economic "utility." According to the Court, a total ban on the slaughter of all bovines would imperil butchers' occupation and source of livelihood. The high judges noted that male buffaloes, are "not half as useful as bullocks," and that sheep and goats, giving "very little milk compared to the cows and the female buffaloes" should not be protected from slaughter by the law.[51] It concluded that these animals are not only deprived of economic value, but also create a burden on resources by draining the nation's cattle feed.

Some forty years later, in a series of case culminating in the 2005 *Gujarat* v. *Mirzapur* case, the Court reverted course, apparently relinquishing the constitutional doctrine according to which cow protection is an economic and public health-oriented endeavor. It announced that "[a] cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless.'"[52] In the case at hand, the Court was called to examine the constitutionality of the Bombay Animal Preservation (Gujarat Amendment) Act of 1994, which mandated a broad ban on cow slaughter, including female buffaloes. The Court upheld the amendment, pointing out that food security was no longer an urgent national problem and that constitutional change, which improved the legal status of animals, had intervened since *Hanif Quareshi*.

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jurisprudence raises the question whether courts have the authority and legitimacy to determine whether certain religious practices are "essential" or not, and accord protection only to those. The *Hanif Quareshi* decision is a particularly striking illustration of the concerns arising from the doctrine given that a bench of five judges, none of whom were Muslim, upheld a ban on cow slaughter.

51 Mohd. Hanif Quareshi & Others vs The State Of Bihar, [1959] 1 SCR 629.

52 State Of Gujarat vs Mirzapur Moti Kureshi Kassab, 2005 8 SCC 534.

In 1976 the Constitution had been amended with the addition of Article 51A(g) making it a "fundamental duty" for every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."[53] The new constitutional mandate of compassion extricated economically valueless, aged cattle from their subaltern status of farm animals, recognizing them as "living creatures." The Court thus declared, "[i]t will be an act of reprehensible ingratitude to condemn cattle in its old age as useless."[54] Despite this new constitutional outlook, however, the Court did not fully renounce its utilitarian or economic framework, carrying on the language of usefulness versus uselessness. For instance, it pointed out that "[a]fter the cattle cease to breed or are too old to do work, they still continue to give dung for fuel, manure and bio-gas, and therefore, they cannot be said to be useless."[55] Though the Bombay cow slaughter ban was ultimately upheld, the conditions of living bovines there as well as in the rest of the country remained constitutionally unexamined.

Similar to the American quasi-constitutionalization of milk, the post-independence anti-cow slaughter provision in India was couched as an economic measure geared toward advancing public health, even though it also embodied a Hindu political and religious agenda. Having described each country's constitutional approach to milk and cows, the next Part argues that the constitutional discourse in favor of milk drinking sanctioned, and even reinforced, the oppression of dairy animals on a scale previously unknown.

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[53] IND. CONST. ART. 51A(g).
[54] State Of Gujarat vs Mirzapur Moti Kureshi Kassab, 2005 8 SCC 534.
[55] State Of Gujarat vs Mirzapur Moti Kureshi Kassab, 2005 8 SCC 534.

Part II. Drinking Milk, Oppressing Cows

This Part begins by tracing a brief history of milk production and consumption in the United States and in India, before arguing that the two nations share a similar reverence for dairy foods and disregard for the plight of cows and other milk-producing animals.

A. The Construction of Milk as an Essential Food

In both the United States and India, anthropologist Andrea Wiley has shown that milk became "the food associated with the modern body, due to its perceived abilities to make it bigger, stronger and more powerful and these qualities extended to the nation-state."[56] In constitutional discourse, this translated into the depiction of milk as a superior source of nutrition, necessary to feed the people, thereby justifying the disregard of dairy animals' welfare.

1. The Milk Drinking American Nation

One of the central twentieth century American nutritional dogmas is epitomized in public health reformers Samuel Crumbine and James Tobey's affirmation that milk is "the modern elixir of life. Without dealing in superlatives, it can indeed be said that milk is the most nearly perfect of human foods for it is the only single article of diet which contains practically all of the elements necessary to sustain and nourish the human system."[57] As sociologist Melanie DuPuis has shown, in the past couple of centuries, this milk ideology has shaped the United States into a "milk-drinking nation" and milk, into

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[56] WILEY, *supra* note 1 at 5.

[57] SAMUEL CRUMBINE & JAMES TOBEY, THE MOST NEARLY PERFECT FOOD: THE STORY OF MILK 17 (1930).

"nature's perfect food."[58] Though drinking fluid milk is a recent phenomenon, it became a staple food near the end of the 19th century and into the 20th century primarily as a substitute for breast milk for infants. Under the conjoined forces of the agriculture community, the new science of nutrition, and the federal and state governments, milk was now produced, marketed, and promoted on an unprecedented scale. During the twentieth century, dairying shifted toward large-scale output through a series of innovations such as herd size increases, highly selective artificial breeding, new feeding techniques tracking every rations, and the mechanization of the milking process. Interstate highways facilitated transport and with access to refrigeration, market demand surged. Mass-produced and mass distributed, it became the patriotic beverage par excellence, providing dairy farmers with a livelihood and sustaining American bodies, making the United States a "tall" nation.[59]

As fluid milk consumption soared, the successive Justices sitting on the Supreme Court treated milk as a core food and a defining element of the American diet. As early as 1906, the Court upheld state legislation discriminating between different classes of milk producers so long as "the purpose of the law [was] to *secure to the population*, adult and infant, milk attaining a certain standard of purity and strength."[60] A few decades later, in *Nebbia*, the 1934 landmark case which upheld New York's milk price regulation, the majority cited a New York senate legislative report approvingly, concluding

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58 *See* E. MELANIE DUPUIS, NATURE'S PERFECT FOOD: HOW MILK BECAME AMERICA'S FAVORITE DRINK 4 (2002).

59 *See* ANDREA S WILEY, RE-IMAGINING MILK. CULTURAL AND BIOLOGICAL PERSPECTIVES 64-80 (2011) (showing that drinking more milk in childhood makes people taller but means they are proner to cancer, hit menarche earlier, and are at risk of other health problems).

60 St. John v. New York, 201 U.S. 633, 637 (1906) (emphasis added).

that "[m]ilk is an essential element of diet," that "[t]he production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people," and that "milk, an essential food, must be available as demanded by consumers every day in the year."[61] In 1937, the Court upheld the states' power to fix a minimum price for milk despite its impact on interstate commerce.[62] Justice Cardozo, writing for the Court, justified this decision by pointing that it would "save producers, and with them the consuming public, from price-cutting so destructive as to endanger the supply"[63] of milk. In 1939, the Court described milk as "an essential item of diet." [64] In the late 1960s, the Court's milk rhetoric remained unchanged, portraying milk as "a fluid staple of daily consumer diet."[65]

2. The White Revolution in India

In South Asia, dairying goes back at least 400 BCE, with the territory now known as India one of the oldest homes of milking populations and agro-pastoralism.[66] In India, domestic animals played an important role in providing not only labor and meat, but also milk for humans. Hinduism and Mahayana Buddhism required dairy products as ceremonial offerings, encouraging dairying and milk use. While fermented milk and curds (yogurt) have long figured in Indian

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61 Nebbia v. People of New York, 291 U.S. 502, 515-16 (1934).

62 Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937).

63 *Id.*, at 609.

64 United States v. Rock Royal Co-op., 307 U.S. 533, 549 (1939).

65 Zuber v. Allen, 396 U.S. 168, 173 (1969).

66 Frederick J. Simoons, *The Determinants of Dairying and Milk Use in the Old World: Ecological, Physiological, and Cultural*, 2 ECOLOGY OF FOOD & NUTRITION 83 (1973). *But see* Dorian Q. Fuller, *Agricultural Origins and Frontiers in South Asia: A Working Synthesis*, 20 J. WORLD PREHIST. 1, 14-15 (2006) (arguing that archaeological evidence indicates that zebu cattle was being used for milk as early as the Indus Valley civilization, ca 3300-1300 BCE.

diets, fluid milk consumption remained limited in scale due to milk's extreme perishability and the traditional system of producing and marketing milk, which made it difficult to obtain it beyond the rural areas where the cattle was kept.[67] Until the 1970s milk consumption was thus limited to rural communities and rich urbanites that could afford to obtain it.[68] Today, India produces and consumes more milk than any other country, though per capita production and consumption remain low due to its large population and income disparities.[69]

Milk consumption has risen dramatically in India since 1970, while U.S. consumption, which had surged dramatically until World War II, stabilized before declining during the second half of the twentieth century. In India, the consumption increase is not only due to the constitutional protection of cows, but also to a series of governmental operations leading up to the establishment of the National Dairy Development Board in 1965, which was tasked with setting up cooperatives and providing technical support to farmers. A few years later, the launch of "Operation Flood," a program designed to flood India with milk with the assistance of European dairy

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67 Marie-Claude Mahias, *Milk and its Transmutations in Indian Society*, 2 FOOD AND FOODWAYS 265, 272 (1987) (explaining that the large-scale consumption of fluid is very recent because first, milk used to be fermented, turning into yoghurt from which butter was made and second, the milk market which existed focused on provisioning cities).

68 *See* Jacques Dupuis, *Coutumes alimentaires, sociétés et économies. Le cas de la répartition de la consommation du lait en Asie tropicale*, 79/435 ANNALES DE GÉOGRAPHIE 529, 541 (1970) (writing in 1970 that "the poorer classes, as well as a very great number of children, are generally deprived of milk. It often happens that the children of the poor waste away when they are weaned because of a lack of milk in their diet").

69 *See* WILEY, *supra* note 1, at 7.

surplus,[70] accelerated the development of the dairy economy. The program had several goals, including improving productivity, making milk more easily available and affordable to urban consumers, bringing technological advances to the rural milk sector, and orienting dairy production toward markets.[71] Certain aspects of Operation Flood resembled the American government's milk policy, in particular the use of price control regulation to off-set seasonal fluctuations in the supply and pricing of milk.[72] Unlike the U.S. dairy industry, which is characterized by consolidation and concentration, Indian milk production remains dominated by smallholder farmers—in 2009, 80% of milk still came from farms with one to five cows.[73]

Despite the relative scarcity of fluid milk around the time the Constitution was enacted, the presumed importance of milk in the Indian diet, especially for infants, was a central topic for discussion among constitutional drafters. At the Constitutional Convention,

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70 The program has been strongly criticized by development cholars Barat Dogra and Shanti George, but praised by Bruce Sholten. *See* BRUCE A SCHOLTEN, INDIA'S WHITE REVOLUTION (2010).

71 To do so, the program purported to replicate the successful cooperative dairying which had developed in Anand across rural India. *See* Pratyusha Basu & Bruce A. Scholten, *Crop–livestock systems in rural development: linking India's Green and White Revolutions*, 10 INT'L J. AGRICULTURAL SUSTAINABILITY 175 (2012) (recounting the history and development of the program). This required funding and led the National Dairy Development Board to seek foreign aid. The program was supported by international organizations. It began by using milk surplus built up in Europe in the form of milk powder and butter which built stock to stabilize Indian milk prices. The World Bank also intervened by injective millions of dollars in the program in the form of loans and promoting high-yielding cows, a cross between European dairy breeds and the original zebu breed. *See* WILFRED CANDLER & NALINI KUMAR, THE IMPACT OF DAIRY DEVELOPMENT IN INDIA AND THE WORLD BANK'S CONTRIBUTION ix-x (1998).

72 Dairy cows do not produce milk evenly year-round, leading farmers to overproduce in the spring so as to have enough milk in the fall. This results in large surpluses in the spring which destabilize milk markets.

73 KENDA CUNNINGHAM, RURAL AND URBAN LINKAGES: OPERATION FLOOD'S ROLE IN INDIA'S DAIRY DEVELOPMENT (2009).

Seth Govind Das asked, "There is a huge infantile mortality in this country. Children are dying like dogs and cats. How can they be saved without milk?" Shibban Lal Saksena affirmed that two of the "evils in our country are infant mortality and tuberculosis which have their origin in deficient milk diet." Pandit Thakur Dass Bhargava added, "the average age in our country is 23 years, and . . . many children die under one year of age! The real cause of all this is shortage of milk and deficiency in diet." The Supreme Court joined the chorus, repeatedly reaffirming the centrality of milk in the Indian diet. In its 1958 landmark case *Hanif Quareshi*, the Court declared that cows are "the back-bone of Indian agriculture," citing approvingly the preamble of the Bombay Animal Preservation Act of 1954, which stated, "cow and her progeny sustain the health of the nation by giving them the life giving milk which is so essential an item in a scientifically balanced diet." [74] As recently as 2013, the Court reiterated the exceptionalism of milk, admonishing state governments to tighten their food safety legislation, specifically making the adulteration in milk and milk products an offense punishable with life imprisonment.[75]

3. A Common Anti Dairy Substitutes Stance

In both the American and the Indian legal discourses, milk is presented as an essential food, which must be protected against counterfeits. There is a striking similitude between the two countries, for example, when it comes to constructing dairy products in opposition to non-dairy substitutes such as margarine and filled milk

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[74] Mohd. Hanif Quareshi & Others vs The State Of Bihar, AIR 1958 SC 629, at 748.

[75] Swami Achyutanand Tirth & ORS vs. Union of India & ORS (December 5, 2013) (when the matter came up for a new hearing in 2014 the Supreme Court called the national government to intervene by updating the Food Safety and Standards Act 2006). *See* Max Bearak, *Upscale Dairies Grow in India, Promising Safer Milk*, N.Y. TIMES (June 3, 2014).

in the United States, and Vanaspati ghee in India. In the famous *Carolene Products* case, the Supreme Court upheld the 1923 federal Filled Milk Act, which prohibited "filled milk" (milk reconstituted with non-dairy fats, usually vegetable oils) from being shipped in interstate commerce.[76] The Act was arguably the result of years of successful lobbying on the part of the dairy industry, which was motivated by the desire to get rid of the competition represented by cheaper non-dairy products.[77] To substantiate its decision to uphold the statute, the Court accepted the nutritional ideology of the day, according to which "[b]utter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, . [is] essential to proper nutrition and . . wanting in vegetable oils."[78] Similarly in India, at the Constituent Assembly, Shibban Lal Saksena lamented the common use of "Vanaspati ghee," a hydrogenated vegetable cooking oil, which he argued was caused by shortage in the more expensive, "pure," dairy ghee.[79] This anti-non-dairy product stance is reflected in the 1954 Prevention of Food Adulteration Act, which prohibits the sale of ghee containing "any added not exclusively derived from milk fat."[80]

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76 United States v. Carolene Products Co., 304 U.S. 144 (1938).

77 *See* Geoffrey P. Miller, *The True Story of Carolene Products*, SUP. CT. REV., 397, 404 (1987) (recounting the background economic and political history behind the *Carolene Products* case). *See also* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989) (claiming that for close to a century, between the 1870s and the 1950s, margarine was "the victim of a sustained and concerted pattern of discrimination by the national government and almost every state in the union.")

78 Carolene Products, 304 U.S. at 149 n.2 (1938) (summarizing the congressional report which served as the factual basis for Congress enactment of the 1923 Filled Milk Act).

79 It is striking to note that the same exact language "injurious to health" was used in both countries to belittle non-dairy substitutes.

80 1954 Prevention of Food Adulteration Act. Part VIII, §44(c) (and vice versa, vanaspati cannot be sold if ghee or any other substance has been added to it.)

In both countries, the apology of milk thus relies on a rhetoric of purity and exclusion of non-dairy substitutes. As the next section argues, the United States and India's juridical glorification of milk also goes hand in hand with the subordination of cows as milk-producing machines whose working and living conditions, especially in intensive dairy systems, is often a form of abuse.

B. The Disregard for the Plight of Cows

Though the American and Indian constitutional treatment of cows and milk differ, most obviously in that there are no federal constitutional restrictions on the killing of animals in the United States, the two share important similarities. Both legal systems are based on a hierarchical ontology, which rests upon the assumption of the superiority of humans over non-human animals, which are not independent bearers of rights. When it comes to the specific case of cows and milk, both constitutional orders ignore the enormous scale of abuse and exploitation that dairy cows endure from birth until they get sent to the slaughterhouse, which has been documented by animal rights' activists as well as scholars.[81] In the United States, the Supreme Court is preoccupied with the quality of milk for *human* consumption. In India, constitutional drafters and high judges are absorbed by the legality of slaughtering, sidestepping the quality of life of living cows.

[81] On the U.S., see Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and its Enforcement*, 4 J. ANIMAL L. & ETHICS 63 (2011) (describing the cruelty and neglect inherent in industrialized animal agriculture). On India, see Michael W. Fox, *India's Scared Cow: Her Plight and Future* in THE ANIMAL ETHICS READER 238 (Susan Jean Armstrong, ed., 2003) (explaining the plight of Indian cows who are chronically malnourished and arguing that the situation is sometimes worsened by the taboo against cow slaughter).

Female cows naturally produce milk as a result of pregnancy to nourish their young. The very concept of dairy farming is premised on a speciesist assumption that humans are superior to animals: the milk that would have fed the cows' offspring is taken for human consumption. Frederick Simoons reports that in Eastern Asia there have been times when the practice of milking was rejected as stealing primal food from the young nursing animal, a violation of the *ahimsa* concept (which can be translated as doing no harm or a commitment to non-violence).[82] But mainstream vegetarianism in India, like *ahimsa*, developed primarily as expressions of one's personal degree of purity and place in society rather than concern for animal welfare.[83] There is no opposition within the major Indian religions to the consumption of milk and milk products, hence, the widespread consumption of dairy products.[84] Even Jains, who extend non-violence to all living creatures capable of suffering and abstain not only from meat, but also from animal source foods such as eggs and honey, consume dairy products.[85]

What do American and Indian constitutional law have to say about dairy animals' welfare? While milk drinking has acquired a privileged cultural and constitutional status in the United States, the

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82 *See* Simoons, *supra* note 66.

83 *See* Catherine Robinson & Denise Cush, *The Sacred Cow: Hinduism and Ecology*, 18 J. BELIEFS & VALUES 25, 30-31 (1997) (pointing out that the motivation behind vegetarianism in Hindu cultures is connected with notions of purity rather than protecting the natural world from humans).

84 *See* Frederick J. Simoons , *The Traditional Limits of Milking and Milk Use in Southern Asia*, 65 ANTHROPOS, 547, 557-61 (1970) (arguing that with the exception of the Muslim Shins who refuse to use cow's milk, milking and milk use are accepted in Indian religions).

85 *See* Colleen Taylor Sen, *Jainism and Food*, ENCYCLOPEDIA OF FOOD & AGRICULTURAL ETHICS (2014).

animals producing milk, mostly cows,[86] remain in the shadow of the law. All but one of the Supreme Court's decisions relating to cattle and milk fail to exhibit concern for the welfare or working conditions of cows.[87] Nor has the Court ever taken on animal welfare generally. A few milk cases address bovine illnesses and inspection,[88] but it is always for the benefit of human dairy producers and consumers that cows' health is regulated. This reflects American law's general lack of interest in the treatment of farm animals. The handful of cases in which the Court has addressed animal cruelty stemmed not from examining farming practices, which could have implicated cows, but from contexts such as the use of animals in research,[89] the ritual slaughter of animals,[90] and the depiction of animal cruelty.[91] In

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[86] Traditionally, the overwhelming majority of the milk consumed in the U.S. has been cow's milk, rather than milk originating from other lactating animals (sheep, goats, mares, donkeys).

[87] Baltimore & OSWR v. U.S., 220 U.S. 94 (1911) (finding that a railroad violated a federal law meant to prevent cruelty to livestock during transfer.)

[88] Kimmish v. Ball, 129 U.S. 217 (1889) (upholding an Iowa statute making anyone in possession of Texas cattle that had not wintered north of the southern boundary of Missouri or Kansas liable for damages resulting from the spread of Texas fever); Grayson v. Lynch, 163 U.S. 468 (1896) (appeal from a case where defendants were held liable for damages resulting from spreading Texas fever to the cattle of the plaintiffs); Reid v. Colorado, 187 U.S. 137 (1902) (upholding a Colorado statute which prohibited bringing cattle with certain diseases into the state); Adams v. Milwaukee*,* 228 U.S. 572 (1913) (upholding a City of Milwaukee ordinance requiring a tuberculin test for milk drawn from cows outside of the city because they cannot be inspected by the health officers); Thorton v. U.S., 271 U.S. 414 (1926) (holding that the Department of Agriculture has the authority to regulate the transport of livestock from state to state and send agents to dip livestock in order to prevent disease); Mintz v. Baldwin*,* 289 U.S. 346 (1933) (upholding a New York order requiring that out-of-state cattle brought in the state for dairy or breeding purposes have a certificate certifying that the animals are free of Bang's disease.).

[89] International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72 (1991) (dealing with the euthanization of monkeys used in research and avoiding the issue of animal welfare by only deciding a narrow jurisdictional question of federal court removal).

[90] Church of the Lukumi Babalu Aye v. City of Hieleah, 508 U.S. 520 (1993) (holding that city ordinances prohibiting religious animal sacrifice violated a church's rights under the Free Exercise clause of the First Amendment).

neither of these cases did animals' interests prevail, suggesting that animals' experience of cruelty remains invisible to law.

The Indian case is more complex. Compared to the United States, one would expect Indian constitutional law to be more attuned to the plight of dairy cows. Yet a few features of Article 48 conspire to make it a weak form of cow protection.

First, the provision figures among the "Directive Principles of State Policy," rather than the Fundamental Rights section of the Constitution. The Directive Principles occupy an ambiguous place in the Indian constitutional scheme. Framed as a set of important governmental goals incumbent upon the States, they are not judicially enforceable, as opposed to "fundamental rights," which create justiciable rights.

Second, the welfare of non-human animals is conspicuously absent from Article 48 and much of the litigation arising from it. The Constitution adopts a hierarchical vision of animals, mirroring the hierarchy inherent in the Indian social system.[92] (The United States is

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Though animal rights advocates were furious, this decision did not lead to a wider movement for the constitutionalization of animals rights, unlike what happened in Germany, where following a similar decision by the German Federal Constitutional Court in 2002, the Constitution was amended to include an animal protection provision. GRUNDGESETZ R [GG] [Constitution] art. 20a (F.R.G.). On the German story see generally Claudia Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 GEO. WASH. INT'L L. REV. 839, 857-72 (2007).

[91] United States v. Stevens, 559 U.S. 460 (2010) (finding that a federal statute criminalizing creation or possession of depictions of animal cruelty was substantially overbroad, and therefore invalid under the First Amendment).

[92] Though the Constitution abolished untouchability. *See* IND. CONST. ART. 17. At the Constituent Assembly, Seth Govind Das explicitly made the link between the plight of dairy cows and the oppressed lower castes, declaring "just as the practice of untouchability was going to be declared an offence so also we should declare the slaughter of cows to be an offence." *See* 7 Constituent Assembly of India (Nov. 24, 1948).

also a hierarchical society, of course, animal hierarchies being reflected in the law through farm animals' exclusion from the definition of the word "animal" as it is employed in the U.S. Animal Welfare Act[93] and human hierarchies, though milk's favored status despite its disparate impact on human consumers.) In India, it is clear that it is the life of *certain cows* that matters, not that of other animals. The supreme position is held by "cow and calves and other milch and draught cattle"—an imprecise group, though as noted earlier generally understood as excluding buffaloes who have a lower cultural and religious status.[94] Buffaloes nonetheless produce the majority of India's milk and are still commonly used as draught animals, especially in the South. If animal welfare were constitutionally valued in and of itself, discrimination among bovines on the one hand and among bovines and other animals on the other hand would not be justifiable.[95]

Third, the beneficiaries of Article 48 are only spared from an early death, not from abuse during their lifetime, the irony being that cows are both worshiped and routinely neglected and poorly nourished. At the Constituent Assembly, the consensus was that the *slaughter* of cows should be banned, or at least restricted, but not a word was uttered on the treatment and welfare of *living* cows, in particular of dairy cows.

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93 Animal Welfare Act, Title 7, s. 2132. *See also* David J. Wolfson & Mariann Sullivan, Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, 205, 206-207 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004) (noting the absence of federal laws regulating the treatment of farm animals prior to transport or slaughter and that state cruelty laws typically exempt farmed animals altogether or exclude "customary farming practices").

94 *See* Robert Hoffpauir, *The Water Buffalo: India's Other Bovine*, 77 ANTHROPOS 215, 227 (1982).

95 The Supreme Court upheld the differential treatment of cows on the one hand and goats and sheep on the other hand in State Of Gujarat v. Mirzapur Moti Kureshi Kassab, AIR 2006 SC 212.

Yet, milking is constitutive of the cruelty inherent in factory farming. The milking process itself can be painful for cows, and may cause infections.[96] Modern dairying is based on the manipulation and exploitation of the reproductive labor of cows. Breeding has become a cornerstone of animal husbandry, artificial insemination being a standard practice to improve meat and milk yield through genetic selection.[97] Assisted reproductive technologies are an integral part of intensive dairying, as consumers expect milk to be available all year round, which means that cows are impregnated and give birth every year. While reproductive control over dairy animals is erased from the American constitutional discourse on milk, it has not escaped Indian jurisconsults. Much of the constitutional debates leading up to the adoption of Article 48 focused on the importance of "breeding" to build "cattle wealth."[98] More to the point, in its 1958 *Hanif Quareshi* decision, the Supreme Court lamented that "notwithstanding the artificial insemination methods, we are in "short supply" of the ordinary breeding bulls."[99]

Assisted reproduction technologies (such as artificial insemination and, since the 1970s, embryo transfers) to increase "genetic gains" (i.e., meat and milk output) constitute a form of

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96 Certain milking practices are more cruel than others. Gandhi, who supported dairying, opposed the practice known as *phooka* or blowing, which consists in inserting a bamboo stick to blow air into the cow's uterus, allowing for more milk to be retrieved. *See* Florence Burgat, *Non-Violence Toward Animals in the Thinking of Gandhi: The Problem of Animal Husbandry*, 14 J. AGR. & ENVIRON. ETHICS 223, 237 (2004).

97 On the imported breed in India and their deleterious effects on the ecosystem and human welfare, see Greta Gaard, *Toward a Feminist Postcolonial Milk Studies*, 65 AM. Q. 595, 606 (2013).

98 Pandit Thakur Dass Bhargava, for example, pointed to the importance of "cow-breeding" for the improvement of milk supply, draught, and transport.

99 State Of Gujarat vs Mirzapur Moti Kureshi Kassab, AIR 2006 SC 212.

animal cruelty.[100] The practice deprives cows of any control over their sexual and reproductive lives and being nearly continually pregnant decreases their life span compared with their natural longevity. A cow's natural lifespan is about 20 years, but cows used by the dairy industry are typically killed in the United States after about five years because their bodies wear out from constantly being pregnant and lactating. The use of assisted reproduction technologies is typically accompanied by the premature separation of newborn calves from their mothers so that humans may consume their milk, a process known to be brutal and distressing, leading cows to mourn their loss for days.[101] India's productivity remains low by world standards, a reflection of the small-scale nature of the dairy industry, the continuing use of traditional breeds, and the less widespread use of assisted reproductive technologies.[102] India's lower productivity is often associated with greater welfare for cows, minimizing interferences in their reproduction as well as diseases such as mastitis and lameness, which are associated with intensive milking. Yet Indian cows suffer from ailments of their own, such as malnourishment.[103] In Indian states where anti-cow slaughter statutes prohibit the practice, old cows are sent to cow shelters (*goshalas*) or animal shelters (*pinjrapoles*). Though the *goshalas* are religious institutions in nature,

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[100] On the use of assisted reproduction technologies in the U.S., see Reuben J. Mapletoft & John F. Hasler, *Assisted Reproductive Technologies in Cattle: A Review*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 393 (2005). On India, see K Misra, Shiv Pragsad, V K Taneja, *Embryo Transfer Technology (ETT) in Cattle and Buffalo in India: A Review*, 75 INDIAN J. ANIMAL SCI. (2005).

[101] *See, e.g.,* Sherry F. Colb, "*Never Having Loved at All": An Overlooked Interest That Grounds the Abortion Right* 48 CONN. L. REV. 933 (2016) (discussing dairy cows' forced pregnancies and their grieving from their separation from their calves).

[102] UNITED STATES INTERNATIONAL TRADE COMMISSION, CONDITIONS OF COMPETITION FOR MILK PROTEIN PRODUCTS IN THE U.S. MARKET 2-3 (2004).

[103] *See* Fox, *supra* note 81 at 238 (explaining the plight of Indian cows who are chronically malnourished and arguing that the situation is sometimes worsened by the taboo against cow slaughter).

they also have an economic mission, which has been strengthened since independence. They are supported by government agencies to act as breeding centers for cattle improvement and some of their bovine boarders are held and milked for human use.[104]

Another ramification of dairy farming is its link to the meat industry. India is the largest beef exporter in the world, and the United States is the fourth.[105] In both countries, dairy cows sometimes end up as meat and their male calves are typically used for veal. In conventional dairy farming, calves are separated from their mother shorty after birth so as to preserve milk yield for human consumption.[106] Male calves are seen as "byproducts" of milk. Confined in crates, they are fed an iron-deprived diet until being slaughtered for veal or fattened for beef. Female calves, too, are separated from their mothers, but they are usually kept on the farm to become dairy cows.

In sum, in both India and the United States, bovine life is typically short and torturous. The harmful effects of dairying are not limited to non-human animals. As the next Part argues, the constitutional status of cows and milk leads to oppressing humans too.

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104 *See* Simoons et al., *supra* note 32 at 121, 133.

105 *See* UNITED STATES DEPARTMENT OF AGRICULTURE, FOREIGN AGRICULTURAL SERVICE, LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE (October 2015).

106 *See, e.g.*, Pamela Vesilind, *Animal Husbandry Redux: Redefining "Accepted Agricultural Practices" for Locally Sourced Foods*, 28 NATURAL RESOURCES & ENVIRON. 1, 3 (2013) (describing the connection between the dairy and the veal industry).

Part III. The Exclusionary Politics of Milk and Cows

In the United States and India, the constitutionalization of milk and cows has been part of a political agenda both implicitly and explicitly aimed at oppressing part of the population—racial and ethnic minorities in the United States and non-dominant-caste groups and religious minorities in India.

A. Milk and Racial Subordination in the United States

The ability to digest lactose, the predominant sugar in milk, is a recent human evolution dating back to the last ten thousand years and closely associated with dairy animal domestication.[107] "Lactase persistent" individuals continue to produce the enzyme lactase, necessary to digest lactose, beyond their toddler years, while "lactase impersistent" individuals do not. For the lactase impersistent, consuming lactose may not only cause a cluster of uncomfortable gastrointestinal symptoms, such as nausea, stomach cramps, bloating, gas, diarrhea, but also cause a range of systemic symptoms, "including headaches and light headedness, loss of concentration, difficulty with short term memory, severe tiredness, muscle and joint pain, various allergies, heart arrhythmia, mouth ulcers, sore throat, and increased frequency of micturition."[108] It may also interfere with the absorption of other nutrients, which can lead to a host of medical conditions.[109]

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[107] *See* Nissim Silanikove et al., *The Interrelationships between Lactose Intolerance and the Modern Dairy Industry: Global Perspectives in Evolutional and Historical Backgrounds*, 7 NUTRIENTS 7312, 7315 (2015).

[108] Stephanie B. Matthews et al., *Systemic Lactose Intolerance: A New Perspective on an Old Problem*, 81 POSTGRAD MED. J. 167, 168 (2005). *See also* Piero Vernia et al., *Lactose Malabsorption and Irritable Bowel Syndrome. Effect of a Long-Term Lactose-Free Diet*, 27 ITALIAN J. GASTROENTEROLOGY 117 (1995) (suggesting a correlation between lactose malabsorption and irritable bowel syndrome).

[109] *See* R. Honkanen, et al., *Lactose Intolerance Associated with Fractures of Weight-Bearing*

Only a minority of humans has developed lactase persistence, a trait now known to be genetically controlled and closely tied with ancestry.[110] As Andrea Wiley has demonstrated, in the United States, "the overall rate of lactase persistence is estimated to be somewhere around 75 percent."[111] The capacity to digest milk in adulthood is highly correlated with racial and ethnic origin. As Wiley has pointed out, "[c]ross-culturally, persistence of lactase activity into adulthood correlates with (1) fresh milk consumption; (2) a central role for milk production in the domestic economy; (3) positive evaluation of milk and other dairy products; and (4) physiological capacity to digest and, hence, tolerate lactose."[112] In practice, the highest rates of lactase persistence "are found only among northern Europeans; South Asians; herding populations of the Middle East, Arabian Peninsula, and sub-Saharan Africa; and descendants of these populations."[113] This means that millions of Americans are lactase impersistent, including close to 100 percent of Native Americans, 90 percent of Asian Americans, and 75 percent of African-Americans, Mexican-Americans, and Jews.

The U.S. Supreme Court's quasi-constitutionalization of milk, conjoined with the government's promotion of milk and dairy products through various forms of subsidization, including food and

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Bones in Finnish Women Aged 38–57 Years, 21 BONE 473 (1997) (indicating that lactose intolerant women have a higher risk of fracture due to calcium deficiency); J. Ji, J. Sundquist, & K. Sundquist, *Lactose Intolerance and Risk of Lung, Breast and Ovarian Cancers: Aetiological Clues From a Population-Based Study in Sweden*, 112 BRITISH J. CANCER 149 (2015) (showing that individuals with lactose intolerance with *low intake of milk and dairy products* have decreased risks of lung, breast, and ovarian cancers).

[110] *See* Timo Sahi, *Genetics and Epidemiology of Adult-type Hypolactasia*, 29 sup. 202 SCANDINAVIAN J. GASTROENTEROLOGY 7 (1994) (providing an overview of the genetic basis of lactase impersistence).

[111] WILEY, *supra* note 1 at 11.

[112] *See* Wiley, *supra* note 111 at 506.

[113] *Id.* at 507.

nutrition policies and federally funded nutrition programs, reflect a form of "nutritional racism"[114] which may arise out of unconscious biases, structural forces, a total lack of appreciation for population diversity in physiological responses to lactose, or all of the above. For the first 180 years of the Court's existence, Justices have almost always been white Protestants,[115] i.e., likely to be lactase persistent considering that the highest rates of lactase persistence are found among descendants of northern European populations. Federal and state legislators have been and remain disproportionately (non-Hispanic) white when compared with the U.S. population.[116] This lack of diversity may explain in part lawmakers and judges' zealous embrace of milk as an essential element in the diet, revealing an "ethno- or biocentric bias" insofar as they have promoted milk consumption and neglected the "significance of other biologies."[117] Though the scientific documentation of lactase impersistence is relatively recent, the racial and cultural biases behind milk's privileged legal position are not.

Though the formative studies demonstrating population variation in milk digestion were not conducted and published until the 1960s,[118] Hippocrates described lactase impersistence around 400

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[114] I borrow the expression from Andrea Freeman. *See* Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 UC IRVINE L. REV. 1251, 1268-9 (2013). *See also* Cohen, *supra* note 2.

[115] Louis Brandeis was the first Jewish Justice to be appointed in 1916, Thurgood Marshall the first African-American in 1967, Sonia Sotomayor the first Hispanic Justice in 2009 and we are still waiting for the first Native American and Asian American.

[116] *See* ROGER H DAVIDSON, ET AL., CONGRESS AND ITS MEMBERS 106-7 (14th ed. 2013).

[117] *See* Wiley, *supra* note 111 at 506.

[118] *See* ANDREA S. WILEY, RE-IMAGINING MILK: CULTURAL AND BIOLOGICAL PERSPECTIVES 21-22 (2010) (presenting and citing the pioneering studies on "lactase deficiency" in African Americans)

BCE.[119] The scientific community has long emphasized a connection between whiteness and milk—not only metaphorically. At the turn of the century, the new discipline of nutrition was in part an enterprise aimed at countering racial degeneracy. Viewing diet not simply as a matter of personal and cultural taste, but a set of practices governed by inherited biological needs, nutrition experts pushed the notion that certain foods were more adapted than others to white Americans. Elmer McCollum, the famed biochemist known for his role in the discovery of vitamins and whom the Supreme Court cites in one of the *Carolene Products* footnotes, was an overt racist. Since the early 1920s, he had become akin a professional expert witness on behalf of the dairy lobby, testifying before legislative committees and courts. His "scientific" apology of milk was premised on the supposed superiority of (white) milk-drinking cultures. McCollum "asserted that milk drinkers had always enjoyed cultural and physical superiority over their leaf-chewing cousins."[120]

This racialized conception of milk was not only widespread among researchers, but it also motivated some of the state and national legislators at the forefront of milk regulation. Representative Edward Voigt of Wisconsin, "America's Dairyland," authored the 1923 Filled Milk Act, which banned milk products compounded with any fat or oil other than milk fat. Voigt was an admirer of McCollum and shared his racism.[121] During the floor debates, Voigt declared:

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[119] *See* Sahi, *supra* note 110, at 17.

[120] *See* Miller, *supra* note 111 at 421.

[121] *See, e.g.*, 62 Cong. Rec. 7581 (remarks of Rep. Voigt: "Doctor McCollum . . . who is probably the greatest expert on nutrition in the world . . . [has shown that t]he vitamins which have been so necessary for the growth of infants and children and for the grown body as well are absent from this filled milk.")

> *The superiority of the white race is due at least to some extent to the fact that it is a milk-consuming race. Natives of the tropical countries who use the products of the coconut are stunted in body and mind. I believe one reason why they are inferior is that they do not use the milk of cows or other animals. We owe a great deal to the dairy cow, a great deal more than the general public gives her credit for. We can not afford to injure the dairy industry: if we do we injure the Nation.*[122]

Other representatives subscribed to this opinion. Representative Haugen of Iowa, a Wisconsin native who served as the chairman to the Agriculture Committee, made a point of reading to the House floor excerpts from the transcript of McCollum's committee hearings. According to McCollum's testimony, the "finest people" are found in "those places where milk and dairy products form one of the prominent, the most prominent constituent of the diet," such as "in Europe, in America, and on the plains of Asia."[123] In contrast, McCollum proclaimed, "[l]ook at the Chinaman who does your laundry and see what he is. Almost without exception he is an undersized individual. He is poorly developed physically."[124]

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[122] 62 Cong. Rec. 7583.

[123] 62 Cong. Rec. 7587.

[124] 62 Cong. Rec. 7587. These racist milk discourses found a practical translation in East and South East Asia, especially in China and Japan, where the American influence was key in establishing a dairy industry and transforming nonmilking cultures into some of the biggest dairy consumers. On China, see Françoise Sabban, *The Taste for Milk in Modern China (1865-1937)*, in FOOD CONSUMPTION IN GLOBAL PERSPECTIVE 182 (Jakob A. Klein & Anne Murcott, eds, 2014) (highlighting the role of American nutritional science and American Christian and missionary circles in developing dairy farming in China in the 1920s). On Japan, see Moen Darrell Gene, *The Postwar Japanese Agricultural Debacle*, 31 HITOTSUBASHI J. SOCIAL STUD. 29(1999); Paul Hansen, *Hokkaido's Frontiers: Blurred Embodiments, Shared Affects and the Evolution of Dairy Farming's Animal-Human-Machine*, 34 CRITIQUE OF ANTHROPOLOGY 48 (2014) (describing the pressure applied by the U.S. during the its military occupation

Long before the discovery of lactase's unequal distribution in humans' small intestine, the Court's reliance on this legislative history indicates that milk had been a substance of choice to govern the biology of a population as a scientific racist project. In spite of, or perhaps in part because of, its racialized construction and its aura of constitutional legitimacy, throughout the twentieth century, milk acquired a prominent place in official dietary recommendations. More than any other organization or entity, the U.S. Department of Agriculture (U.S.D.A.) shaped the way Americans think about a healthy diet. Its guidelines, which are widely used in nutrition, health, and education settings, in the media, and in the food industry, have continuously afforded milk products a prominent position. They have constituted their own food group since the 1940s.[125] The food pyramid included a separate category for dairy products, prescribing two to three servings per day. The new design, MyPlate devotes a circle to dairy products, symbolizing the glass of milk accompanying the American meal, with recommended daily amounts varying from two to three cups depending on people's age. A welcome evolution of the MyPlate guidelines is to suggest that "[f]or those who are lactose intolerant" soymilk counts as a "dairy" product. At the same time, the guidelines still recommend that people who do not digest milk nonetheless consume milk products, albeit in "smaller portions" or in "[l]actose-free and lower-lactose" form.[126]

The constitutional and governmental promotion of milk has negative disparate effects upon certain segments of the American

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for Japan to purchase its food surpluses and its role in initiating a nationwide milk program in schools).

125 *See* Susan Welsh, *Atwater to the Present: Evolution of Nutrition Education*, 124 J. NUTRITION 1799S, 1800S (1994).

126 *See* the U.S.D.A. document titled "What Foods Are Included in the Dairy Group?", *available at* http://www.choosemyplate.gov/food-groups/dairy.html.

population, in particular racial and ethnic minorities more likely to be lactase impersistent. Not only do these groups not benefit from the legal framework and public monies fostering milk promotion, but also their health and well-being are adversely affected. Some of the most commonly produced foods in the fast food industry are laden with dairy products,[127] children are typically given milk at public schools, and underprivileged families are often given milk products as part of their food aid package. As a result, low income African Americans and Latinx who live in urban centers dominated by fast food restaurants and who rely in part on government-funded program to meet their nutritional needs are disproportionately harmed by milk's favored position. As Andrea Freeman has shown, the omnipresence of dairy products in American society is constitutive of "food oppression," which she defines as "institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group."[128] Individuals who already experience multiple levels of structural subordination are also those most negatively affected by more than a century of bovine jurisprudence.[129]

In India, it is the protected status of cows, rather than milk, which has had adverse consequences on already marginalized groups.

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[127] *See* Mathew, *supra* note 108, at 170 (pointing out that lactose is "hidden" in many processes foods and drinks such as bread, cake mixes, processed meats, breakfast drinks, sauces, as well as slimming products, given that it is used as a sweetener and browning agent)

[128] *See* Freeman, *supra* note 114 at 1253.

[129] Historically, the dairy industry has also relied on the exploitation of minority farm workers, with an ethnic shift from black (including African American and Caribbean) to Latino workers in the late the twentieth century. *See* MARGARET GRAY, LABOR AND THE LOCAVORE. THE MAKING OF A COMPREHENSIVE FOOD ETHIC (20014) (exposing the exploitative labor practices of Hudson Valley's small dairy farms which typically employ undocumented Latino immigrants.)

B. The Ambivalent Politics of the Sacred Cow in India

In India, the cultural and legal status of cows has had more ambivalent effects than that of milk in the United States, alternatively used to contest or reinforce existing social hierarchies. The battle for cow protection was waged as an effort to assert a pan-Hindu identity and political agenda against the British colonizer, but also against minority religious groups and non-dominant castes.

1. The Anti-Colonial Cow

In the mid- to late nineteenth century, the cow was a symbol for "Mother India" as a "life giving nation."[130] Cow worship became a rallying-cry against the British colonists who were portrayed as the enemy of the cow and hence the Indian people. The great mutiny of 1857, which nationalists see as their first war of independence, started because of a rumor according to which British soldiers were greasing their new riffles' cartridges in a compound of pig and cow's fat.[131] The *sepoys*, the Indian soldiers serving the British, were commonly tasked to bite off the ends of the cartridges. This would have meant oral contact with a mixture of animal fats—an abomination to both the Muslims and the Hindus.[132]

The so-called cow protection movement, which aimed at curbing or even eliminating the slaughter of cows, developed in the

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[130] WILLIAM GOULD, HINDU NATIONALISM AND THE LANGUAGE OF POLITICS IN LATE COLONIAL INDIA 78 (2004).

[131] *See, e.g.*, GEORGE FORREST, 3 A HISTORY OF THE INDIAN MUTINY, 1857-58 xxxii (1912).

[132] During those years, these two groups, labeled as such by the colonial administration, were far from constituting homogenous units. Due the British administration's desire to identify the constituent peoples in Indian society, a new process of forging group identities began, relying in part on religious symbols.

1880s in urban northern India, later spreading to rural surroundings.[133] Through the sacred cow, "mobilizing and ideological connections were forged between the city and the countryside."[134] The sacred cow became a unifying idiom among Hindus to overcome fragmentation and raise the new consciousness that they were members of an identifiable community.[135] Similar to the eugenic discourse surrounding milk in the United States, Indian cow protection integrated a nutritional ideology. The reasoning was that protecting cows would result in more milk, which in turn would increase dairy consumption, promoting bigger and stronger Hindu men.[136]

The targets of cow protection action included the beef-eating British, but cow protectionists also used the unifying symbol to exclude autochthonous groups. Muslims in particular were targets of sectarian violence, with propagandists claiming that cows were mistreated in their hands. In 1893, the first of a long series of "cow protection riots" arose in the Azamgargh District in the eastern United Provinces, when groups of Hindus attempted to prevent Muslims from sacrificing animals in celebration of Bakr-id.[137] Concerned with the threat to their authority represented by the campaign and the social unrest it generated, the British suppressed much of the movement's organizational and communications

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133 *See* Adcock, *supra* note 42 at 298 (situating the birth of the movement in the foundation of Arya Samaj in 1881).

134 Sandria B. Freitag, *Sacred Symbol as Mobilizing Ideology: The North Indian Search for a "Hindu" community*, 22 COMP. STUD. IN SOC'Y & HIST. 597, 599 (1980).

135 On this process, see Freitag, *supra* note 134 at 599.

136 Charu Gupta, *The Icon of Mother in Late Colonial North India: "Bharat Mata," "Matri Bhasha" and "Gau Mata,"* 36 ECON. & POL. WEEKLY 4291, 4296 (2001) (arguing that cows and their milk were connected to building and providing "physical power" a strong nation).

137 *See* Freitag, *supra* note 134 at 617-8.

network.[138] The colonial rule was temporarily preserved, but the cow protection movement left an enduring legacy in Hindu nationalism.

A few decades later, Gandhi recognized the sanctity of the cow as central to Hindu faith and used it as a political tool, emphasizing both the economic and spiritual benefits of the cow.[139] Gandhi is remembered as passionately committed to the philosophy of *ahimsa* (non-violence) and what he saw as its dietary translation, vegetarianism. He expressed a lifelong interest in diet and dietary reform, frequently experimenting upon himself.[140] The young Gandhi had consumed meat, a concession to the dominant carnophilic and carnivorous ideology according to which Indian men were effeminate compared to the British because they abstained from meat.[141] The articulation of meat, especially beef, as a masculine food necessary to sustain virile and healthy bodies was a common trope not only of

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138 *See* Sandria B. Freitag, *"Natural Leaders," Administrators and Social Control: Communal Riots in the United Provinces. 1870-1925*, 1 SOUTH ASIA: J. SOUTH ASIAN STUD. 27 (1978).

139 *See* Subrata Kumar Mitra, *Desecularising the State: Religion and Politics in India after Independence*, COMP. STUD. IN SOC'Y & HIST. 755, 771 (1991) (reporting that Gandhi supported the national commitment to cattle preservation and had declared that "cow protection is more important than swaraj [self-rule].") At the same time, Gandhi condemned the use of sacred cow as an anti-Muslim prop. *See, e.g.*, Mahatma K. Gandhi, *Presidential Address at the Cow-protection Conference*, YOUNG INDIA 29-1- 1925.

140 *See* Parama Roy, *Meat-Eating, Masculinity and Renunciation in India: A Gandhian Grammar of Diet*, 14 GENDER & HIST. 62 (2002) (describing Gandhi's meat eating period, his turn to vegetarianism, his fasting, his insistence on eating few, cheap foods, and nothing after nightfall, his removal of certain foods from his diet such as spices, salt, cow's milk, or lentils).

141 *See* John Rosselli, *The Self-Image of Effeteness: Physical Education and Nationalism in Nineteenth-Century Bengal*, 86 PAST & PRESENT 124-4 (1980). There is a long history in the Global North of associating vegetarianism with inferior bodies and civilizations. German philosopher Ludwig Feueurbach's famous phrase "Man is what he eats" was in its original context immediately followed by a denunciation of plant-based diets, the next sentence stating "A man who enjoys only a vegetable diet is only a vegetating being, incapable of action." *See* Melvin Cherno, *Feuerbach's "Man Is What He Eats": A Rectification*, 24 J. HIST. OF IDEAS 397, 401 (1963).

British colonial discourse but also of mainstream American politics.[142] Meat, red meat in particular, has long been associated with power, status, and patriarchy in the United States and elsewhere.[143]

The vegetarian movement as it emerged in nineteenth-century Europe and North America was a form of social critique. As Leela Gandhi has shown, since the mid-nineteenth century, the movement was associated with dissident politics.[144] This subversive force may have had to do with the fact that reconceptualizing the human-animal divide and noticing the similar forms of oppression of animals and humans opened up new anticolonial possibilities. During his student years in London, Gandhi encountered *fin de siècle* animal welfare groups, arguably prompting his conversion to vegetarianism and marking the beginning of his political involvement.[145] Becoming vegetarian was in and of itself a political act with profound anti-colonialist implications. Gandhi saw meat avoidance as a mode of resistance against Western imperialism, when he had earlier advocated in favor of meat eating as a means of strengthening Indians in their fight against the British colonizer.

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142 *See, e.g.*, Samuel Gompers & Herman Gutstadt, Some Reasons for Chinese Exclusion: Meat Versus Rice; American Manhood Versus Asiatic Coolieism—Which Shall Survive? at 24 The American Federation of Labor Washington DC, GPO (1902) Submitted to the U.S. Senate as document No. 137 (an American Federation of Labor pamphlet written to support the renewal of the 1882 Chinese Exclusion Act).

143 *See generally* CAROL ADAMS, THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY (1990).

144 *See* LEELA GANDHI, AFFECTIVE COMMUNITIES. ANTICOLONIAL THOUGHT, FIN-DE-SIÈCLE RADICALISM, AND THE POLITICS OF FRIENDSHIP 67-114 (2006).

145 *See* TRISTAM STUART, THE BLOODLESS REVOLUTION: RADICAL VEGETARIANS AND THE DISCOVERY OF INDIA 424 (2006) (arguing that "Western vegetarianism had been heavily influenced by Indian culture for more than 300 years; in Gandhi's hands it was re-exported to India as a core element in the great national freedom struggle.").

The political significance of the cow endured after Gandhi's death. In independent India, the dominant political party, Congress, made use of a bovine iconography. Under Nehru's leadership, the party adopted the symbol of a pair of bullocks carrying a yoke. When Nehru's daughter, Indira Gandhi, was expelled from the party in 1969 and set out to form her own party, the New Congress, she chose the image of a cow and suckling calf as a new emblem.[146] As a political tool, the cow may have served to end the British Raj and to structure post-independence politics. But as the following section argues, in contributing to the formation of a dominant-caste pan-Hindu identity, the cow also functioned as an exclusionary mechanism against those of non-dominant castes and religious minorities.

2. The Dominant Caste Pan-Hindu Cow

Legal scholar and activist Shraddha Chigateri has demonstrated that the constitutional elision of the religious dimension of cows "masks the prioritizing of dominant-caste Hindu identity."[147] The groups that contravene the taboo on beef-eating in India are minorities which historically have been the victims of discrimination: Dalits[148] and "Other Backward Castes,"[149] Christians, Adivasi communities,[150] and Muslims, who all continue to be held as

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146 VIJAY SANGHVI, THE CONGRESS, INDIRA TO SONIA GANDHI 77 (2006).

147 Chigateri, *supra* note 7 at 138.

148 Gaining currency in the 1990s, the term "Dalit" (meaning "crushed underfoot," "broken into pieces") is the contemporary version of the word "untouchable," used as form of identity assertion. *See* Sagarika Ghose, *The Dalit in India*, 70 SOCIAL RESEARCH 83, 85-6 (2003).

149 "Other Backward Castes" (OCBs) is a collective expression used by the Indian government to classify disadvantaged classes for the purposes of affirmative action policies.

150 "Adivasi" is an umbrella term for several aboriginal South Asian groups making up 8.6% of India's population according to the 2011 census.

low standing groups and to suffer various forms of violence. In every culture, "food is a focus of much taxonomic and moral thought."[151] This is particularly true in India, where eating practices are explicitly interwoven with caste and sect affiliations. Social hierarchies intersect with food in complex ways, but vegetarianism remains a sign of superiority and privilege.[152] As Chigateri points out, there is "an order of superiority of food conception—which goes down from vegetarianism, meat-eating (no beef) to beef-eating."[153]

The caste system maintained its hold over the prevailing social structure in part through food and eating practices, particularly those pertaining to beef. The structural distance between castes is defined in terms of pollution and purity, with dominant castes refraining from certain contact with the oppressed, including abstaining from eating food cooked by them. Though beef eating was part of Hindus' food habits in the Vedic times,[154] it has long signaled low status and pollution. The "purity" of dominant-caste Hindu is intimately connected to the "purity" of their vegetarian foodways, in a positive feedback loop. According to Ambedkar (1891-1956), the framer of the Indian Constitution who launched the modern Dalit movement, the principal origin of "untouchability,"[155] the practice of humiliating and ostracizing from generation to generation, is food hierarchy. In his famed book-manifesto *The Untouchables*, he dedicated an entire chapter to the question, titled "Beef Eating as the Root of

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[151] Arjun Appadurai, *Gastro-Politics in Hindu South Asia*, 8 AM. ETHNOLOGIST 494, 195 (1981).

[152] Caroline Osella, *Introduction*, 31 SOUTH ASIA J. SOUTH ASIAN STUD. 1, 4, 7 (2008).

[153] Shraddha Chigateri, *'Glory to the Cow': Cultural Difference and Social Justice in the Food Hierarchy in India*, 31 SOUTH ASIA: J. SOUTH ASIAN STUD. 10, 11 (2008).

[154] Mahadev Chakravarti, *Beef-Eating in Ancient India*, 7 SOCIAL SCIENTIST 51 (1979).

[155] *See* Simon Charsley, *"Untouchable": What is in a Name?*, 2 J. ROYAL ANTHROPOLOGICAL INSTITUTE 1 (2001).

Untouchability,"[156] noting that there is no community that is really an untouchable community which has not something to do with the dead cow.

Historically, marginalized groups have tended to be flesh-eaters in part because of their occupational and social segregation. The caste hierarchy assigns them perennially "dirty" occupations, including tasks involving contact with dead cattle such as butchering and skinning cattle, removing carcasses and waste, itinerant packing, working leather, bones, and tanning.[157] Condemned to dirtying their hands in the dead cattle business for upper castes, beef is often one of the most easily accessible foods. In part because it is taboo, it is also cheap and an easy source of nutrition for the underprivileged.[158] In a vicious circle, those at the bottom rungs of society are ostracized partly because they consume foods, which they are socially programmed to eat.

Despite the 1949 Constitution's commitment a casteless, secular, and egalitarian nation state,[159] the sacred cow principle has been used as a political tool to oppress two communities in particular: Muslims and Dalits. The political association of vegetarianism and non-violence often goes hand in hand with the

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[156] BHIMRAO RAMJI AMBEDKAR, THE UNTOUCHABLES: WHO WERE THEY AND WHY THEY BECAME UNTOUCHABLES?, Part IV, Chapter X.

[157] *See* OLIVER MENDELSOHN & MARIKA VICZIANY, THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA 7 (2000).

[158] *See* Ian Copland, *What to do about Cows? Princely versus British Approaches to a South Asian Dilemma*, 68 BULL. SOAS 59 (2005) (noting that beef has traditionally been cheaper than mutton or goat).

[159] The Constitution's commitment to secularism has been discussed above. The Constitution also contains an anti-discrimination in its Article 15, which broadly prohibits "discrimination on grounds of religion, race, caste, sex or place of birth." Article 17 attempts to attack the root of the caste system by abolishing untouchability ("Untouchability is abolished and its practice in any form is forbidden.")

claim that minority groups, in particular Muslims, are violent because they eat beef.[160] This is ironic given the fact that communal violence has long been associated with instances, real or imaginary, of cow slaughter and beef consumption in violation of Hindu principles.[161] By the start of the nineteenth century, and perhaps even before, communal violence between Hindus and Muslims in particular had become commonplace, with cow-related riots breaking out in multiple northern Indian districts in the late 1880s.[162] The most recent illustration was the killing of a Muslim man in September of 2015 over rumors that he had consumed beef.[163] Similar episodes have been reported concerning Dalits, including the 2002 infamous lynching of five Dalit men who were found skinning a dead cow on the roadside.[164]

A longstanding strategy for vilified castes and minority groups to upgrade their social standing has been to adopt dominant-caste mores, such as abjuring beef and other anathematic diets by, for example, converting to vegetarianism or joining cow protection movements.[165] At the same time, a subaltern perspective giving voice

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160 *See* Osella, *supra* note 152.

161 *See, e.g.*, Gyanendra Pandey, *Rallying Around the Cow: Sectarian Strife in the Bhojpuri Region, c.1888 –1917*, in 2 SUBALTERN STUDIES 60 (Ranajit Guha, ed., 1983); Anand Yang, *Sacred Symbol and Sacred Space in Rural India: Community Mobilization in the "Anti-Cow Killing" Riot of 1893*, 22 COMP. STUD. SOC'Y & HIST. 576 (1980).

162 *See* Copland, *supra* note 158 at 60.

163 *See* Eugene Volokh, *Man murdered by mob in India for allegedly eating forbidden meat,* WASH. POST (Sept. 30, 2015), *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/30/a-mob-in-india-just-dragged-a-man-from-his-home-and-beat-him-to-death-for-eating-beef/.

164 *See* Surinder S. Jodhka & Murli Dhar, *Cow, Caste and Communal Politics: Dalit Killings in Jhajjar*, 38 ECON. & POL. WEEKLY 174 (Jan. 18-24, 2003) (pointing out the islamophobic bias in the incident as some of the perpetrators joined the killing on the mistaken assumption that the victims were Muslim).

165 *See* Adcock, *supra* note 42 at 298 (pointing out that as early as the 1880s

to oppressed groups themselves reveals the importance of meat eating or meat avoidance in forging positive identities, rather than simply reactive choices dictated by elites. Thus some Adivasi people in southern Gujarat may turn to vegetarianism, not out of a desire to enhance their social standing, but as "powerful subaltern way of being," to become full members of a Hindu religious sect.[166] Conversely, in other groups, such as Christians, beef eating can be understood as a form of resistance to Hindu oppression.[167] For them, the goal is not to associate with the dominant-caste Hindu way of life, but with what is perceived as a Western and modern practice.

The religious and cultural dimensions inherent in constitutional cow protection, therefore, have contributed to reinforce social and religious hierarchies to the detriment of the most vulnerable segments of the population. Has the increased availability of milk resulting from the constitutionalization of cows compensated, at least in part, for these inequities? Andrea Wiley has shown that the boom in dairy production benefits urban middle classes, not the poor and the rural.[168] Though the "white revolution" was aimed at improving the economic livelihood of the rural poor as much as expanding milk production for the benefit of all consumers, some farmers reportedly deprived their own malnourished children of cow's milk to sell it to dairy cooperatives.[169] Yet the cooperatives

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proponents of cow protection included groups such as the Jats of eastern Punjab and the Ahirs of the United Provinces).

166 *See* Amit Desai, *Subaltern Vegetarianism: Witchcraft, Embodiment and Sociality in Central India*, 31 SOUTH ASIA: J. SOUTH ASIAN STUD. 96, 100 (2008) (critiquing from a subaltern perspective the assumption that non-dominant castes and Adivasis turn to vegetarianism out of a desire to enhance their social standing).

167 *See* James Staples, "*Go on, just try some!": Meat and Meaning-Making among South Indian Christians*, 31 SOUTH ASIA: J. SOUTH ASIAN STUD. 36 (2008).

168 WILEY, *supra* note 1 at 77.

169 *See* Gaard, *supra* note 97 at 606.

received more milk than they could sell, leading them to convert surplus milk into marketable products such as infant formula.[170] Amul, the Gujarat-based dairy cooperative, became the largest baby-food producer in India, disrupting traditional breastfeeding practices and lobbying extensively against bans on infant food advertisement recommended by the World Health Organization's Code against advertising baby foods. There is ample research today documenting the superiority of human milk over animal-milk based formula to feed infants, particularly in areas where access to clean water is difficult.[171] But government-sponsored, industrial animal milk production and marketing goes hand in hand with infant formula production and marketing. Much like in the United States, the supposed beneficiaries of milk's prominent status, humans, in particular baby humans, are actually harmed by it.

It appears that the constitutionalization of the prohibition on cow slaughter not only failed to significantly advance the cause of cows or animal welfare generally, but it also encouraged a culture of subordination and stigmatization of marginalized human groups.

Conclusion

This Article has outlined the various elements, which contributed to the development of a constitutional law of cows and milk in the United States and in India. While each case study is

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[170] *See generally* CLAUDE ALVARES, ED., ANOTHER REVOLUTION FAILS: AN INVESTIGATION INTO HOW AND WHY INDIA'S OPERATION FLOOD PROJECT, TOUTED AS THE WORLD'S LARGEST DAIRY DEVELOPMENT PROGRAMME, FUNDED BY EEC, WENT OFF THE RAILS (1985) (critiquing the various outcomes of Operation Flood).

[171] *See, e.g.*, Patrice L. Engle, *Infant Feeding Styles: Barriers and Opportunities for Good Nutrition in India*, 60 NUTRITION REV. S109 (2002); Arun Gupta, et al., *Breastfeeding and complementary feeding as a public health intervention for child survival in India*, 77 INDIAN J. PEDIATRICS 413 (2010).

rooted in its culture and history, taken together, the two constitutional frameworks reveal surprisingly similar attitudes toward milk and cows. Both legal histories show how deeply a political issue milk drinking and beef eating are and have been in past societies. They also expose constitutional law's instrumental conception of non-human animals as assets with positive economic values, justifying their legal status as objects of rights vested in humans. Cows are particularly illustrative of this subordination as they represent a major economic resource, being a source of labor, land fertilization, milk, meat, and leather.

In 1954 Gandhi wrote,

> *The cow protection ideal set up by Hinduism is essentially different from and transcends the dairy ideal of the West. The latter is based on economic values, the former while duly recognizing the economic aspect of the case, lays stress on the spiritual aspect viz. the idea of penance and self-sacrifice for the relief of martyred innocence which it embodies.*[172]

This Article has demonstrated that this distinction is overstated as economic considerations have been at the forefront of cow protectionism in India as well as milk's legal status in the United States. While religion clearly underlies the Indian constitutional discourse with respect to cows and other "living creatures," it is absent from the legal and policy debate surrounding milk in the United States. Yet the cow has been afforded some "spiritual" symbolism, to use Gandhi's language, in American culture too. As Andrea Wiley reminds us, in contemporary U.S. culture images of "cow care and devotion" are ubiquitous—from milk cartons

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172 MAHATMA K. GANDHI, HOW TO SERVE THE COW 85 (1954).

depicting happy cows grazing in idyllic pastures to children's books where cows are represented as loving moms nursing their own.[173] India and the United States, therefore, may be even more analogous than expected in their approach to the constitutional status of cows and milk.

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[173] WILEY, *supra* note 1 at 103. *See also* William J. Moore, *The Milk Mystery*, 56 A.B.A. J. 357 (1970) (comparing the Hindu and American enshrinement of the cow and pointing out that "[m]ilk has been described in our country as "nature's most perfect food" and as such has been treated more as a holy oil than a food commodity.").

Right to Internet Access - A Constitutional Argument

Kartik Chawla[*]

Abstract

It all started with the printing press, which was a revolutionary technological innovation for its time, especially where the freedoms of speech, expression and information were concerned. So revolutionary in fact that the concept of the 'freedom of press' was introduced to ensure that the right of individuals to exercise their right to speech and expression through the medium of the press was preserved. But the press was only the first of many – soon enough, the very concepts of 'communication' and 'speech' were entirely revolutionised. The latest of these revolutions has been ushered in by the Internet. But the effect of the internet is not restricted to speech alone – it is a technology that has changed the very face of human society. It has become such a crucial part of our lives, in fact, that it has arguably now become a fundamental aspect of it.

Thus, this paper attempts to encapsulate this social evolution within Constitutional jurisprudence to argue for a right to internet access. It first conducts an analysis of the very articulation of the Right to Internet Access and its multiple facets, and then moves on to a comparative analysis of the evolution of the various types of Right to Internet Access across the world, considering the multiple articulations of the same and picking the parts that are the most suitable for Indian jurisprudence. It then places this discussion in the context of Indian Constitutional jurisprudence, focusing on the negative-right and freedom-of-speech based articulation of the Right

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to Internet Access. It finally puts forth an argument for the recognition of a Right to Internet Access in such a form within our existing Constitutional jurisprudence – a recognition that we desperately need.

Introduction

At one point of time, the printing press was one of the greatest technological advancements in the history of humanity, at least as far as the freedoms of speech, expression and information were concerned. The printing press gained so much importance, in fact, that the concept of the 'freedom of press' was introduced to ensure that the right of individuals to exercise their right to speech and expression through the medium of the press was not unduly restricted. But the press was only the first in a series of technological advancements that would thereafter revolutionise the entire concept of 'speech and expression', of 'communication', as human society understood it. The radio followed the press, and the television the radio. Soon, even these mediums of communications were protected under the right to freedom of expression.This 'right to freedom of expression' is a multifaceted and pervasive concept, which evolves along with the evolution of the concept of 'communication' within human society. And the next step in its evolution is the Internet.

The Right to Internet Access is gradually gaining increasing acceptance within the international community and within legal jurisprudence, with various countries adopting it outright. This paper considers the true, practical meaning of this right. On the basis of this analysis, it attempts to argue that Indian Constitutional jurisprudence, as it exists right now, directly provides for such a right, the same conceptual right which has been repeatedly violated over

the past year in India through various means, ranging from criminal sanctions for comments made online, continued privacy violations on the internet, to preventive detention for digital offences.[1] The time is ripe for it to be given the recognition it deserves, and for free speech online to be given the protection it deserves.

This paper is divided into five parts. The first part explains and analyses the concept of a right to internet access and its various dimensions. The second part traces the history of the acceptance of the right to internet access internationally, and explains the reasoning employed by the various countries which recognised this right. The third part is an analysis of existing cases from the Indian Supreme Court on the concept of the right to freedom of speech, which puzzle out the objects and purpose of this right, in the context of the Right to Internet Access. The fourth part of the paper is a short note on the positive dimension of this right, which has not been discussed in detail, as the focus remains on the negative dimension of the right. The fifth and final part of the paper is the conclusion of the paper, which combines the understanding of the right to internet access that has been created in the first two parts with the Indian jurisprudence as explained in the third part, and argues that the Indian jurisprudence implicitly already provides for the right to internet access, and that all the ingredients for its explicit recognition are already in existence.

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[1] Geetha Hariharan, *No more 66A!*, CIS-INDIA (Mar. 24, 2015), http://cis-india.org/internet-governance/blog/no-more-66a; Prachi Arya & Kartik Chawla, *A Study of the Privacy Policies of Indian Service Providers and the 43A Rules*, CIS-INDIA (Jan. 12, 2015), http://cis-india.org/internet-governance/blog/a-study-of-the-privacy-policies-of-indian-service-providers-and-the-43a-rules; Gautam Bhatia, *Karnataka's Amendments to the Goonda Act Violate Article 19(1)(a)*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Aug. 5, 2014), https://indconlawphil.wordpress.com/2014/08/05/karnatakas-amendments-to-the-goonda-act-violate-article-191a/.

Notably, the arguments made with regard to the Indian jurisprudence are limited to the negative aspect of the right to internet access, as a medium for the exercise of the right to free speech, and they do not discuss the positive aspect of the same in much detail. At the same time, this paper includes a short note on this issue as well, with examples of the Indian government's attempts to bridge the digital divide. This paper also does not deal with the argument that the right to access the Internet is part of the Freedom of Association, as a Freedom to Connect, and nor does it deal with the role played by the Internet Service Providers ('ISPs') in this context. These points are admittedly quite important and worth detailed consideration but in order to do its topic justice, this paper focuses on establishing the right to Internet access within the dimension of the right to free speech.

Part I. What is the 'Right to Internet Access'? The positive and negative paradigms.

The concept of a Right to Internet Access has two recognised dimensions: a) the right to access the internet without any restrictions, except in the limited cases wherein such restrictions are allowed by law; and b) the availability of the infrastructure and technologies that would reasonably allow all citizens to connect to the internet.[2]

These issues are two sides of the same coin, but they differ on very crucial points. While the first is a *negative* right,[3] obligating the

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2 Special Rapporteur On The Promotion And Protection Of The Right To Freedom Of Opinion And Expression, Human Rights Council, U.N. Doc. A/HRC/17/27, ¶3 (May 16, 2011) (by Frank La Rue).

3 Jonathon W. Penney, *Internet Access Rights: A Brief History and Intellectual Origins*, 38 (1) WILLIAM MITCHELL LAW REVIEW 9, 15 (2011).

State to not interfere with the right of a citizen to access the internet in any way he or she pleases except in the most extreme of cases, the latter is a *positive* right,[4] obligating the State to take all measures necessary and practical in order to enable each and every one of its citizens to access the internet, within reasonable bounds. Furthermore, while the former is a form of a civil and political right, the latter is a socioeconomic right.

A. **The Negative Right**

As mentioned earlier, the negative dimension of the right to internet access is simply an obligation on the State to allow its citizens to access any and all content on the internet, without unreasonable, undue or illegal restrictions. It is essentially a right *against* unreasonable blocking of internet-based resources.This dimension of the right is based on the existing jurisprudence on the interlinked rights of Freedom of Speech, Opinion and Expression, of Information, of Press, the Right to Association, and so on. It is the logical evolution of the aforementioned liberties, brought about as a result of technological development, convergence, and a growing awareness of the potential of the internet medium.

To establish the same, we must necessarily look to the object and purpose of the freedom of speech and expression. Here, the Canadian case of *Irwin Toy Ltd. v. Quebec (Attorney General),*[5]one of the first and most important cases in Canada regarding freedom of speech, is quite illustrative. The parts of the judgement relevant here are the three values that were found to be underlying freedom of speech – respectively, the value of seeking and attaining truth; the value

4 *Id.*
5 (1989) 1 S.C.R. 927.

of participation in social and political decision-making; and individual self-fulfilment and human flourishing.

Indian jurisprudence has tended to agree with the view taken in *Irwin Toy Ltd. v. Quebec (Attorney General)* – in fact, similar underlying principles of the freedom of speech have been noted in the case of *Indian Express Newspapers (Bombay) (P) Ltd. &Ors. v. Union of India & Ors.*,[6] both of them drawing upon the thesis of the instrumentalist justifications of free speech given by John Stuart Mill in his essay, '*On Liberty*',[7] and all of these purposes directly tie in with the internet.

1. Individual Content Creators

Not only does the internet as a medium directly support the achievement of all the values of the right to free speech, it is increasingly becoming a *necessary* means for it, just as the press did in the 20th century. It has rapidly become one of the fundamental tools for the exercise of a citizen's right to freedom of speech, a tool of political discussion and debate[8] and for gaining information and knowledge that would otherwise be unavailable. The internet has made each individual an active publisher of information, an '*individual content creator*'.[9] It, along with other technological advancements, has taken the power that rested earlier in the hands of television and radio broadcast networks and newspapers, and given it directly to the netizens. This new form of freedom holds immense practical promise, as a dimension of individual freedom, and a platform for better democratic participation, a medium to foster a more critical

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6 A.I.R. 1986 SC 515.

7 UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT, 32 (2011).

8 Ahmet Yildirim v. Turkey, App. No. 3111/10, ECtHR (December 18, 2012).

9 YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 1-5 (2006).

and self-reflective culture, and in an increasingly information-dependent global economy, as a mechanism to achieve improvements in human development everywhere. In short, it holds immense promise to achieve the core objectives of the freedom of expression.[10]

This is because the same content that earlier required huge amounts of capital and an established infrastructure is now available to all citizens at a fraction of the cost and a minimal infrastructure requirement. For instance, artists, authors, and journalists alike can now simply create their content and upload it on the internet, getting the same reach as any established record studio, publishing house, newspaper, or news channel. The internet even allows people to exercise their right to information, against governments and political parties and corporations alike.[11] The internet gives the people a voice to an extent unlike that provided by any technology or medium that preceded it.

2. Convergence

This 'democratisation' of internet is even more radical because of a phenomenon that is now termed 'convergence',[12] which refers to a confluence between the various media of communication, such as text (newspapers), simple audio (radio and telephony), and audio-video (television) within one medium – the internet. Thus, not only does the internet allow its users to create content at a level that was unimaginable even two decades ago, it is gradually bringing all

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10 *Id*, at 2.

11 For instance, *see YourAdhikar*, available at: https://youradhikar.com/, an online tool to help citizens file RTIs.

12 Milton L. Mueller, *Digital Convergence and its Consequences*, THE PUBLIC 6(3) 12 (1999).

the existing media of communication together into one, singular medium. Thus, the importance of the right to internet access can really not be overstated. Not only is it a crucial right in and of itself, it is a right that is extremely crucial for the exercise of the enjoyment of the right to freedom of speech and expression. It is an enabling right, and its importance will only increase with the passage of time.

B. **The Positive Right**

Keeping in mind the above points, providing internet access to all the citizens of a country is still not 'cheap', and the cost of such a program increases exponentially when the country in question is as large and populous as India. But at the same time, there are some very important arguments to be made for the positive version of the right to internet access.

The most convincing of these arguments is based on the Right against Discrimination. Currently, internet access is for the most part a luxury enjoyed by the affluent. Affordable mobile internet seems to be changing that, but the fact remains that right now, internet access is a prerogative of the rich.[13]

This has resulted in a phenomenon dubbed the 'digital divide', which is defined as "*the gap between people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access at all*".[14]The digital divide also exists along wealth, gender, geographical and social lines within States, especially in India due to the low Internet penetration.[15] With wealth being one of the

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13 La Rue, *supra* note 2, at 17.

14 *Id.*

15 Chandra Gnanasambandam et al., *Online and Upcoming: The Internet's Impact on India*, MCKINSEY & COMPANY,6,available at: http://www.mckinsey.com/~/media/mckinsey%20offices/india/pdfs/online_

most significant factors in determining who can access Information Communication Technologies ('ICTs'), Internet access is likely to be concentrated among socioeconomic elites. In addition, people living in rural areas often face several obstacles to Internet access, such as lack of technological and infrastructural availability, slower Internet connection, and/or higher costs.[16]

Furthermore, even where Internet connectivity is available to all persons, disadvantaged groups, such as persons with disabilities and persons belonging to minority groups, often face barriers to accessing the Internet in a meaningful way that would be relevant and useful to them in their daily lives.[17]

Part II. 'Right to Internet Access' internationally

The 'Right to Internet Access' has been gaining increasing recognition on the international platform, as evidenced by the recognition of the *positive* and/or *negative* dimension of this right by various States, Courts, and UN bodies. At the same time, there are some forums which partially recognise the crucial role played by the internet in the exercise of the fundamental rights, even if they do not explicitly recognise a '*right to internet access*'. In order to understand the forms of and arguments for recognition of a right to internet access in a broad and practical manner, the recognition accorded to it by the various bodies has been analysed here.[18]

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and_upcoming_the_internets_impact_on_india.ashx (last accessed Aug. 30, 2015).

16 *Id.*

17 *Id.*

18 Paul De Hert & Dariusz Kloza, *Internet (Access) as a New Fundamental Right, Inflating the Current Rights Framework?*, 3 EUROPEAN J OF L & TECH 3, 3 (2012).

A. **International Recognition**

One of the most important documents regarding the right to internet access in all its dimensions and facets is the 2011 report of United Nations Special Rapporteur for Freedom of Speech and Expression Frank La Rue.[19] The Special Rapporteur's report was the first international document to make note of the right to internet access and examine the concept in detail.

The Special Rapporteur's report finds the basis for the right to internet access within i) the right to freedom of speech and expression, as enshrined within Article 19 of the Universal Declaration of Human Rights ('UDHR') and the International Covenant on Civil and Political Rights ('ICCPR'); and ii) in the right to 'seek, receive and impart information'. The arguments used by the Special Rapporteur follow the trend of a movement to recognise the '*right to communicate'*, an essentially *positive* right which has quite a history within the international sphere, though they aren't limited to the same.[20]

1. Right to Communicate

The original idea of a "*right to communicate*" was articulated in the international sphere in 1969 by the late U.N. official Jean d'Arcy, who believed the UDHR would one day recognize it. But the movement for its recognition did not gain momentum among international institutions like the UNESCO until much later. [21] UNESCO brought the idea of a "*right to communicate*" to the international stage in 1980, when its General Conference in Belgrade

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19 La Rue, *supra* note 2.
20 Penney, *supra* note 3, at 18.
21 *Id*, at 14.

passed a resolution recognizing it as a "*right of the public, of ethnic and social groups and of individuals to have access to information sources and to participate actively in the communication process*", with further recognition coming in subsequent resolutions in 1981 and 1983. [22] This culminated with a '*status report*' on the right prepared by UNESCO consultants in 1985.

However, international interest in the '*right to communicate*' began to falter during early 1990s, with UNESCO itself showing decreasing inclination to promote it in its subsequent meetings. Subsequent efforts of other international organizations and officials to take up the cause met with little success[23] and the movement to codify "right to communicate"internationally ultimately failed. The reasons for this are multifaceted, but an important role was played by the fact that the right, as it was then expressed and advocated, implied a kind of international positive obligation to provide a means for people to communicate, which neither the First nor the Third World States wanted to support or subsidize, due to a lack of will and resources.

2. Right to Freedom of Speech and Expression, and Right to Seek, Receive, and Impart Information

The Special Rapporteur's arguments regarding the right to internet access are fundamentally based on the "*right to seek, receive and impart information and ideas*", a right which is directly drawn from Article 19(2) of the ICCPR, on the right to freedom of speech and

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22 *Id.*

23 *Id*, at 15.

expression. The history and origins of the former are informed to a great extent by the latter, as a part of the 'Free Flow' paradigm.[24]

The first noted use of the language that indicates an implication of the Free Flow paradigm was Resolution 59(I), the 1946 U.N. Declaration on Freedom of Information. It cited the right to "*gather, transmit, and disseminate news anywhere and everywhere without fetters",* an early form of right to *"seek, receive, and impart information*" mentioned above, which called for an international conference on freedom of information. This language was later reiterated in the preamble to the first resolution issued by the same conference, convened in 1948, which recognized that "*freedom of information carries the right to gather, transmit, and disseminate*".[25] Furthermore, within the resolution itself, the right was expressed in a language which is even closer to that later found in both the UDHR and ICCPR, inextricably linking the right to freedom of expression and opinions with the right to freedom of information.

Thus, it is a culmination and confluence of the right to seek, receive and impart information, the right to freedom of expression, and the right to communicate that informs the understanding of the right to internet access as it is articulated by the Special Rapporteur.

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[24] *Id* (The language used here codified the broader international legal paradigm of the 'Free Flow of Information', on freedom of information and expression.Its origins in international law and politics go back to about the Second World War, when the movement to adopt international covenants and bills of rights gained momentum. The rights to "seek, receive and impart information," codified in the UDHR and ICCPR and re-invoked in the Report emerged from within this paradigm.)

[25] *Id.*

B. **State Recognition**

The following is a chronological list of countries where the right to internet access has been explicitly recognised, including the form and means of the recognition.

Estonia

The first country to acknowledge the right to internet access as a fundamental right was the small nation of Estonia. A Soviet-controlled state till 1990, Estonia started off with barely any telecommunications infrastructure and a strict control on information. Deeply affected by this, the independent Estonia chose to ensure the exact opposite. About a decade later, in February 2000, the Estonian *Riigikogu* (Parliament) enacted the new Telecommunications Act, adding Internet access to its universal service list, an acknowledgement of the *positive* dimension of the right to internet access.[26] Now, Estonia is one of the most extensively wired nations in the world, with a robust network infrastructure,[27]and easily accessible wireless coverage.[28] Education, voting, culture, taxation, and governance are some of the sectors that have now entirely moved online. The current networked nation makes a sharp contrast to its Soviet roots.

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[26] Telecommunications Act (Act No. 56/2000), § 5 (Est.).

[27] Felix Knoke, *Estonia: Tiger's Leap into the Wireless Network*, SPIEGEL ONLINE, available at: http://www.spiegel.de/netzwelt/web/0,1518,488083,00.html (as translated by Google Translate).

[28] In part, thanks to the *Tiigrihüpe* (Tiger Leap) Project; *see* Soumitra Dutta (INSEAD), *Estonia: A Sustainable Success in Networked Readiness?*, THE GLOBAL INFORMATION TECHNOLOGY REPORT, Chapter 2.1 (2006), available at http://www.weforum.org/pdf/gitr/2.1.pdf (last accessed on 19 Aug., 2014).

Greece

Following Estonia, Greece amended its Constitution in 2001,[29] introducing Article 5A, (2): "*All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State*".This is a recognition of both, the positive and negative dimensions of the right to internet access.

European Union

The European Union ('EU') in 2009 enacted Directive 2009/136/EC of the European Parliament and Council, which entered into force in 2011.The Directive amended, among others, the 2002 Directive(2002/22/EC) on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services.[30] The 2009 amendment replaced Article 4 of the earlier Directive, establishing a *positive* obligation on European States to ensure that all reasonable requests for network connection from a fixed location are met with a functional level of internet access.[31] Member States of the EU were obligated to transpose the Directive into their national law by 2011. At the same time, the European Commission ('EC') launched a public consultation in 2010 to analyse whether the universal service obligations should be extended to broadband access. Following this, the EC launched the Digital Agenda for Europe action plan, one of the objectives of which is to ensure that by 2020

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29 Syntagma, [CONSTITUTION], APR. 6, 2001 (Greece).

30 Directive 2009/136/EC Of The European Parliament And Of The Council of 25 November 2009 Amending Directive 2002/22/EC On Universal Service And Users' Rights Relating To Electronic Communications Networks And Services.

31 Directive 2002/22/EC of 7 March 2002 on the authorisation of electronic communications and services [2002] OJ L 108/21.

all Europeans '*can*', and not *must*, have access to much faster internet.[32]

France

The French example is of particular importance to the issue at hand, as the recognition of the right to internet access in France came not from the Government, but from the *Conseil Constitutionnel*('Constitutional Council'). The pronouncement came in a June 2009 decision of the Council regarding the *Haute Autorité pour la Diffusion des OEuvres et la Protection des Droits sur Internet,* more commonly known as the HADOPI law or the '*three strikes*' law, which aimed at ensuring copyright protection online. The Council declared in its judgement that '*given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions*',[33] the '*free communication of ideas and opinions'* enshrined in the Declaration of the Rights of Man and the Citizen, 1789, a doctrine essentially identical to the right to freedom of speech and expression, implied freedom to access such services. Notably, this upholds the *negative* dimension of the right to internet access, within the dimension of the existing civil liberties.[34] The Council's judgment rendered the HADOPI law toothless, essentially stating that no law could restrict the right to internet access without reason. The limits of the 'reasonable restriction' are illustrated by a following judgement which came only a few months later, in which an amended version of the HADOPI law was

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[32] The 2010 communication (COM (2010) 472) is available here: http://ec.europa.eu/information_society/activities/broadband/docs/bb_communication.pdf (last accessed 19 Aug., 2015).

[33] Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2009-580 DC, 10 June 2009, Rec. 107, ¶ 12 (Fr.)

[34] *Id*, ¶ 24-27.

approved by the Council,[35] as the amendment restricted the revocation of an offender's Internet access for a maximum period of one year but, imperatively, only after judicial review.

Finland

Finland followed suit in 2011, declaring broadband access a basic right through an amendment to Section 60C of its Communications Market Act,[36] including a functional Internet connection in its '*universal service*'.[37]Thus, from July 2010 onwards, Finnish telecom operators categorised as '*universal service providers*' must be able to provide every permanent residence and business office with access to a reasonably priced and high-quality connection with a minimum downstream rate of 1 Mbit/s. This is another acknowledgement of the *positive* dimension of the right to internet access, but it is slightly different from the legislations noted earlier as it increases the burden on a universal service provider with regard to the quality of the connection.

Costa Rica

Just like France, the recognition of the right to internet access came to Costa Rica through the *Sala Constitucional* (Constitutional Court) in a July 2010 judgment.[38]The Court's judgment came in a case filed against the government's delay in opening the telecoms market to competition.[39] The Court stated in the judgement that the delay in

35 Conseil Constitutionne [CC] [Constitutional Court] decision No. 2009-590 DC, 22 October 2009, Rec. `179 (Fr.).

36 Communications Market Act (Act. No. 393/2003) , § 60 (c) (1) (Fin.).

37 De Hert & Kloza, *supra* note 18.

38 *Id.*

39 Sala Constitucional De La Corte Suprema De Justicia, Exp: 09-013141-0007-CO. Res. Nº 2010012790, available at:

opening up the verified telecommunications market violated, among others, the exercise and enjoyment of other fundamental rights, such as freedom of choice of consumers, the constitutional right of access to new information technologies, the right to equality and the eradication of the digital divide,and the right to free enterprise and trade.[40] This is, again, a recognition of the *positive* right, but at the same time it has ingredients of the *negative* dimension in it. This case is all the more notable because it obliged the government to revise the national plans of telecoms development, as there was no obligation on the government to provide for universal access of the service until this point.

Spain

The last on this list is Spain, which recognised the *positive* dimension of the right to internet access in 2011 through Article 52 of its Sustainable Economy Act 2011.[41]It added broadband access to its 'universal service', stipulating that a broadband connection at a speed of 1Mbit per second is to be provided, through any technology.

The above analysis has been summarised in this table:

Country	Recognised the		Recognition by	Year of Recognition
	Positive Aspect	Negative Aspect		
Estonia	Yes	-	Government, Constitution	2001
Greece	Yes	Yes	Government, Constitution	2001

https://docs.google.com/document/d/1_n7anxwm9Cd4fJT-rP6zt1vvjHMnA0DFibTV-AMmCg0/edit (last accessed 19 Aug., 2015).

40 *Id.*

41 De Hert & Kloza, *supra* note 18.

European Union	Yes	-	European Parliament Directive	2009
France	-	Yes	*Conseil Constitutionnel*	2009
Finland	Yes	-	Government, Legislation	2010
Costa Rica	Yes	-	*Sala Constitucional*	2010
Spain	Yes	-	Government, Legislation	2011

It is thus quite clear that most of the countries have only recognised the positive dimension of the right to internet access, and not the negative dimension, thereby leaving the question of the effect of this right on the freedom of speech online unclear. The most relevant example is the French one, as its recognition comes from its Constitutional Court, and is based on the right to freedom of speech and expression and other civil liberties.

C. **Partial Recognition**

There have been a multitude of cases in multiple forums which have recognised the important role played by the internet as a medium of speech. These cases directly support an argument for a right to internet access within the paradigm of existing civil liberties, specifically the right to free speech.

The European Court of Human Rights ('ECtHR') has recognised the importance of the Internet in the contemporary communications landscape in a forthright manner in the case of *Ahmet Yildirim v. Turkey,*[42] stating that the internet "*has become one of the principal means for individuals to exercise their right to freedom of expression*

42 *Supra* note 8.

today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest."

This was followed up by the ECtHR in the case of *Eğitim ve Bilim Emekçileri Sendikası v. Turkey,*[43] which was the first case before it dealing with unreasonable blocking of websites. The ECtHR followed the reasoning given in *Ahmet Yildirim*, finding that the right to freedom of speech of the owners of the wrongly blocked websites had been violated.

The importance of the Internet with regard to the right to freedom of speech was also recognised by the Canadian Supreme Court in the case of *Saskatchewan (Human Rights Commission) v. Whatcott.*[44] The United States of America has repeatedly recognised the importance of the internet towards the right to freedom of expression, most notably in the cases of *Reno v. ACLU*[45] and *Ashcroft v. ACLU.*[46]

Part III. The Indian Supreme Court and the Right To Freedom of Speech

The jurisprudence surrounding the negative dimension of the concept of a right to internet access is therefore deeply intertwined with the right to freedom of speech and expression, and the right to seek, receive, and impart information, and, as we will discuss here, the freedom of press. These rights are known within the Indian Constitutional jurisprudence in various forms, such as the 'Right to

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43 Eğitim ve Bilim Emekçileri Sendikası v. Turkey, App no 20641/05, ECtHR. (25 September 2012).
44 (2013) 1 S.C.R. 467.
45 521 U.S. 844 (1997).
46 535 U.S. 564 (2002).

Know',[47] the 'Right to Publish',[48] the 'Right to Disseminate and Circulate Information',[49] and the 'Right to Communicate'(separate from the eponymous concept mentioned earlier).[50].

A. **Rights within Rights**

The concept of 'derivative rights' has been discussed in detail in the case of *People's Union for Civil Liberties ('PUCL') v. Union of India('UoI').*[51] The Court in this case rejected the idea of 'derivative rights', stating that the fundamental rights and freedoms enshrined in the Constitution have no contents, and that from time to time, it has fallen to the Court to fill the '*skeleton with soul and blood and [make] it vibrant*', in the words of Shah, J. To support this contention, the Court used the precedents laid down by *Kesavananda Bharati v. State of Kerala*, wherein Mathew, J. stated that the fundamental rights themselves have no fixed content, and that most of them are empty vessels into which '*each generation must pour its content in the light of its experience*'[52] and *Pathumma v. State of Kerala,* wherein the Court stated that it should be the attempt of the Court to expand the reach and ambit of fundamental rights.[53]The Court also relied on the American case of *Missouri v. Holland.[54]* Therefore, our Supreme Court is quite clearly capable of reading into the law a new right such as the right to internet access on the basis of existing rights. In fact, it has done so

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47 State of Uttar Pradesh v. Raj Narain, 1975 A.I.R. 865, (1975) 3 S.C.R. 333.
48 Sakal Papers (P) Ltd. & Ors. v. Union of India, A.I.R. 1962 S.C. 305.
49 Secy. Ministry of Information and Broadcasting, Govt. of India & Ors. v. Cricket Association of Bengal & Ors. 1995 (2) S.C.C. 161.
50 *Id.*
51 A.I.R. 2003 S.C. 2363.
52 (1973) 4 S.C.C. 225.
53 (1978) 2 S.C.C. 1.
54 252 U.S. 416.

on similar occasions, for instance with the right to privacy, which was included under Article 21 of the Constitution.[55]

Such a separate and specific recognition of the right to internet access is crucial, as it is quite complex a concept, which cannot be subsumed in its entirety within the existing jurisprudence of the right to free speech, and it deserves to be examined separately. Furthermore, it is a right which is consistently under threat due to the criminalisation of legitimate expression and arbitrary blocking of content, from both governmental and private sources. These threats include the blocking, tampering, and regulation of Internet content[56] and the concentration of controlling power over the Internet, in the hands of private entities or the government, through a lacking Network Neutrality regime.[57]

1. **The Object and Purpose of the Right to Freedom of Speech**

The justifications usually given for the right to free speech can be divided into two categories: instrumentalist and non-instrumentalist.[58] In the former category, are arguments that try to prove the necessity of this right by pinpointing the values it serves and the good it does, while in the latter are arguments that find free speech itself worth being guaranteed, irrespective of its benefits or harms. The Indian jurisprudence is heavily inclined towards instrumentalist justifications.[59] It also arguably gives more importance

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55 M. P. Sharma & Ors. v. Satish Chandra, 1954 A.I.R. S.C. 300.

56 La Rue, *supra* note 2, 9-15 & 19-20.

57 TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES, 260 (2010).

58 RAI, *supra* note 7, at 32.

59 *Id,* at 35.

to political speech than other forms of speech,[60] which is, in my opinion, a fallacy.

It becomes necessary, then, to consider the purpose of the various rights that the Court has articulated under the Right to Freedom of Speech. Crucial here is the case of *Indian Express Newspapers (Bombay) (P) Ltd. &Ors. v. Union of India & Ors.*[61]in which the Court observed that the freedom of expression has four broad social purposes to serve: 1) helping an individual to attain self-fulfilment (which is a non-instrumentalist purpose); 2) assisting the discovery of truth (this and the following two are instrumentalist purposes); 3)strengthening the capacity of an individual in participating in decision-making; and, 4) providing a mechanism by which it would be possible to establish a reasonable balance between stability and social change. The Court stated that this was in order to ensure that all members of the society should be able to form their own beliefs and communicate them freely to others, which leans towards the instrumentalist side of the debate. As noted earlier, these observations are quite similar to those of the Canadian Supreme Court in the case of *Irwin Toy v. Quebec,* except for the maintenance of a balance between stability and change mentioned here.[62]

The Court here used this logic to establish the '*right to know*' within the freedom of speech and expression, the obiter making the value given to political speech extremely clear. It also stated that anyone supporting the freedom of expression would necessarily support the right to know, drawing a strong link between the two. Using this logic, the Court expanded the freedom of speech to also

60 *Id*, at 33.
61 (1985) 1 S.C.C. 641.
62 (1989) 1 S.C.R. 927.

include the freedom of propagation of ideas in the case of R*omesh Thappar v. State of Madras*[63]. It spoke of this concept in the context of the right of circulation of newspapers, but the medium of the propagation is secondary to the actual propagation itself, as we shall see later in the paper.

This logic can thus be extended to include within it a right to internet access as a medium of exercise of the right to free speech, since the Internet demonstrably supports all four of these stated purposes. The non-instrumentalist purpose argues that the very right to free speech itself is what is important, and the internet is now one of the leading mediums for the exercise of this right by individuals and institutions alike. Not only is the Internet a medium through which individuals can communicate with others, it is also a medium which provides access to a plethora of information. This brings us directly to the third and fourth purposes – the cornucopia of information, academic and otherwise, that is available on the Internet directly and inarguably assists in discovery of truth. This was actually the original purpose of the Internet in its halcyon years when it was designed as a network to share information between universities to facilitate research.[64] And through the same information sharing, which extends from the academic environs to the published results of Right to Information reports, news reports from all over the world, and the reports of the works of policy workers, and the discussion and debate platforms provided to *individuals*, the Internet directly assists individuals in strengthening their ability to participate in decision-making. Finally, the Internet is such a vast platform that there is some space for everyone, and a lot of overlap in between for

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[63] 1950 S.C.R. 594.

[64] Julien Mailland, *The Semantic Web and Information Flow: A Legal Framework*, 11 N. CAROLINA J. OF L. & TECH. 269, 272 (2010).

social change and transition. It provides for a platform for sharing and learning about diverse views, and for disagreement, thereby providing as much of a balance between stability and social change as possible while still moving forward.

2. **A Medium-neutral Right**

It is argued here that the freedom of speech and expression, as it has been established within Indian jurisprudence, is medium-neutral. This argument is supported by the observations of the Court in quite a few cases, three of which are noted below.

The first is the case of *S. Rangarajan v. P. Jagjivan Ram and Ors.,*[65] wherein the Court stated that the freedom of speech and expression means that every citizen has the right to express his or her opinion by words of mouth, writing, printing, picture or '*in any other manner*'. The Court here specifically noted that the communication of ideas "*could be made, through any medium, newspaper, magazine or movie*".[66]The Court therefore concluded that the freedom of speech and expression would include the 'freedom of communication' and the 'right to propagate or publish opinions'.

The second is the case of *LIC v. Manubhai D. Shah,*[67] wherein theCourt noted that the freedom of speech and expression is a natural right and a basic human right, relying herein on the same Article 19 of UDHR that Frank La Rue has relied on, and noted that it is a right that every human being has since birth. The Court stated that, therefore, every citizen has a right to air his or her views

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65 (1989) 2 S.C.C. 574.
66 *Id.*
67 (1992) 3 S.C.C. 637.

through *the printing and/or electronic media or through any communication method.*

The third case that supports this argument and indicates an evolution in the right to freedom of expression on the basis on the medium being employed to exercise it is that of *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana &Ors.*,[68] wherein the Court held that citizens had a right to exhibit films on Doordarshan, subject to Doordarshan's terms and conditions. The Court went on to state that this right is a part of the fundamental right of freedom of expression guaranteed under Article 19 (1) (a), and that such a right can be curtailed only under circumstances set out under Article 19 (2). The Court likened it to the right of citizens to publicise their views through *'any other media',* such as newspapers, magazines, advertisement hoarding etc., subject to the terms and conditions of the owners of the media.

Thus, the right to freedom of speech is a medium-neutral right, which therefore can be extended to protect the same right on the internet.

3. **The Freedom of Press, or the Right to Publish**

Another crucial concept that must be examined here is the Freedom of Press, or the Right to Publish, and the object and purpose of the same. Relevant here is the case of *Sakal Papers (P) Ltd. & Ors etc. v. Union of India,*[69] in which the Court noted that the freedom of speech and expression includes the right of citizens to publish, disseminate and circulate their ideas, opinions and views in order to propagate them.

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68 1988 A.I.R. S.C. 1642.

69 1962 A.I.R. S.C. 305.

Crucially, the Court's defense of the freedom of press and of circulating newspapers depended on the fact that the freedom of press and of circulation of a newspaper was an essential and basic attribute of the conception of the freedom of speech, with regards to the right of citizens to circulate their views to all whom they can reach or care to reach. Similarly important is the case of *Bennett Coleman and Co. & Ors. v. Union of India & Ors.,*[70] in which the Court noted that the freedom of press means the right of citizens to speak, publish and express their view, as well as the right of people to read.

Thus, the central concept in the freedom of press is not the press itself, but the right of *citizens* to publish and propagate their views. The protection accorded to freedom of press here is entirely dependent on the fact that press acts as a medium for the exercise of the right to freedom of speech.

The arguments being made here can be summarised very well through the observations of the Supreme Court in case of *Secy., Ministry of Information and Broadcasting, Govt. of India &Ors. v. Cricket Association of Bengal &Ors.*[71]Here, the Supreme Court summarised the law on the freedom of speech and expression under Article 19 (1)(a), as restricted by Article 19 (2), and found it to include the right to acquire and disseminate information. The Court focused on the necessity of this right for the purposes of achieving self-expression, its ability to enable people to contribute to debates of social and moral issues, and the fact that it is also the best way to find the truest model of anything, since it is only through this freedom that the widest possible range of ideas can circulate and be compared.

70 (1972) 2 S.C.C. 788.
71 (1995) 2 S.C.C. 161.

The Court thus concluded that this freedom is the only vehicle of political discourse so essential to democracy, but also considered equally important, the role it plays in facilitating artistic and scholarly endeavours of all sorts. The Court did not restrict the ambit of the freedom of speech and expression to just informational, artistic and scholarly endeavours, but noted that that the right to freedom of speech and expression also includes the right to educate, to inform and to entertain, and also the right to be educated, informed and entertained.[72]

The Court further stated in this case that the right to communicate, under the right to freedom of speech, therefore included right to communicate *through any media that is available,* whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. Following the same line of reasoning, the Court concluded in the case of *Union of India v. Naveen Jindal & Anr.*[73] that "*the right to impart and receive information by air waves and otherwise is a species of the right of freedom of speech and expression…*", the crucial part here being the Court's usage of the phrase 'and otherwise'.

Furthermore, the Court explicitly stated that it is because the press supports and facilitates this freedom that it is protected under freedom of speech and expression. Thus, it concluded that the fundamental right to freedom of speech and expression and the freedom of press includes "*the freedom to communicate or circulate one's opinion without interference to as large a population in the country as well as abroad as possible to reach*", and that this fundamental right can be limited only by reasonable restrictions under a law made for a purpose mentioned in Article 19 (2) of the Constitution, stating that

72 Zee Telefilms Ltd. & Anr. v. Union of India & Ors., A.I.R. 2005 S.C. 2677.
73 A.I.R. 2004 S.C. 1559.

the burden to justify such restrictions is on the authority making them.The nature of the right in the existing Indian Jurisprudence, in its purposes and its medium, directly supports a right to internet access.

4. **Media Freedom and Monopolies – Justice KK Matthew's Dissent**

In the context of Media Freedom, another concern that attaches itself to the practicalities of the right to free speech is the privatisation and monopolisation of the very medium of speech itself by corporates. This is conceptualised clearly by Justice KK Matthew's dissent in the case of *Bennett Coleman v. Union of India*,[74] wherein he spoke of the weakening effect of the '*concentration of power*' on the fundamental presupposition that the right to press facilitates the objectives of the right to free speech.

What worried Justice Matthew was that if mass media was to be concentrated in a few hands, the chances of ideas antagonistic to the ideas of the proprietors of this mass media getting access to the same become very remote. This, according to him, biased the 'marketplace of ideas', meaning that it did not treat all ideas equally. He believed that it was no use to have a right to express your idea, unless you have got a medium for expressing it.

On the basis of the above, Justice Matthew concluded that the 'marketplace of ideas', if any such concept had ever existed, has long since ceased to exist due to the concentration of mass media in select hands, creating *private* restrictions to free speech in place of the governmental restrictions. This is exactly where the right to internet

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[74] (1973) 2 S.C.R. 757.

access actually becomes even more important. Because the internet is the one and only medium at this point of time that is, or rather can be, free from privatisation, monopolisation, and non-governmental control.[75]This is due to the principle of '*Network Neutrality*', which requires all ISPs to treat all data on their networks *equally*, and conjoins them from discriminating between various types or streams of data on their networks. Therefore, not only is a right to internet access necessary to ensure the widest and most effective medium of free speech currently possible, it is also the first step towards enforcing Network Neutrality as a law in India, thereby ensuring that at least this one free medium, remains free.

Part IV. Positive dimension of the Right to Internet Access

Arguably, the theoretical structure for even the positive dimension of the right to internet access already exists, within the bounds of the right against discrimination, and the international obligations undertaken by our country.[76] But such an obligation is difficult for the Indian government to execute immediately, keeping in mind the current size and population of our nation. Furthermore, we are already failing to achieve a good standard of education under the Right to Education – the added burden of a positive right to internet access will be catastrophic for the Indian government.

But it should still be noted that the Indian government has launched quite a few schemes and programs to bring ICTs, including the Internet, to those deprived of them. For instance, soon after his election as the Prime Minister, Narendra Modi proposed an ambitious 'Digital India' program aimed at promoting e-governance,

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[75] WU, *supra* note 61, 260.

[76] Stephen Tully, *A Human Right to Access the Internet? Problems and Prospects*, 14 (2) OXFORD HUMAN RIGHTS L. REV. 175 176 (2014).

two of the stated focus areas of which are "*[bringing]Digital infrastructure as a Utility to Every Citizen*" and the "*Digital Empowerment of Citizens*", including digital literacy.[77]

Some of the details of these programs are:

i. National Optic Fibre Network: This plan was approved in 2011, and aims to provide broadband connectivity to all panchayats by extending the existing optical fibre network to the same. It was rebooted by the Modi government, and now aims to be finished by 2017.

ii. A part of the same program is to ensure provision of mobile communication services to areas affected by left wing extremism.

iii. As part of the National E-Governance Plan of 2006, the government has established 'Common Service Centres', or 'e-Kiosks', in collaboration with the private sector. As of January 2011, over 87,000 centres have reportedly been established.[78]

Conclusion

The roots of the negative dimension of the right to internet access, as has been discussed in the beginning, can be traced to the concepts of the right to freedom of speech, the right to information, and the right to communication within international jurisprudence.

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77 Press Conference on 100 Days Performance of IT and Telecom, *India at the Door of Digital Revolution – Ravi Shankar*, PRESS INFORMATION BUREAU (13 Sep., 2014), available at: http://pib.nic.in/newsite/erelease.aspx?relid=109646, (last accessed Aug. 30, 2015).

78 La Rue, *supra* note 2, at 18.

The internet is the next step in the evolution of the very idea of communication, of speech, as we see it. In fact, it has already revolutionised all the previous modes of communication to the extent that they are all converging into a singular medium, that of the Internet. And it is quite clear from the above analysis that the internet is now fundamental to the stated object and purpose of the right to freedom of speech within the Indian jurisprudence. Furthermore, it has clearly been established that in the Indian jurisprudence, the right to freedom of speech is a medium-neutral right, and that in fact, any medium that is important to the exercise of the right to freedom of speech of an individual gradually becomes included *within* the right to freedom of speech, and becomes protected under it. We saw a similar evolution with regards to the freedom of press in India, and we saw the evolution of the law to include the television medium as well.

The time will soon be at hand when internet access becomes crucial for nearly any form of mass exercise of the right to freedom of speech – in fact, it is arguably already here. In such an age, the recognition of the importance of the internet medium as central to the right to freedom of speech is the necessary next step for the law. Just as the technology has evolved, so has the human condition, and so must the law.

Frank La Rue defines the negative dimension of the right to internet access as "*the right to access the internet without any restrictions, except in the limited cases wherein such restrictions are allowed by law*". This paper establishes that this definition of the right is entirely in consonance with the Indian jurisprudence surrounding the right to freedom of speech, including the reasonable restrictions clause. But this conceptual right has been repeatedly threatened over the past year in India, through legislations such as the amendment of the

Karnataka Goonda Act,[79] Section 66A of the Information Technology Act, absurd arrests under the same, and a multitude of agreements which violate the principle of Network Neutrality. Even despite Section 66A being struck down for its unconstitutionality, the government is reportedly attempting to bring it back in a different guise.[80] At the same time, this concept is a complex one, which includes dimensions like the concept of Network Neutrality, jurisdictional issues, and has far more potential for impact than any other existing medium. It, therefore, deserves to be analysed and protected separately. It is thus high time that the Indian Courts formally recognised the right to internet access, since without such recognition, the 'right to freedom of expression' in the context of internet is nothing but a set of hollow, meaningless words.

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[79] Bhatia, *supra* note 1.

[80] PTI, *Govt working on restoring 66A of IT Act with changes*, BUSINESS STANDARD (31 July, 2015), available at: http://www.business-standard.com/article/pti-stories/govt-working-on-restoring-66a-of-it-act-with-changes-115073101000_1.html.

The Commercial Speech Doctrine – Expository analysis of the constitutional conception within the Indian free speech paradigm

Shantanu Dey[*]

Abstract

Through this paper, I seek to examine the constitutional treatment of commercial speech, drawing illustrations in a cross-jurisdictional perspective. Primarily the paper seeks to direct attention towards the definitional barriers to the conceptualization of this particular doctrine in a cross-constitutional context, which has led the judiciary to treat commercial speech synonymously with advertisements. Subsequently I move on to the analysis of this doctrine within the Indian Constitutional Setup focussing on the rationale behind its constitutional protection and delve into the debate behind its contentious placement under Article 19(1)(a) or Article 19(1)(g). Furthermore, I engage in examining the possibility of gradation vis-à-vis the constitutional protection guaranteed to commercial speech in contrast to non-commercial speech drawing inspiration from the American approach. Ultimately, the penultimate chapter, sensitive to the risk of abuse of such speech, attempts to characterize the wide range of "reasonable restrictions" that have been imposed over the use of such commercial speech in the last few decades.

Thus, I seek to cull out the manner in which advertisements have assumed the dominant position in the discourse governing the constitutional placement of the commercial speech doctrine. The paper intends to initiate a discussion surrounding the possibility of the gradation approach in the Indian Constitutional Scheme against

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the backdrop of the criticism faced by the equal treatment of commercial and non-commercial speech. It highlights the manner in which the judicial treatment of this doctrine has contributed to the view of identifying commercial speech as a core component of the Right to Freedom of Speech and Expression as envisaged under Article 19(1)(a).

Introduction

The sacrosanct idea of the right to freedom of speech and expression within the contours of Article 19(1)(a) of the Indian Constitution has often assumed primacy within the judicial discourse in the last sixty-six years centralizing the value of free speech in the Indian democratic society. Tracing its genesis from the Vedic prayer of "*Let noble thoughts come to us from all sides*"[1], the constitutional provision has effectively culled out the emergence of the idea of free speech and expression within the Indian constitutional context as a means to attainment of ideals of individual fulfilment. It has been idealized as an instrument ensuring citizen participation in socio-political decision making based on informed consent and maintaining a balance between stability and change in society.[2] However, change has been a constant in Indian constitutional history and involves the judiciary as the frontrunner. Subsequently, the constitutional conception of free speech and expression has experienced progressive expansion giving birth to the commercial speech doctrine.

The judicially manufactured notion of commercial speech finds its first mentioning within the American constitutional

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1 Naraindas v State of MP, AIR 1974 SC 1232.

2 M. HIDAYATULLAH, THE CONSTITUTIONAL LAW OF INDIA, 288 (1984).

jurisprudence in *Valentine v Chrestensen.*[3] In the present case, the court was grappling with the constitutionality of the restriction imposed by the Police Commissioner of New York City, Lewis Valentine prohibiting distribution of handbills alleged to contain commercial advertising material. Endorsing a conservative approach, the US Supreme Court held such commercial speech to be completely outside the ambit of the First Amendment protection.[4] However, the case marked the beginning of the discursive analysis revolving around the idea of providing constitutional protection to commercial speech.

Drawing from such a comparative constitutional narrative, the dialogue involving the constitutional dynamics developing between Article 19(1)(a) and commercial speech as a form of speech involving a commercial element[5] traces its origin in the Indian scheme of affairs with the 1959 case of *Hamdard Dawakhana v Union of India.*[6] Such expansive interpretation of the fundamental rights jurisprudence, specifically the right to freedom of speech and expression, can be explained as the judicial consolidation of the Constituent Assembly intent, which hailed such a right as the "very life of the Draft Constitution".[7]

In Part I of the paper, the focus is on the varying interpretive models utilized to limit the definition of commercial to advertisements in the US as well as India. Reflecting upon the conservative judicial sentiment characterizing its approach towards constitutionally protecting commercial speech, Part II explores the

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3 Valentine v Chrestensen, 316 U.S. 52 (1942).

4 Jonathan Weinberg, *Constitutional Protection of Commercial Speech*, Columbia Law Review, Volume 82, No. 4, 721 (May 1982).

5 Tata Press Ltd v Mahanagar Telephone Ltd., AIR 1995 SC 2438.

6 Hamdard Dawakhana v Union of India, 1960 SCR (2) 671.

7 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, 222 (1968).

myriad of issues emerging out of such discourse. In this part, I examine the instrumentalist understanding of advertisements in a growing liberal economy employed to rationalize protection of certain forms of commercial speech. Furthermore, this part delves into the question of corporations bringing in fundamental rights claims under Article 19 and the academic debate surrounding the constitutional placement of commercial speech claims under Article 19(1)(a) and 19(1)(g).

Part III focuses on the manner in which Indian courts have gone a step ahead of their American counterparts by treating such speech as sacrosanct to protecting core constitutional values of free speech and expression. Finally, in part IV, I discuss the "reasonable restrictions" debate central to application of Article 19 and highlight the paternalistic undertone corrupting the judicial debate on this matter. The paper attempts to cull out the lack of consensus causing the unstable jurisprudential treatment of commercial speech as a subject of rising constitutional importance in our market-based economy. The doctrinal analysis demonstrates judicial innovation to reinvent constitutional principles as per changing circumstances. However, it is critical to broadly interpret commercial speech as a form of expression requiring fundamental rights protection and the Indian judiciary ought to address the future of the "underlying objective" standard articulated in *Hamdard Dawakhana*.

Part I. Scrutinizing the evolving idea of "Commercial Speech": A definitional analysis

The definition of commercial speech as provided in the Black's Law Dictionary is "communication (such as advertising and marketing) that involves only the commercial interests of the speaker

and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech."[8] It is evident that the definition though coming from an American Constitutional perspective does provide a theoretical foundation for substantive discussion in the Indian context.

In this chapter, I seek to undertake a trace-back approach examining the manner in which Indian courts have grappled with the issue of defining commercial speech as a constitutionally protected form of expression. Engaging in a cross-jurisdictional analysis, it reveals the converging jurisprudence of Indian and the US reducing the constitutional understanding of free speech to advertisements.

A. Traversing through the Indian Experience in reaching definitional certainty

It is interesting to note that the Indian judicial discourse determining the essence of the commercial speech doctrine in India has concentrated on the understanding of advertisements as the mode of such commercial speech. *Hamdard Dawakhana v Union of India*[9] marked the first attempt of the Indian courts towards articulating a unified definition of commercial speech. The case involved the court dealing with the constitutionality of Section 3 and 8 of the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954 aimed at curbing advertisement of prohibited drugs.[10]

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8 Emma K. Wertz, *A little clarity please: A lacklustre commercial speech definition leads to wishy-washy First Amendment protection and sporadic legal decision*, American Communication Journal, Volume 11, No. 4, 2-3,(2009).

9 Hamdard Dawakhana v Union of India, AIR 1960 SC 554.

10 *Id.*

The Supreme Court defined advertisements to be falling within the protected ambit of commercial speech by contextualizing the underlying objective of such advertisements. With the present case involving sale of prohibited drugs, the Court using the "underlying objective" assessment had no hesitation to keep such advertisements beyond fundamental rights protection.[11]

Unsurprisingly, the judiciary at its nascent stage then was reluctant to adduce an expansive interpretation to the concept of commercial speech vis-à-vis inclusion of advertisements. Such an approach during the 1950s has often been explained to be inevitable in light of the sparse possibility of the cross-constitutional borrowing from the American commercial speech jurisprudence, which had not progressed much beyond the conservative stance in *Valentine v Chrestensen.*[12]

Yet the Court in *Hamdard Dawakhana* brought out the "true character test" and the "public interest" justification for defining advertisement within the scope of commercial speech affording it constitutional protection but explicitly sought to exclude any form of a commercial advertisement mean to further business falling within the concept of trade/business.[13] Such rationality governing this judgment interestingly also finds reflection in Commercial Speech-Commercial Communication theory. Scholars such as Frederick Schauer utilizing this theory have propounded a similar justification

[11] UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT, 38-39 (2011).
[12] Valentine v Chrestensen, 316 U.S. 52 (1942).
[13] UDAI, *Supra* n. 11, at 38.

for disallowing protection for such advertisements explicitly concerning themselves to purely business activity.[14]

Subsequently, moving on from such judicial line of reasoning focussed on the socio-political-economic agenda of commercial speech, the apex court has substantially modified the determination of commercial speech protection for advertisements. The 1985 case of *Indian Express Newspapers (Bombay) Pvt. Ltd v Union of India*[15] presented the court with another opportunity to examine the issue while discussing the validity of imposition of import duty on newsprint argued to have a chilling effect on free speech. Despite delving into the subject of commercial speech, the Apex court never really addressed the possibility of engaging in a definitional analysis.

In 1995, the Supreme Court in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd*[16] was asked to adjudicate on a matter wherein a government entity was claiming monopoly over publication of a list of telephone subscribers (yellow pages). However, the idea of free speech assumed relevance with the appellants utilizing this constitutional guarantee to claim the right to earn revenue by circulating their own telephone directory (white pages).[17]

While the Apex court did not utilize this dispute to fill in the definitional lacuna, it was in this case that the court altered its stance on defining advertising within the contours of the idea of commercial speech. Deviating from the position laid down in the *Hamdard*

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14 Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, The University of Cincinnati Law Review, Volume 56, 1185-1186, (1988). Also *see* Robert Post, *The Constitutional Status of Commercial Speech*, UCLA Law Review, Volume 48, No. 1, 21-22, (2000).

15 Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India, AIR 1986 SC 515.

16 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd., AIR 1995 SC 2438.

17 *Id.*

Dawakhana Case, the court in *Tata Press* characterized an advertisement as "*merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase*"[18]. This was yet another failure on the Supreme Court's part to define commercial speech in concrete terms, apart from merely recognizing advertisements as part of it.

B. Finding Parallels in the American Scheme of Affairs

The definitional barriers to commercial speech doctrine are not novel to the Indian context, and a similar trend has plagued the American constitutional jurisprudence. The judicial treatment of "commercial speech" has never reached settled shores as the case of *Ohralik v Ohio State Bar Association*[19] defined commercial speech to "occur in an area traditionally subject to government regulation".[20] Subsequently Justice John Paul Stevens in *Central Hudson Gas & Electric Corporation v Public Service Commission*[21] while assessing the constitutionality of a Public Services Commission regulation prohibiting promotional advertising, laid down two broad conditions for identifying commercial speech namely: "*expression related solely to the economic interests of the speaker and its audience*; and *speech proposing a commercial transaction*".[22]

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18 *Id.* Also *see* Ohn W. Rast v. Van Deman & Lewis Company, 1915 (60) Law Ed. 679.

19 Ohralik v Ohio State Bar Association, 436 U.S. 447 (1978).

20 *Id.*, at ¶455-456

21 Central Hudson Gas & Electric Corporation v Public Service Commission, 447 U.S. 557 (1980).

22 EMMA, *Supra* n. 8, at 4.

However, in *Bolger v Youngs Drugs Products Corporation*[23], the American courts went back to a reductionist understanding of commercial speech as implying something proposing no more than a commercial transaction. [24] Such desperation to eliminate the omnipresent definitional ambiguity surrounding the application and regulation was evident in the California Supreme Court case of *Kasky v Nike*[25] wherein commercial speech was comprehensively defined as covering "*everything said by anyone "engaged in commerce," to an "intended audience" of "potential . . . customers" or "persons (such as reporters . . .)" likely to influence actual or potential customers that conveys factual information about itself "likely to influence consumers in their commercial decisions*". [26] Unfortunately, the US Supreme Court has deemed this definition to be problematic. The US Supreme Court, while rejecting such a move to achieve such determinacy, has been criticised for not availing such an opportunity to itself construe a positive definition for "commercial speech" rendering coherence to the doctrine.[27]

C. The inevitable dominance of the idea of advertisements

From the line of cases dealing with commercial speech, it can be discerned that the common pointe vis-à-vis the analysis of the idea of commercial speech is recognition of a transactional and inducement motive. The idealization of commercial speech in the Indian as well as the American contexts has paved way for the emergence of advertisements as classic examples of commercial

[23] Bolger v Youngs Drugs Products Corporation, 463 U.S. 60 (1983).
[24] David Mcgowan, *A Critical Analysis of Commercial Speech*, California Law Review, Volume 78, 360-361, (1990).
[25] Kasky v Nike, 539 U.S. 654 (2003).
[26] *Id.*, at ¶939, 960.
[27] Thomas C. Goldstein, *Nike v Kasky and the Definition of Commercial Speech*, CATO Supreme Court Review, 79, (2003).

speech.[28] This often makes it difficult to determine the scope of this doctrine vis-à-vis other possible modes of commercial speech. Cases such as *H.T. Annaji v The District Magistrate and the Deputy Commissioner*[29], involving the court recognizing information pamphlets published by a private company for their tourist buses to be brought within the idea of advertisements and commercial speech supports this observation.[30]

On the other hand, Indian High Courts in cases such as *Lakshmi Ganesh Films v Government of Andhra Pradesh*[31] have provided an illustration of the manner in which commercial speech has been utilized as a judicial instrument to add width to the idea of "freedom of speech and expression". The court sought to utilize the commercial speech logic and apply it to exhibition of films bringing it within the Article 19(1)(a) ambit.[32] Such judicial reasoning was in opposition to Allahabad High Court's judgment in *Star Videos v State of Uttar Pradesh*,[33] where the Court dismissed the claims of an exhibitor of video films for protection under Article 19(1)(a) as such exhibition did not involve propagation of views but mere earning of profits.[34]

Despite such occasional developments, in the absence of a single definition for commercial speech, the distinction drawn between commercial and non-commercial speech continues to remain uncertain. Drawing from the legislative and judicial

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[28] NANCY LIND AND ERIK RANKIN, FIRST AMENDMENT RIGHTS: AN ENCYCLOPAEDIA, 76-77 (2012 ed.).

[29] H.T. Annaji v The District Magistrate and the Deputy Commissioner, 1998 (4) KarLJ 75.

[30] *Id.*

[31] Lakshmi Ganesh Films v Government of Andhra Pradesh, 2006 (4) ALD 374.

[32] *Id.*

[33] Star Videos v State of Uttar Pradesh, AIR 1993 All 253.

[34] MP JAIN, INDIAN CONSTITUTIONAL LAW, 1080 (6th ed.).

experience, the doctrinal analysis has particularly centred itself round the idea of advertisements. Such characterization of advertisement as falling under one of the species of commercial speech has been of contemporary relevance as illustrated in major corporate tussles witnessed in the High Court cases of *Dabur India v Colortek Meghalaya*[35] and *Hindustan Unilever Ltd. v Proctor and Gamble Home Products Limited and Anr.*[36] These cases involved the court dealing with the developing idea of comparative advertising discussed later in the chapter discussing "reasonable restrictions".

Part II. Doctrinal justification within the Indian constitutional setup and the progressive judicial approach

Moving on from the definitional examination of the commercial speech doctrine, it becomes necessary to address its placement as justified by the judiciary and scholars under the Indian Constitution and delve into the pertinent issues that arise. In this part, I seek to thematically discuss the debate that has centred round the constitutional positioning of the commercial speech as witnessed in the latter half of the twentieth century.

A. Rationalizing the guaranteed constitutional protection

Tracing the development of the doctrine in the Indian context from *Hamdard Dawakhana v Union of India*[37] to the present state of affairs, where commercial speech is often identified as a core element of free speech and expression, highlights the progressively changing landscape in favour of commercial speech.

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[35] Dabur India v Colortek Meghalaya, 2010(42)PTC88.

[36] Hindustan Unilever Ltd. v Proctor and Gamble Home Products Limited and Anr., 2011(1)CHN204.

[37] Hamdard Dawakhana v Union of India, AIR 1960 SC 554.

The *Hamdard Dawakhana Case* illustrating judicial conservatism did not guarantee constitutional protection to the emerging doctrine of commercial speech unless certain stringent standards were met. The Court, while conceding advertisement as a form of speech, nevertheless held the view that the furtherance of the business interests of an individual by successfully bringing a free speech claim vis-à-vis publication of commercial advertisements was antithetical to the constitutional scheme of affairs as envisaged under Article 19.[38]

Attributing a restricted interpretation heavily drawing from premature American jurisprudence on the subject, the court ruled that Article 19(1)(a) was for propagation of ideas of socio-economic-political value or contributing to furtherance of literature or human thought.[39] Such emphasis attributed to the inherent value of speech was an unambiguous iteration of the instrumental theory of free speech,[40] which marked the beginning of the Commercial Doctrine Era in the Indian context. The judicial opinion has been reiterated by Richard Posner's views justifying special protection of speech owing to its social benefit frequently not captured by its producers, whereas such is not the case with commercial advertisements premised on the motive of reaping sale of a product and the benefit of the producer.[41]

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38 *Hierarchies of Expression: Commercial Speech, Hamdard Dawakhana and Tata Press*, Indian Constitutional Law and Philosophy, https://indconlawphil.wordpress.com/tag/commercial-speech-2/, (Last visited on: September 29, 2016).

39 DAVID M.O' BRIEN, CIVIL RIGHTS AND CIVIL LIBERITES, 485-486 (Volume 2, 1991 ed.)

40 MATTHEW BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY, 6-9 (2008 ed.).

41 Daniel Halberstam, *Commercial Speech, Professional Speech and the Constitutional Status of Social Institutions,* University of Pennsylvania Law Review Volume 147, 796-797, (1999).

The changing landscape began with the adoption of a progressive judicial stance in *Bennett Coleman v Union of India*[42] and *Sakal Papers v Union of India*[43] discussing the increased significance of advertisements in the developing economy.[44] Both the cases dealt with statutory restrictions [Newsprint Policy of 1972-73; Newsprint (Price and Page) Act, 1956 and allied orders/rules/regulations] imposed on the sale/acquisition/use of newsprint determining the price charges and space allocated for advertising.[45]

Such centrality accorded to the concept of advertisements as a mode of commercial speech acted as a prelude to the emerging phenomenon of free markets marked by the liberalization after 1991. During this era, advertisements as a marketing instrument occupied a pivotal position.[46] The cases of *Bennett Coleman* and *Sakal Papers* created a jurisprudential foundation for the proliferation of the commercial speech doctrine in the Indian context.

The 1985 case of *Indian Express Newspapers (Bombay) Pvt. Ltd v Union of India*[47] contributed to the developments brought in by *Bennett Coleman* and *Sakal Papers*, as it modified the stance taken in *Hamdard Dawakhana* holding that, "*all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by business men.*"[48] The Court clarified that the *Hamdard Dawakhana*

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42 Benett Coleman v Union of India, AIR 1973 SC 106.

43 Sakal Papers v Union of India, AIR 1962 SC 305

44 M.P. JAIN, *Supra* n. 34, at 1085-1086.

45 *Id.*

46 Lawrence Liang, *How the Press Carved out Freedom of Speech in India,* The Hoot, (May 30, 2010), http://www.thehoot.org/free-speech/media-freedom/-how-the-press-carved-out-freedom-of-speech-in-india-8471, (Last visited on: September 30, 2016).

47 Indian Express Newspapers (Bombay) Pvt. Ltd v Union of India, AIR 1986 SC 515.

48 *Id.*, at ¶91.

judgment ought to be treated as limited to its fact situation dealing with misleading advertisements and the judicial intent was not to exclude commercial speech from constitutional protection as a general principle.[49]

Yet the contribution of this case was to cause a shift in the conceptualization of commercial speech within the scope of Article 19(1)(a) as primacy was attached to the benefits derived by the recipients of speech and the impact of advertisements as a form of commercial speech on the Indian economic system.[50] Such judicial construction of commercial speech culling out the importance of the rights of the listener within Article 19(1)(a) is a reflection of Alexander Meiklejohn's work supporting the rights of both the speaker and the listener. It prioritizes the virtue of providing access to people of information of the prevailing state of affairs in a truly democratic society.[51] Ultimately, in *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors.,*[52] the court demonstrating sensitivity to the higher bench strength of its predecessor (*Hamdard Dawakhana*), reiterated that the judgment of the previous case should be treated as limited to its facts and could not be applied as a general proposition.[53]

Furthermore, the Court rebutted the principle that advertisements purely commercial in nature are devoid of any value of speech thereby. This can be argued to be an altered interpretation

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[49] *Id.*, at ¶90.

[50] *Id.*, at ¶91.

[51] A.MEIKLEJOHN, POLITICAL FREEDOM, 33-34 (Harper and Row, 1960 ed.). *Also see* New York Times Co. v Sulivan 376 US 254 (1964) and *R. Rajagopalan v State of Tamilnadu* laying down the right to know as arising out of such freedom of speech and expression creating a theoretical foundation for constructive public discourse.

[52] Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438.

[53] UDAI, *Supra* n. 11, at 39.

of the instrumental theory of free speech. Beginning with the conceptualization of advertising as commercial speech forming the "*cornerstone of our economic system*"[54], the court discussed the critical status of advertisements in enabling mass production and democratic availability of news and opinions by the free press.[55]

Additionally, the Court utilized the "free flow of commercial information" perspective to bring out the need for constitutional protection to be extended to commercial speech, couched in the idea of furthering general public interest. The perception that commercial motive would disentitle such speech from protection was sought to be countered by highlighting the dissemination of information leading to advancement of knowledge and discovery of truth[56] The emphasis upon the informational element is a replication of the judicial thought process in *Central Hudson Gas & Electric Corporation v Public Services Commission*[57] wherein it was explicitly held that: "*the First Amendment's concern for commercial speech is based on the informational function of advertising*".[58]

Utilizing the "public right to receive and interest in commercial speech" construct under Article 19(1)(a), the Court highlighted the role played by such commercial speech in guiding the private economic decisions determining the allocation of resources in the Indian Political economy. Such theorization of commercial speech evidenced its indispensability as an instrument to ensure such

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54 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438, at ¶19.
55 *Supra* n. 38.
56 UDAI, *Supra* n. 11, at 41.
57 Central Hudson Gas & Electric Corporation v Public Services Commission, 447 U.S. 557 (1980).
58 ROBERT, *Supra* n. 14, at 14.

decision-making is carried out on the basis of informed opinions.[59] The Court thus, brought out the principles of "honest and economical marketing" critical to democratic distribution of commercial information and endorsed protection of commercial speech as a means to achieve the same.[60]

The approach taken in *Tata Press* and reiterated in the subsequent commercial speech cases in the 21st Century is strikingly similar to Ronald Coase's defense of commercial speech.[61] Using this approach, I contend that the justifications for the placement of commercial speech within the Indian Constitution can be found in economic rationality. Ronald Coase scrutinises the principles of individual autonomy and market competition leading to discovery of truth as the underlying values rationalizing the constitutional protection for commercial speech subject to governmental regulation. He makes a claim that the "*values of self-fulfillment, truth-discovery, public participation in decision making, and maintenance of a balance between stability and change would seem to apply with the same force to the market for goods as they do to the exchange of ideas making the economic system more competitive and efficient.*"[62] Such emphasis on economic efficiency for the constitutional protection of commercial speech demonstrates logical coherence with the judicial reasoning articulated by Justice Blackmun in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.*[63]. In the present case, Justice Blackmun justified the criticality of

59 *Id.*

60 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438, at ¶22.

61 DANIEL, *Supra* n. 41, at 794-795.

62 *Id.*

63 Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976). *Also see* ROBERT, *Supra* n. 14, at 7-8.

such speech vis-à-vis the efficient allocation of resources in a free enterprise system.[64]

Furthermore, the twin conceptions of "democratic availability" and "allocation of resources" brings out the reconciliation of the ideas of democracy with a market economy in the Indian Context. The judicial approach as demonstrated in *Tata Press* bears jurisprudential resemblance to the philosophies of John Milton and J.S. Mill. The court seeks to create a link between such commercial speech and the maintenance of democracy.[65] Therefore, Milton and Mill's characterization of commercial speech as creating a marketplace of ideas ensuring effective popular participation in government advancing the quality of democracy in a nation through such increased deliberation and better information culls out the idealization of commercial speech as *pre-condition for democratic politics*. [66]

B. Corporations and commercial speech: Where does Article 19 step in?

The issue that has often arisen involving the claim of commercial speech under Article 19 by corporations is the constitutional guarantee of fundamental right restricting itself to only the "citizens" thereby excluding corporations. Even though this position continues to be in a nebulous state,[67] yet in the cases of *Bennett Coleman v Union of India*[68] *and Sakal Papers v Union of India*[69] it

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64 *Id.*

65 *Supra* n. 38.

66 Jennifer M. Keighley, *Can you handle the truth? Compelled Commercial Speech and the First Amendment,* Journal of Constitutional Law, Volume 15, Issue 2, 550-552, (November 2012). *Also See* Stanley Ingber*, The Marketplace of Ideas: A Legitimizing Myth,* Duke Law Journal, 3-4, (1984).

67 Delhi Cloth and General Mills Co. Ltd. v Union of India and Ors., 1986 SCR (1) 440.

68 Benett Coleman v Union of India, AIR 1972 SC 106.

was recognized that lifting of corporate veil was a means to provide protection to the corporate sector under Article 19. The Apex Court argued that it would otherwise lead to legal dogmatism as also discussed in the Law Commission of India's 101st Report under the leadership of Justice KK. Mathew.[70] The law commission created an image of the lives of natural persons being led through such organisations, which are sought to be excluded from the Article 19 on a plain reading. Recognizing such anomaly in the constitutional provisions[71], *Bennett Coleman* adopted a progressive stance following up from the liberal position adopted in *Sakal Papers* wherein the court accepted the writ petition filed by a company and the reader of the newspaper.[72]

The judicial opinion discerned from the above two cases has been to determine whether the contended violation of rights extends to cover the right of the members of such corporation. This would potentially join a natural person along with a company in the writ petition challenging violations under Article 19.[73] Such treatment of corporations in the abovementioned decisions led to further nuanced constitutional understanding of commercial speech.

Sensitive to such a developing judicial stance, the Supreme Court in cases involving advertisements as commercial speech,

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69 Sakal Papers v Union of India, [1962] 3 SCR 842.

70 Law Commission of India, *101st Report on Freedom of Speech and Expression under Article 19 of the Constitution: Extension to Corporations*, (1984), 7-8, http://lawcommissionofindia.nic.in/101-169/report101.pdf, (Last visited on: September 25, 2016).

71 *Id.*, at 4-5; There are a large number of organizations and corporations who exist as "artificial/juristic persons" whose functioning can lead to active involvement in the right to freedom of speech and expression under Article 19(1)(a) yet they are contended to be excluded from its ambit in light of the use of the word, "citizens" under the impugned constitutional provision.

72 MP JAIN, *Supra* n. 34, at 870-871.

73 *Id.*, at 868.

beginning from *Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India*[74] to *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors.*,[75] has brought about the rights of the speaker as well as recipient of the commercial speech within the ambit of Article 19(1)(a). The right to commercial speech has often been theorized from the perspective of a speaker keeping the view of the "businessman" in mind attributing an individual's identity to the speaker rather than a corporate identity.[76]

I seek to argue that the conceptualization of commercial speech within the ambit of Article 19(1)(a) raises a corporation-citizen debate with cases involving use of advertisements by corporates. However, by referring to the rights of recipients of such speech including individuals and individualizing the economic interests of the speaker, the Courts have tried to avoid endorsing the judicial positions as found in *Sakal Papers and Bennett Coleman* trying to find a middle-way out.

C. Article 19(1)(a) or Article 19(1)(g): A constitutional overlap?

While scrutinising the constitutional placement of the commercial speech doctrine, I wish to discuss the overlap argument brought forth by scholars such as Udai Raj Rai. This section will also highlight the arguments raised in the of *Novas ADS v Secretary,*

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74 Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India, AIR 1986 SC 515

75 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors.,AIR 1995 SC 2438.

76 *Id.*, at ¶23.

Department of Municipal Administration and Water Supply,[77] which add an interesting dimension to the scope of the debate.

The proposition laid down has been that commercial speech fits better into Article 19(1)(g) than under Article 19(1)(a) and the absence of a constitutional provision similar to Article 19(1)(g) in the American context has compelled the position of this doctrine within the free speech and expression kaleidoscope.[78] Such a mix-up of the speech and business element is an extension of the line of argumentation vis-à-vis freedom of press wherein the judiciary has often drawn a thin line between the speech and non-speech aspect of the media.[79] I seek to approach such an argument made for Article 19 overlap with respect to commercial speech with a sense of scepticism as the argument has often being placed on the judicial opinion expressed in the *Tata Press Case*. In this case, the Court supported the constitutional protection of the fundamental right to commercial speech of the appellants under Article 19(1)(a) holding that such right cannot be denied by creating a monopoly in favour of the State or any other authority as it does not fall within the ambit of Article 19(2) restrictions.[80]

Such reliance on the monopoly perspective has been used by *Udai Raj Rai* to further the overlap argument arguing that a similar conclusion could have been reached via reading Article 19(1)(g) along with Article 19(6) to hold that the restrictions provided under the

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77 Novas ADS v Secretary, Department of Municipal Administration and Water Supply, AIR 2008 SC 2941.

78 UDAI, *Supra* n. 11, at 41.

79 Anahita Mathai, *Media Freedom and Article 19*, Observer Research Foundation, (April 2013), 2-3, http://orfonline.org/cms/export/orfonline/modules/issuebrief/attachments/issue53_1365505705338.pdf, (Last visited on: September 30, 2016).

80 UDAI, *Supra* n. 11, at 41.

latter do not envisage creation of a private monopoly couched in the idea of a State Monopoly.[81] However, I seek to contend that such a constitutional model governing the interpretive application of commercial speech though ambitious is largely based on a reversal of the logic governing Article 19.

It is necessary to examine the host of cases evidencing the interaction between Article 19 and commercial speech, which has involved the identification of right and subsequently corresponding restrictions. Relying upon the judicial approach in these cases, the logic governing Article 19 and its functioning within the Indian Constitutional Framework has been to locate the right being claimed within the range of freedoms listed from Article 19(1)(a)-(g) and then determine the need for corresponding reasonable restrictions.[82] Such enunciation has also been found in Justice Mukherjea's opinion in *AK Gopalan v State of Madras*[83] wherein he opined that - "*Article 19 of the Constitution gives a list of individual liberties and subsequently prescribes in the various clauses the restraints may be placed upon them by law so that they may not conflict with public welfare or general morality*"[84]

Furthermore, the substantive content of the idea of "commercial speech" also adds to my scepticism of the model suggested by Udai Raj Rai. The cases of *Lakshmi Ganesh Films v. Government of Andhra Pradesh*[85], *Mr. Mahesh Bhatt & Kasturi and Sons v.*

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81 *Id.*

82 When an enactment is found to infringe any of the fundamental rights guaranteed under Article 19(1), it is held to be invalid unless it falls under the corresponding protective provisions provided from Article 19(2)-(6). *See* L.M. SINGHVI, CONSTITUTION OF INDIA, 641-642 (Volume 1, 2nd ed.).

83 AK Gopalan v State of Madras, AIR 1950 SC 27.

84 *Id.*

85 Ganesh Films v Government of Andhra Pradesh, 2006 (4) ALD 374.

Union of India[86] and *Marico Ltd. v Adani Wilmar Ltd.*[87] have brought out the nature of judicial discourse centred round the constitutional idea of content-based limitations. The cases revolved around issues governing obscenity, public health vis-à-vis advertising tobaccos and disparagement of competitor's product through aggressive advertising.[88]

The court in all these cases focussed on restrictions to be imposed on the speech aspect and the business/trade element has been affected incidentally through the State action. Such judicial interpretation is symptomatic of the primacy attached to the idea of free speech leading to conjunct reading of Article 19(1)(a) with Article 19(2).[89] The fundamentality rendered to the propagation of views and reaching the masses serving the economic interests of the recipient as well as speaker goes well with the *instrumental justification* of free speech[90] validating the placement of "commercial speech" within Article 19(1)(a).

However, it is necessary to appreciate such judicial maneuvering as suggested by Udai Raj Rai, who seems to be endorsing the idea of *Liberal Constitutionalism*.[91]He intends to prioritize the conception of political liberty within the free speech and

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86 Mr. Mahesh Bhatt & Kasturi and Sons v. Union of India, 147 (2008) DLT 561

87 Marico Ltd. v Adani Wilmar Ltd.,199(2013)DLT663

88 DR. LILY SRIVASTAVA, LAW AND MEDICINE, 29-30 (2010 ed.).

89 *Id.*

90 LEE BOLLINGER AND GEOFFREY STONE, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, 122-123 (2002 ed.).

91 "*The two important defining features of liberal constitutionalism is an equally strong commitment both to a set of civil and political rights derived from justice and that democracy and the sovereignty of the people is a foundational aspect of a legitimate political order*." *See* Harald Borgebund, *Liberal Constitutionalism: Re-thinking the Relationship between Justice and Democracy*, (2010), http://core.kmi.open.ac.uk/download/pdf/1145179.pdf, (Last visited on: October 1, 2016).

expression jurisprudence informing constitutional interpretation.[92] Yet, he demonstrates cognizance of the mechanical approach followed by courts in contextualising rights with their quadrating restrictions under Article 19 often disabling the state from imposing certain "reasonable restrictions".[93] He seems to be proposing a balancing act wherein the judiciary actively fights for the progressive expansion of the free speech idea in a liberal democratic society yet provides room for the government to impose reasonable restrictions within the broad idea of "interests of the general public".[94]

Therefore, the Article 19(1)(g) usage though appealing in light of the inevitable business element peculiar to the usage of commercial speech is an ambitious model still striving to find a place within the prevailing state of affairs.

Part III. Examining the possibility of gradation: Going the American way?

Marking the genesis of Commercial Speech Jurisprudence in India from *Hamdard Dawakhana v Union of India*[95], in this part, I attempt to understand the implications of this judgment vis-à-vis the treatment of the impugned speech under Article 19(1)(a). The conscious judicial effort to locate intrinsic value in speech has been used to construct a case for integrating the American Model of Gradation determining free speech protection under the First Amendment.

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92 *Id.*
93 UDAI, *Supra* n. 11, at 41.
94 *Id.*
95 Hamdard Dawakhana v Union of India, 1960 SCR (2) 671.

The Court in *Hamdard Dawakhana* accepted that advertisement constitutes one of the forms of speech warranting constitutional protection. However, such concession was subjected to a rider that advertisements coloured with a commercial motive possess no "*relationship with the essential concept of the freedom of speech*" as such commercial advertisements involve no propagation of ideas and thus, cannot be protected by Article 19(1)(a).[96] The judiciary in this case striving to locate certain values in speech before affording it Article 19(1)(a) protection seems to suggest the possibility of application of the idea of gradation. Such an idea is a product of American Constitutional jurisprudence as discussed in cases such as *US v Playboy*[97] and *Liquor Mart v Rhode Island*[98] creating a hierarchy among different forms of speech.

The Court creating the presence of such relational satisfaction acting as a pre-condition for affording constitutional protection has compelled me to scrutinise the possibility of attributing different forms of speech varying standards of protection under the Constitution. Such a model is premised on the idea that degree of protection will depend on the proximity of disputed speech to the central idea of freedom of speech and expression.[99]

However, the Indian Apex Court has taken a seemingly conflicting stance in *Tata Press Case* as it pushed for the Dworkinian idea of providing every citizen an equal chance to contribute to the societal development via such propagation of ideas promoting the

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[96] *Id.*, at ¶17.
[97] US v Playboy, 529 U.S. 803 (2000).
[98] Liquor Mart v Rhode Island, 517 U.S. 484 (1996).
[99] Akhil Deo and Joshita Pai, *Commercial Speech: A Variant or a Step Child of Free* Speech, Comparative and Administrative Law Quarterly, Volume II Issue I, 14-15, (September 2014).

true essence of democracy based on equal concern and respect for all.[100] The effect of such a position was that the case effectively excluded no form of speech from the ambit of protection of Article 19(1)(a). The Court however clarified that advertisements held to be deceptive/unfair/misleading/untruthful though protected by the impugned article will be subjected to the restrictions provided under Article 19(2).[101]

Demonstrating sensitivity to the fact that the case of *Hamdard Dawakhana* involved a constitutional bench,[102] the judicial rationality excluding certain forms of speech from Article 19(1)(a) protection and the "relational" concept continues to be a source for endless argumentative discourse. This has compelled me to delve into the possibility of the idea of gradation as found in the American Constitutional scheme of affairs.

The US Supreme Court moving on from the cautious stance in *Valentine v Chrestensen*[103] has come a long way in recognizing the constitutional protection for such speech.[104] Despite such developments, commercial speech does not enjoy "core" First Amendment protections and enjoys a sub-ordinate peripheral position compared to other constitutionally guaranteed non-commercial speech.[105] Such lower level of protection granted to

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100 *Supra* n. 38.

101 AKHIL, *Supra* n. 99, at 14.

102 The decision involving such exclusion of forms of speech not bearing a direct relation with the essential idea of freedom of speech disentitling them of the Article 19 protection was also affirmed by the Delhi High Court in Mahesh Bhatt and Kasturi Sons v Union of India and Anr., 147 (2008) DLT 561.

103 Valentine v Chrestensen, 316 U.S. 52 (1942).

104 ROBERT, *Supra* n. 14, at 2-3.

105 Victor Brudney, *The First Amendment and Commercial Speech,* Boston College Law Review, Volume 53, 1212-1213, (2012).

commercial speech evidences the element of gradation present in the American free speech jurisprudence.

Scholarly discourse carried out by jurists such as HM Seervai can be utilized for creating a jurisprudential foundation for the possibility of the application of such gradation in the Indian context. He stated that the granting of constitutional status to commercial speech at par with other forms of speech was *reduction ad absurdum*.[106]

The constitutional protection for free speech and expression has been usually premised on the grounds that it contributes to democratic governance and individual self-fulfillment. Using this construct, the judicially approved definition of commercial speech as "*speech proposing nothing more than a commercial transaction*"[107] has often failed to satisfy this metric.[108]

The judicial characterization of commercial speech has often led to its understanding in the Indian as well as American Context in the contemporary times as a marketing practice aimed at inducing profitable market transactions. The commercial speech has been argued by scholars such as Edwin Baker to involve an attempt to exercise power in an instrumental manner to effectuate commercial transactions via rearrangement of resources.[109] For Baker, a typical speech situation involves respect for other's autonomy leaving them

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[106] The author in his books seeks to describe the *Tata Press Case* Reasoning as the blind duplication of the American Commercial Speech Jurisprudence. *See* HM SEERVAI, CONSTITUTION OF INDIA: A CRITICAL COMMENTARY, (1983 ed.).

[107] Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438, at ¶12-13.

[108] Nishant Kumar Singh, *Should lawyers be allowed to advertise?*, Student Advocate, Volume 11, 68-69, (1999).

[109] C. Edwin Baker, *The First Amendment and Commercial Speech*, Indiana Law Journal, Volume 84, 991-992, (2009).

with a possibility of choice referred to as communicative agreement by Habermas. On the other hand, commercial speech essentially involves a coercive attempt to create profits for the speaker placing primacy on such institutional exercise of power through constitutionally guaranteed autonomy.[110] Despite such criticisms, commercial speech cannot be deemed to be merely a commercial proposition. It would mean turning a blind eye to its social utility and pragmatism as has often been evidenced in the Indian context. Contextualising this sentiment, I find it hard to support the extreme model often put forth by Thomas Emerson as part of his "full protection" absolutist approach viewing commercial speech entirely outside the free speech paradigm.[111] The intermediate level of protection for commercial speech[112] via application of the gradation model is thus, a middle-way out of two positions demonstrating ideological polarity.

Thus, in this section, I have tried to build a case for the possibility of such a constitutional move in light of the judicial position and scholarly criticism faced by the "constitutional presence of commercial speech". However, it is essential to recognize that such creation of hierarchy under Article 19(1)(a) placing commercial speech at a lower pedestal is problematic within the existing constitutional framework in light of the specific restrictions provided on such speech in Article 19(2), which do not feature as part of the First Amendment.[113] Hence, the structural differences in the American and Indian prevailing models make such cross-

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110 *Id.*, at 991. *Also see* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, (1996 ed.).

111 *Id.*, at 994.

112 UDAI, *Supra* n. 11, at 41.

113 *Id.*

constitutional borrowing a risky proposition reflecting an aspirational sentiment more than a practical agenda.

Part IV. Striking a balance: Qualifying the reasonable restrictions

The constitutional conception of free speech and expression as enshrined under Article 19(1)(a) on a plain reading of the provision renders validity to the conclusion that the rights guaranteed under the impugned article are not absolute in nature. Hence, it becomes inevitable to discuss the constitutional limitations provided under Article 19(2) to be discussed as instruments justifying state regulation of such freedom and limitations on legislative power to curb free speech and expression.[114]

The application of such a constitutional principle of restrictions is not unqualified and subjected to the use of the term, "reasonable". This term has played a significant role in curtailing the political state's power and integrating the role of judiciary as an adjudicative mechanism within the constitutional setup.

In this part, I explore the "reasonable restrictions" discourse critical to the operation of Article 19 on a general and specific level. After streamlining the guiding principles determining judicial determination of restrictive government actions classified as reasonable, the discussion in this part particularly looks at the approach of Indian courts when it comes to curbing commercial speech.

Pursuant to such discussion, I have tried to highlight two points relevant to the "reasonable restrictions" jurisprudential

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[114] MP JAIN, *Supra* n. 34, at 1072.

framework impacting the scope of right to commercial speech claims. Firstly, it reveals the legal paternalism illustrated by the concept of compelled speech mandating advertisers to abide by certain "must-carry provisions". Secondly, the judicial examination of validity of state actions in the US has recently demonstrated resemblance to the approach taken by Indian courts despite the divergent standards of constitutional protection afforded to commercial speech in these two jurisdictions opening up another Pandora's Box.

The discourse surrounding reasonability has never really reached settled shores as the judiciary has constantly struggled providing an exact definition of the word reasonable as recognized in *Gujarat Water Supply v Unique Electro (Gujarat) Pvt. Ltd.,*[115] in light of no definite test determining the reasonableness of a restriction. However, cautious of the excessive undesirable subjectivity causing the "reasonable restriction" clause to experience redundancy, the constitutional jurisprudence on the subject has experienced streamlining over the years especially in the cases of *Pathumma v State of Kerala*[116]and *Papnasam Labour Union v Madura Coats Ltd.*[117]

In these two cases, the Apex Court stated that the arbitrary or excessive threshold must not be crossed. This threshold is required to be measured vis-à-vis the requirement of the society and object sought to be achieved often engaging the *Effect v Subject Matter Test.*[118]Under this test, the effect of the state action imposing such a restriction has been given primacy. [119] Additionally, the court

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115 Gujarat Water Supply v Unique Electro (Gujarat) Pvt. Ltd., AIR 1989 SC 973.

116 Pathumma v State of Kerala, AIR 1978 SC 771.

117 Papnasam Labour Union v Madura Coats Ltd., AIR 1995 SC 2200.

118 MP Jain, *Supra* n. 34, at 1070.

119 *See* Maneka Gandhi v Union of India, 1978 SCR (2) 621; RC Cooper v Union of India, 1970 SCR (3) 530.

emphasized on the existence of a direct and proximate nexus between restriction and object coupled with sensitivity to the dynamic socio-political circumstances while engaging in such act of constitutional interpretation.

Engaging further in the "reasonable restrictions" constitutional examination, judicial discourse has culled out that procedural and substantive Reasonableness both form pre-requisites for such determination of reasonability under Article 19(2)-(6). It is to be noted that any judicial scrutiny ought to be carried out against the backdrop of Directive Principles of State Policy.[120]

Subsequently, as commercial speech has been time and again granted constitutional protection by the Indian Courts, it has also been subjected to the corresponding ambit of restrictions provided under Article 19(2) by virtue of its existence as a qualified right.[121] The reasonable restrictions debate has significantly adapted itself to the peculiarities of the commercial speech doctrine within the Indian Context with primary focus on advertisements. It is interesting to observe that for a period of 35 years since the *Hamdard Dawakhana* ruling, the judiciary never entered into a contextual reading of Article 19(1)(a) along with its corresponding restrictions under Article 19(2). The *Tata Press* case, in 1995, marked the first time this aspect of the doctrine was scrutinised. [122]

The Court opined that commercial speech which is "*deceptive, unfair, misleading and untruthful would be hit by Article 19(2) the Constitution*

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[120] *See* MP JAIN, *Supra* n. 34, at 1075-1076; *Also see* UDAI, *Supra* n. 11, at 18.

[121] VIKRAM RAGHAVAN, COMMUNICATION LAWS IN INDIA, 149-150 (2007 ed.).

[122] SINGHVI, *Supra* n. 82, at 860.

and can be regulated/prohibited by the State",[123] thereby opening up the debate. It is critical to appreciate that the nature of commercial speech subjected to reasonable restrictions in this 1995 case never involved Justice Kuldip Singh bringing in such characterisation under any one of the specific grounds provided.[124] Such lacunae in judicial reasoning can be resolved by bringing in the category of advertisements within the constitutional field of immorality.

Furthermore, with the emergence of the concept of open competition in the neoliberal era, the phenomenon of comparative advertising has assumed unprecedented prominence compelling the Courts to adapt the application of the constitutional idea of "reasonable restrictions" in a dynamic environment.[125] Such an approach was illustrated when the Delhi High Court, in *Hindustan Unilever Ltd. v Cavincare Pvt. Ltd.,*[126] held that instrumentalization of commercial speech as a means to cause denigration of rival goods legitimizes state regulation.

Similarly, in the case of *Lakshmi Ganesh Films v Government of Andhra Pradesh*[127], the virtue of deception and promotion of an illegal activity were discussed as grounds legitimizing state regulation involving commercial speech. Hence, the judicial discourse has further pushed the analysis towards the realms of immorality centred round the idea of advertisements as a mode of communication.

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123 Also see HUL v Reckitt Benckiser, 2014(2) CHN 1, at ¶73, which reiterates the same judicial position vis-à-vis constitutionally provided reasonable restrictions on the conception of commercial speech.

124 UDAI, *Supra* n. 11, at 40.

125 JEREMY PHILIPS, TRADEMARKS AT THE LIMIT, 29-30 (2006 ed.).

126 Hindustan Unilever Ltd. v Cavincare Pvt. Ltd., (2010)ILR 5Delhi748.

127 Lakshmi Ganesh Films v Government of Andhra Pradesh, 2006 (4) ALD 374.

I seek to contend that the treatment of reasonable restrictions as part of the Commercial Speech Doctrine has been heavily advertisement-centric thereby often invoking the idea of consumer protection within the scope of affairs as evidenced by Madras High Court ruling in *Coalgate Palmolive (India) v Anchor Health and Beauty Care Pvt. Ltd.*[128]The use of puffery/bait advertising has often found place within the judicial dialogue as the courts owing to the peculiarity of disputes in a liberalised, privatised and globalised economy has expressed caution against the use of commercial speech as a marketing tactic in the name of exercise of free speech and expression. [129]

The judicial treatment of reasonable restrictions read in context of the Commercial Speech Doctrine exemplifies the manner in which legal paternalism plays a pivotal role in the realm of fundamental rights jurisprudence.[130] Such line of judicial thinking reveals the content-based application of restraints enabling the State to assume the status of a regulatory authority determining what kind of commercial speech can make individuals vulnerable to deception thus taking decisions for their own good.[131]

The idea of legal paternalism in relation to free speech and expression is furthered by the discussion carried out by scholars such as L.M. Singhvi as they discussed the idea of compelled speech in advertisements as a form of commercial speech within the scope of such restrictions.[132]

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[128] Coalgate Palmolive (India) v Anchor Health and Beauty Care Pvt. Ltd., (2008) 7 MLJ 1119.
[129] *Id.*
[130] *Supra* n. 38.
[131] Joel Feinberg, *Legal Paternalism,* Canadian Journal of Philosophy, Volume 1, No. 1, 105, (September 1971).
[132] SINGHVI, *Supra* n. 82, at 861.

Compelled Speech essentially involves the use of "must carry provisions" in advertisements alleged to infringe the free speech and expression rights provided under Article 19(1)(a). Yet the presence of such statutory validation of compelled disclosures has been argued to be within the scope of the operation of reasonable restrictions as under Article 19(2) depending on the nature of the impugned "must carry" provision.[133]

Tracing its theoretical justification to the substantive content of free speech and expression, compelled commercial speech acquires validity if it leads to the promotion of speech which propels the cause of informed decision-making by the recipients of such commercial speech. Such an approach was also reflected in the case of *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.*[134]wherein the court noted that- "*it may be appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.*"[135]

The 2010 case of *Dabur India v Colortek Meghalaya*[136] has however initiated a paradigm shift as the Delhi High Court held that the objective of commercial speech doctrine is to provide an advertisement with adequate leeway to deliver a message and display caution against judicial hyper-sensitivity and excessive state regulation. Marking a deviation from the line of paternalistic judicial reasoning, the Court cognizant of the market forces, prevailing economic climate and specific features of the advertised product

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133 *Id.* The author in his book discusses the examples of statutory warnings on cigarette packs as a classic example of such compelled commercial speech satisfying the Article 19(2) reasonability standards.

134 Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *Also see* ROBERT, *Supra* n. 14, at 7-8.

135 KEIGHLEY, *Supra* n. 66, at 547-548.

136 Dabur India v Colortek Meghalaya, 167(2010)DLT278.

placed reliance upon the informed decision-making of the consumers constituting the recipients of commercial speech.[137]

A. From Hudson to Sorrell: American Doctrine going the Indian Way?

In the American Constitutional Setup, the void created in light of the absence of a "reasonable restrictions" clause placing constraints upon the acts of state regulation on commercial speech has been often sought to be filled by the judiciary determining the validity of such state action. In this sub-section, I discuss the two landmark cases of *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*[138] and *Sorrell v IMS Health*[139] in order to examine the manner in which the American courts have scrutinised government speech restrictions on commercial speech.

In 1980, the US Supreme Court in the *Central Hudson Case* developed a four-part doctrinal standard for the purposes of testing the validity of state restrictions on commercial speech eligible for the subordinate First Amendment protection. In *Central Hudson*, the court primarily went into the inquiry concerning the unlawful/misleading nature of the speech disentitling protection under the First Amendment.[140] Subsequently, if the speech falls within the scope of First Amendment protection, the US Supreme Court laid down three guiding principles to justify the contended speech regulation namely- "*(1) They have identified a substantial government interest; (2) The regulation*

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[137] *Id*, at ¶18.
[138] Central Hudson Gas & Electric Corp. v Public Service Commission of New York, 447 U.S. 557 (1980).
[139] Sorrell v IMS Health, No. 10-779 131 S.Ct. 2653 (2011).
[140] *Id.*

``directly advances'' the asserted interest; and (3) The regulation ``is no more extensive than is necessary to serve that interest"[141]

The test though often subjected to criticism continued to dominate the restriction standard of the commercial speech doctrine for a prolonged period of time[142] until *Sorrell* entered into the scheme of affairs. This case dealt with a 2007 Prescription Confidentiality legislation passed in Vermont requiring consent of doctors before publication of his/her prescribing practices for marketing purposes especially by pharmaceutical companies. The Hudson test represents the intermediate level of judicial scrutiny however, in *Sorrell*, the court espousing for the higher standard of "heightened scrutiny". It involved the court extending the ambit of judicial examination of state imposed restrictions to include content-based restraints on commercial speech.[143]

Such a judicial stance implied a conscious effort to expand the scope of First Amendment protection to place commercial and non-commercial speech at the same level. Such a conclusion can be drawn in light of the judicial practice to utilize the heightened scrutiny standard specifically in cases of non-commercial speech when the government regulated speech on disagreement with its content.[144]

This judicially initiated move for heightened scrutiny has caused the blurring of the constitutional distinctions existing between commercial speech and other forms of speech enjoying core First

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141 Richard Samp, *Sorrell v IMS Health: Protecting Free Speech or Resurrecting Lochner?* , CATO Supreme Court Review, 132-133, (2012).

142 Daniel A. Farber, *Commercial Speech and the First Amendment Theory,* Northwestern University Law Review, Volume 74, 373-374, (1979).

143 *Id.*

144 RICHARD, *Supra* n. 141, at 134.

Amendment protection. It has problematized the situation in hand compelling me to suggest that the American jurisprudence could be slowly going the Indian way as conservatives continue championing the cause of expansive commercial speech rights.[145] The increase in the level of scrutiny has imposed burden on the state while formulating regulations on commercial speech. *Sorrell* though not committing irrevocably to such scrutiny standards has initiated a discourse surrounding a shift in the American commercial speech model placing the doctrine within the core of the First Amendment.[146]

Conclusion

I have tried to demonstrate that the commercial speech doctrine, though finding place within the Article 19 framework, continues to experience constant interpretive alteration in light of its definitional ambiguity and advertisement-centric judicial discourse. The constitutional narrative regarding the commercial speech doctrine in the Indian and American context is an illustration of the relatively contemporary status of the concept.

The paper is an attempt to construct a case for a more expansive interpretation of commercial speech as a constitutional doctrine break free of the current single-minded advertisement-biased approach. Such interpretive reorientation will also provide the courts with an opportunity to move beyond the "free flow of

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[145] *Id.*, at 148.

[146] The court decided the case on the basis of the non-exact standards of the Central Hudson Test demonstrating its uncertainty concerning the constitutional ramifications of such a scrutiny standard. *See* Tamara R. Piety, *A Necessary Cost of Freedom? Incoherence of Sorrell v IMS*, Alabama Law Review, Volume 64, 5-6, (2012).

information" justification for justifying the constitutional status of this doctrine.

While the controversial subject of "corporation as a citizen" has been circumvented by several judicial decisions, the acceptance of right to commercial speech claims from press houses and corporates is a tacit acknowledgment of their capacity to raise Article 19 disputes. Despite the extensive debate and divergent viewpoints on this subject over the past few decades, the *Hamdard Dawakhana* rule still keeps open the possibility of implementation of a gradation model under Article 19 of the Constitution.

It is imperative that Indian courts conclusively decide the constitutional status of commercial speech within the fundamental rights framework. With the current architecture of Article 19 not supporting subordination of specific free speech claims, the question remains- Is granting of constitutional status to commercial speech at par with other forms of speech an absurd proposition?

Does Bangladesh need the Political Question Doctrine?

Md. Zahirul Islam[*]

Abstract

In the era of judicial activism, the judiciary has become more active and functional as opposed to its traditional "self-restraint" position. Application of the political question doctrine somehow narrows the expanding scope of judicial review, and therefore remains a crucial issue to be dealt with by the courts. This article focuses on the various judicial approaches to the justiciability of issues with political ramifications. This work adopts a broader study of the origin, the evolution, the current legal position and the future of the political question doctrine in constitutional law discourse by analyzing works of scholars and courts across jurisdictions. Relying on an extensive study of the judicial works of Bangladeshi courts, this paper makes an honest endeavor to see whether Bangladesh needs the political question doctrine, while its judiciary has progressed towards achieving constitutionalism by widening the scope of its review.

Introduction

The "political question doctrine"; the combination of these three words seems innocuous on the face of it. Nevertheless, in constitutional law discourse, this doctrine is often misused, sometimes wrongly applied and shown to be problematic. At the same time, this doctrine has managed to gather support and

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recognition from a few quarters. The "political question doctrine", an American invention, states that some issues are inherently non-justiciable due to their political nature. Philosophically, judicial restraint over political issues seems to be a sound principle. But in reality, this principle is most often misused. A large number of "issues" have been kept outside judicial review for being "political". The political question doctrine is closely linked to the concept of justiciablity, i.e., the question of whether the judiciary is the appropriate forum to judge a particular issue. While legal questions are deemed to be justiciable, political questions are not. This is despite constitutional law being a grey area, where legal issues often have political overtones.[1]

In Bangladesh, the existing socio-political realities require the judiciary to adopt and evolve an active and operational jurisprudence of its own to help gaining the promised constitutional democracy.[2] The judiciary has generally pursued a broader approach to the justiciability of issues with political ramifications. Sometimes, it has refused to go beyond the political question doctrine so as to adjudicate "politics-inspired issues of constitutional importance",[3] sometimes avoided[4] and sometimes accepted[5] this doctrine. But a clear stance has yet to be adopted by the judiciary. Therefore, the

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1 MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 444 (2003).

2 Ridwanul Hoque, *On* Coup D' Etat, *Constitutionalism, and the Need to Break the Subtle Bondage with Alien Legal Thought*, THE DAILY STAR (Dhaka), October 29, 2005.

3 M A. Mannan v. Bangladesh (High Court Division's judgment in 2008) (Unreported). This case was about the legality of delimitation of constituencies by the Election Commission.

4 Constitutional Reference No 1 of 1995 (MPs' Resignation) III BLT (Spl.) (1995) 159.

5 M/S Dulichand Omraolal v. Bangladesh, 1 BLD (1981) (AD) 1. Khondaker Modarresh Elahi v. Bangladesh, 21 BLD (2001) (HCD) 352.

present study is the search for a clear stance that the Bangladesh judiciary can consider appropriate for itself, where the judiciary has begun playing an active role to promote constitutionalism. This paper revolves around the question of whether Bangladesh needs the political question doctrine. This paper analyses the political question doctrine and its relationship with judicial activism. It is not my argument that the judiciary should intervene in every political dispute. Rather, it is that there is no reason to disempower the judiciary in the name of the "political question doctrine".

Part I. Understanding the "Political Question Doctrine"

The "political question doctrine" is an American invention, and has its roots in the historic U.S. Supreme Court case *Marbury v. Madison.*[6] In this case, Justice Marshal appears to have created two major doctrines in constitutional law.[7] The *first* is the statement that it is "emphatically the province and the duty of the judicial department to say what the law is", which paved the way for modern judicial review. The *second* is the assertion that recognized the existence of certain questions that are wholly outside the purview of the courts by use of the term "question in their nature political". The statements, when read together, may reveal Marshall's fundamental conception of the separation of powers, and highlight both the limits of judicial authority and the interpretive role played by the political branches.[8] When these cases involving such political questions are presented, it is the province and the duty of the legislature or the executive and not the courts to clarify the legal position. These questions have

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6 5 U.S. (1 Cranch) 137 (1803).

7 A. A. Shamrahayu & A. O. Sambo, *Internal Affairs of Political Questions and Judicial review: An Expository Study of the Experience in Nigeria and Malaysia*, 7(13) J. OF APPLIED SCIENCE RESEARCH 2257-2265 (2011).

8 *Id.*

come to form the substance of the so-called "political question doctrine."[9]

Louis Henkin and Aharon Barak are some of the leading scholars who have argued against this doctrine. Henkin points out that, in many cases, the "political question doctrine" merely restates in a confusing manner the obvious principle that "the courts are bound to accept decisions by the political branches within their constitutional authority." [10] For Barak, "any act is liable to be "caught" by the legal norm, and there is no act for which there is no applicable legal norm. The law spans all actions."[11] Barak's view is that the political nature of the act is irrelevant as every act necessarily has legal implications. Barak also wrote: "the American doctrine concerning political questions is particularly problematic. Its legal foundations are shaky and it is largely based on irrational reasons".[12]

In *Vieth v. Jubelirer*, [13] the US Supreme Court observed, "sometimes—the law is that the judicial department has no business entertaining a claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be 'non-justiciable,' or 'political questions'."[14] The political question doctrine "excludes from judicial review those controversies which revolve around policy

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[9] R. E. Barkow, *More Supreme than Court? The Fall of Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUMBIA L. REV. 237 (2002).

[10] Louis Henkin, *Is There a 'Political Question' Doctrine?,* 85 YALE L. J. 597-599 (1976).

[11] Ressler v. Minister of Defense, 42 P.D. (2) 441 (1988) *per* Barak J.

[12] AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006).

[13] 541 U.S. 277 (2004). The Pennsylvania General Assembly (D) drew a map delineating the districts for the congressional elections. The map was challenged by Vieth (P) and others in court, on the basis that the creation of the districts was for the improper purpose of obtaining political advantage, or gerrymandering.

[14] *Id.*

choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[15] Furthermore, "because political questions are non-justiciable under Article III of the Constitution,[16] courts lack jurisdiction to decide such cases." Correspondingly, in the American context, the political question doctrine performs an important function in ensuring separation of powers. Similarly, in Nigeria, the Courts have created a dichotomy between matters that the Constitution prescribed and other matters that concerned the affairs of the legislature or the executive. For instance, in *Balarabe Musa v Auta Hamzat*,[17] the Nigerian Court of Appeal observed that a question of impeachment of a state's governor was a political question, and outside its jurisdiction.[18]

In Canadian case of *United States v. Burns*,[19] the challenge concerned an extradition request by the United States for two accused individuals in Canada. Despite public outcry, Canada's Minister of Justice refused to impose a condition that the United States would not seek death penalty upon conviction. This was a matter of foreign policy, clearly falling within the usual ambit of the political question doctrine. Nevertheless, the Supreme Court of Canada regarded the matter as justiciable, and mandated the "no death penalty" condition. The Court observed death penalty to be a matter concerning justice, and not outside its realm.

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[15] Lessin v. Kellogg Brown & Root, U.S. Dist. LEXIS 39403 (2006).

[16] Article III of the United States Constitution establishes the judicial branch of the federal government. The judicial branch comprises the Supreme Court of the United States and lower courts as created by Congress.

[17] 3 NCLR 229 (1982)

[18] See *Ume Ezeoke v Makarfi* 3 NCLR 663 (1982); *Okwu v Wayas* 2 NCLR 522 (1981)

[19] 1 S.C.R. 283 (2001)

An analysis of these cases from different jurisdictions reveals that the political question doctrine has no universally accepted definition. Its recognition and application varies across jurisdictions. Nonetheless, it is submitted that the doctrine constitutes a form of judicial avoidance where courts defer matters without reviewing the positions taken by the political branches of the government, and refuse to comment on the lawfulness of the positions.[20]

A. Development of the Political Question Doctrine

Although the doctrine's current analytical framework originates from a handful of landmark U.S. Supreme Court opinions,[21] the political question doctrine arrived in America as a component of common law.[22] Some scholars argue Alexander Hamilton contemplated the basic principle behind the doctrine in *The Federalist Papers*.[23] However, Justice John Marshall deserves much of the credit for bringing the doctrine to the forefront of American jurisprudence. Three years before Marshall discussed political questions as a limit on judicial review in *Marbury v. Madison*,[24] he warned of the potential danger of a court without jurisdictional limits.[25] Marshall cautioned, "if the judicial power extended to every question under the constitution, it would involve almost every subject

20 F. W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75(4) YALE L. J. 517-535 (1966).

21 *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1963); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

22 Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 UNIVERSITY OF COLORADO L. REV. 65, 68–69 (1977).

23 Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine* in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 24 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); *See* The Federalist No. 78 (Alexander Hamilton).

24 5 U.S. (1 Cranch) 137 (1803).

25 Barkow, *supra* note 9.

proper for legislative discussion and decision."[26] This would undermine the separation of powers and "the other departments would be swallowed up by the judiciary."[27] Marshall carried these notions of judicial restraint with him to the Supreme Court. *Marbury v. Madison* is the case in which judicial review was "firmly established as a keystone of American constitutional jurisprudence."[28] Therefore, *Marbury* was quite significant in the development of the political question doctrine.

The most important U.S. Supreme Court case regarding the political question doctrine is a voting rights reapportionment case from 1963, *Baker v. Carr.*[29] In *Baker*, the Court held that the determination of whether a matter has been committed to another branch of the Federal Government "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as

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26 Barkow, *supra* note 9, (quoting Representative John Marshall, Speech on the Floor of the House of Representatives Mar. 7, 1800, *in* 18 U.S. (5 Wheat.) app. note I, 16–17, (1820).

27 Barkow, *supra* note 9.

28 Henkin, *supra* note 10

29 369 U.S. 186 (1963); *see* Rogers v. Lodge, 458 U.S. 634 (1982) (contending *Baker* "represents one of the great landmarks in the history of [the U.S. Supreme Court's] jurisprudence"); *Developments in the Law: Access to Courts*, 122 HARVARD L. REV. 1195 (2009) (describing *Baker* as the case which "announced [the political question] doctrine's modern contours"). Charles Baker (P) was a resident of Shelby County, Tennessee. Baker filed suit against Joe Carr, the Secretary of State of Tennessee. Baker's complaint alleged that the Tennessee legislature had not redrawn its legislative districts since 1901, in violation of the Tennessee State Constitution that required redistricting according to the federal census every 10 years. Baker, who lived in an urban part of the state, asserted that the demographics of the state had changed shifting a greater proportion of the population to the cities, thereby diluting his vote in violation of the Equal Protection Clause of the Fourteenth Amendment. Baker sought an injunction prohibiting further elections, and sought the remedy of reapportionment or at-large elections. The district court denied relief on the grounds that the issue of redistricting posed a political question and would therefore not be heard by the court.

ultimate interpreter of the Constitution."[30] The *Baker* case delineated six criteria[31] to be used in determining the existence of a political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[32] These six *Baker* criteria serve as standards with which political question cases are to be measured.[33] Unless one of the six presents itself in a particular case, there should be no dismissal on political question grounds.[34]

Subsequent cases further clarified and refined the *Baker* criteria. For example, in 2004, the Court held that the *Baker* criteria

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30 *Id,* at 211.

31 *See also,* The *Baker* criteria are also described as formulations, tests, and indicia. *See id.* 217 (describing the criteria as formulations); Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (describing the criteria as tests); McMahon v. Presidential Airways, Inc.*,* 502 F.3d 1357 (11th Cir. 2007) (describing the criteria as indicia). However, the *Baker* criteria are not factors to be weighed against one another.

32 *Supra* note *29*, 217.

33 Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005) ("The political question doctrine may lack clarity, but it is not without standards.") (Citing Comm. of U.S. Citizens Living in Nicar. v. Reagan*,* 859 F.2d 929, 933 D.C. Cir. 1988).

34 369 U.S. 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."); S*ee* Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978) ("The inextricable presence of one or more of these factors will render the case non-justiciable under the Article III 'case or controversy' requirement.").

"are probably listed in descending order of both importance and certainty."[35] Other cases suggested the six criteria could be viewed together or combined into more succinct inquiries.[36] Despite these suggestions, modern U.S. cases as well as courts in other countries [37] still prominently use the *Baker* criteria to identify political questions.[38]

B. Theoretical approaches to the Political Question Doctrine

Political Question doctrine is compounded with the various theories, primarily with the classical and prudential theory. The prudential theory further includes the opportunistic theory, cognitive theory and normative theory. The classical theory conceives of political question as a question of constitutional interpretation rather than judicial discretion.[39] Wechsler appears to be the main proponent of this classical school. He opined that the courts are called upon to

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35 *Vieth*, 541 U.S. 278.

36 *See,* Goldwater v. Carter, 444 U.S. 996 (1979). In a concurring opinion, Justice Powell contended a court's analysis of political question doctrine issues "incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *See id.* 998; *see also,* Nixon v. United States, 506 U.S. 224 (1993).

37 In Nigeria, the Court relied on *Baker v Carr* to decide in *Onuoha v Okafor*, NSCC 494 (1983). The Supreme Court defined the political question doctrine in Nigeria as consisting of two principles. One is that '[t]he lack of a satisfactory criteria for judicial determination of a political question is one of the dominant considerations in determining whether a question falls within the category of political questions'. The other is '[t]he [appropriateness] of attributing finality to the action of the political department and political parties under the Nigerian Constitution and system of government'.[37] The Supreme Court cited *Baker v Carr* in support of these two principles.

38 Lane v. Halliburton*,* 529 F.3d 548, 558 (5th Cir. 2008); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1358 (11th Cir. 2007).

39 *See,* Moyer v. Peabody, 212, U.S. 78 (1908). The court was of the view where the constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene.

consider whether the constitution has committed to another agency of government the autonomous determination of the issues raised, a finding which itself requires an interpretation rather than discretion to abstain or intervene.[40] The prudential theory evolved as a result of the criticism levied on the classical theory. It is not based on constitutional interpretation, rather on prudence. Finkelstein described the prudential theory through certain cases that were completely outside the sphere of judicial interference.[41] Prudential theory is further divided into opportunistic, cognitive and normative theories. Finkelstein explained opportunistic theory in terms of court's instinct for political survival that would persuade the court to avoid the court from deciding "prickly issues" and "contentious questions" which touch the hypersensitive nerve of "public opinion."[42] Courts cannot shy away from deciding a case properly brought before it all on the ground that it is controversial and thus could be hidden under the doctrine of political questions. Field explains cognitive theory political question in terms of "a lack of legal principles to apply to the questions presented".[43] If the danger of clash with the political institution or political controversy about an issue will not account for the court to use the doctrine, we may need to analyze the legal nature of questions that the court has avoided.[44] Where there are no standards or rules, the court should create legal principles that would be applicable in the circumstances of the case. Although in the case of *Baker v. Carr*,[45] Justice Frankfurter showed

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40 Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARVARD L. REV. 1-12 (1959).

41 Maurice Finkelstein, *Judicial self Limitation*, 37(3) HARVARD L. REV. 338-64 (1924).

42 Scharpf, *supra* note *20*.

43 Oliver P. Field, *"The Doctrine of Political Questions in the Federal Courts",* 8 Minnesota L. REV, 512 (1924).

44 Finkelstein, *supra* note *41*.

45 Baker, *supra* note *3*.

"lack of judicially discoverable and manageable standards" as one of the elements of political questions, it is difficult to justify on cognitive grounds.[46] That is the reason why the 'minimum rationality test' has been suggested.[47]

Jaffe in light of normative theory of political question doctrine sees some other matters flowing from the powers of the political class apart from constitutional assignments as political questions because there are no guiding rules for its operation or its better done without rules. One is tempted to submit that the rationale of the phrase 'that the job is better done without rules'[48] is less convincing.

Thus, above definitions and theories offered by various authors do not perfectly define and delimit the scope of the term political questions. All the definitions and theories have one flaw or another. They are products of individual idiosyncrasies. The definitions and theories do not entirely capture the intention of Marshall in *Marbury*'s case. This is perhaps the reason why an attempt has been made to list the factors or consideration.[49] An attempt to propose a definition that will incorporate the various definitions offered does not solve this problem. This is because the

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46 *E.g.,* Field and Frankfurter's views are related in the sense that both are saying where there are no standards or rules to decide a particular situation, the court will not interfere by regarding it as a political question. For instance, since there are no guidelines, rules or standards to measure when emergency proclamation is needed; it should be regarded as a political question.

47 Scharpf, *supra* note *20*.

48 This phrase means that actions of political class do not have rules to be followed in doing it or even if there are rules, they may not be complied with as political processes often influence it. Thus, courts should not enforce the rules of the House where it is not complied.

49 B.O. NWABUEZE, NIGERIA'S PRESIDENTIAL CONSTITUTION 1979-1983: THE SECOND EXPERIMENT IN+CONSTITUTIONAL DEMOCRACY (1985).

incorporation will be suffering from all the defects of the proposed definitions. It is a constitutional law doctrine that was developed to stop the court from deciding on the merit certain questions, which may affect the powers or functions of other arms of government, or questions relating to the affairs of the political parties. But this doctrine has earned huge criticism as well through the all way of the development. In recent times, some scholars see this doctrine as almost dead one.[50]

Part II. Judicial Review and the Political Questions Doctrine

The origin of the concept of judicial review is also linked with *Marbury case,* which is the origin of the concept political question too. However, the practices of the English courts in the sixteenth and seventeenth century are equally important. Montesquieu, the father of the modern "separation of powers" doctrine, considered separation of judiciary as the most vital part of the constitutional scheme because it guards the government against its own lawlessness and ensures rule of law by securing the liberties of the citizenry *vis-a-vis* executive and legislative branches.[51] Despite the absence of a uniform practice, in function, there has emerged the theory of checks and balances, which in fact is a manifestation of the separation doctrine itself.[52] In this context, the judiciary exercises the power of judicial review to enforce legal limits on the other branches.

The term judicial activism, despites its popularity amongst legal experts, judges, scholars and politicians, has not until recently been given an appropriate definition of what the term should mean

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50 Barkow, *supra* note *9*.

51 RIDWANUL HOQUE, JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH 33 (2011).

52 HOQUE*, id. 33*.

so that it will not be subject to abuse.[53] The effect of this has been a misconception about what the term is all about.[54] This therefore creates a series of definitions about the concept. Paul Mahoney in offering his own definition of the concept submits that judicial activism exists where the judges modified the law from what was previously stated to be the existing law that often leads to substituting their own decisions from that of the elected representatives of the people.[55] This definition would consider invalid actions or decisions of the judges given for the purpose of seeking the justice in a particular case or to interpret the law in the previous jurisprudence of law.[56] A contrary view has also been offered that judicial activism becomes a valuable instrument when the legislative machinery comes to a halt in a case.[57] It must be stated that other approaches to the meaning of judicial activism has been largely focused on three main issues.[58] One of the other approaches focuses on the willingness of the judges to depart from the previous decisions thereby doing away with the doctrine of *stare decisis*. Another approach sees judicial activism as a departure from the original or ordinary meaning of the

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53 Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 *Geo. L.J.* 121 (2005); RICHARD A. POSNER, THE SUPREME COURT (2004); Term—Foreword, *A Political Court*, 119 HARV. L. REV. 54 (2005); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure,* 80 TEX. L. REV. 1077 (2002); Ernest A. Young, *Judicial Activism and Conservative Politics,* 73 U. COLO. L. REV. 1141 (2002).

54 Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism*", 92 CALIFORNIA L. REV. 1442 (2004); *see also*, Bradley C. Canon, *A Framework for the Analysis of Judicial Activism* in SUPREME COURT ACTIVISM AND RESTRAINT 386 (Stephen C. Halpem & Charles M. Lamb eds.1982).

55 Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUMAN RIGHTS L. J. 58 (1990).

56 Dragoljub Popovic, *Prevailing Judicial Activism over Self Restraint in the Jurisprudence of the European Court of Human Rights*, 42 CREIGHTON L. REV. 363 (2009).

57 Thijmen Koopmans, *The Roots of Judicial Activism in Protecting Human Rights: The European Dimension* in STUDIES IN HONOR OF GÉRARD J. WIARDA 326 (F Matscher & H. Petzold Eds., 1988).

58 Mark Tushnet, *The United States of America* in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 416-17 (Brice Dickson Ed., 2007).

constitutional text.[59] The last approach measures judicial activism in the light of the numbers of judicial decisions that strike down legislations.[60] To quote Hoque:

> "*If we recognize that judicial activism is the creative and assertive exercise of the aiming at activating the court in overseeing legislative and executive inactivity, its exercise seems inevitable not only in case of excessive or illegal exercise of state powers but also in cases of failure of the power-holders in performing constitutional/public duties.*"[61]

A. Relationships between Judicial Review and Political Questions

In many cases, the courts while exercising the power of judicial review or of interpreting the constitution, may involve in examining political power or policy activities.[62] Then, what is the dividing line between political and legal questions? Western scholarship has yet to answer this question.[63] In practice, often a political issue has legal/constitutional dimensions.[64] A clear distinction between "law" and "politics" in the framework of the Parliament is impractical. Notably, in the constitutional states of Europe, political activity is constitutionally regulated. As such it has a "normative" character and is for the most part justiciable.[65]

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59 Tushnet, *id.*

60 *Id.*

61 HOQUE, *supra* note *51*, at 35.

62 HOQUE, *supra* note *51*, at 36.

63 Tushnet, *supra* note *58*.

64 Hoque, *supra* note *51*.

65 Suzie Navot, *Political questions in the Court: Is "Judicial self-restraint" a better alternative than a "non justiciable" approach?*, July 14, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596/ (Last visited on August 12, 2015)

Those who oppose judicial review of political questions criticize that the Supreme Court of Nigeria frequently dwells into matters specifically delineated to elected representatives; and thereby infringes on the prerogatives of the political institutions.[66] Here, I agree with the comment of Hoque: "If the court's job is to dispense justice to the claimants, then every issue involving interpretation of the constitutional provisions or determination of a serious legal issue giving rise to public duties upon which depends the realization of justice for all, however political or policy-oriented that question might be, is verily within the judicial competence, although institutional comity demands a cautious approach."[67]

Aharon Barak argues, "the mere fact that an issue is 'political'— that is, holding political ramifications and predominant political elements—does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality."[68] He comes up with a jurisprudential argument: "although not everything is law, there is law in everything."[69] Lon Fuller's concept of polycentricity and the limits of adjudication[70] also become relevant here. Fuller argued that polycentric issues are non-justiciable.[71] Where conventional political

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66 Nwosu, *supra* note *18*.

67 HOQUE, *supra* note *51*.

68 AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006).

69 *Id.*

70 Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARVARD L. REV. 353 (1978-1979).

71 *See*, Jeff A King, *The Pervasiveness of Polycentricity*, PUBLIC LAW 101-124 (2008). To Fuller, a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors. The perfect example of a polycentric task is how to set an appropriate price or wage. Setting the price of a commodity or the wage of an employee can affect supply or demand for the commodity or employment, which in turn affects a multitude of other costs and relationships. And each of the separate consequential effects of the price

activism may take years or may not happen at all, necessitating the need to "effect socio-economic and political transformation from outside the conventional political arena",[72] or where constitutional mandates are unjustifiably twisted, judicial engagement with policy issues may be a constitutional imperative.[73]

B. Political Question Doctrine in Bangladesh

On constitutional issues of wider importance, the Court has generally pursued a broader approach to the justiciablity issues of political ramifications.[74] It seems that apart from some unsustainable failure of the past, the court has, on balance, avoided being eluded by the so-called American doctrine of political question,[75] remaining at times essentially passive on complex political issues such as the legality of *hartal* (political strike).[76] The following are some cases

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determination (e.g., lay off, decreased demand for the commodity), in turn affects networks of relationships associated with that factor (e.g., production, transport, insurance, advertising), and so on.

72 *See,* Ahmed (1999: 75), considering PIL in South Asia as such an alternative device to realize social transformation (Cited in HOQUE, *supra* note *51*).

73 Minister of Health v. Treatment Action Campaign, (5) SA 721 (CC); (2002) 5 LRC 216, ¶99. In this case the South African Court emphatically rejected an argument that an injunction to enforce the government to fulfill the socio-economic rights of AIDS patients would breach separation of powers as it would eventually require the government to pursue a particular policy (Cited in HOQUE, *supra* note *51*).

74 *See*, Najmul Huda, MP v. Secretary, Cabinet Division, 2 BLC (1997) (HCD) 414; Rafique Hossain v. Speaker, Bangladesh Parliament, 54 DLR (2002) (HCD) 42.

75 HOQUE, *supra* note *51*.

76 *E.g.,* In Khondaker Modarresh Elahi v. Bangladesh, 21 BLD (2001) (HCD) 375, the Court decided, "this political issue should in all fairness be decided by the politicians". It earlier rejected another hartal-challenging case, Abu Bakar Siddique v. Sheikh Hasina*,* WP No 2057 of 1995 (Unreported). In Abdul Mannan Bhuiyan v. State, 60 DLR (2008) (HCD) 49, the Appellate Division held that *hartal* or strike, unaccompanied by force or violence, is a democratic right of the citizens.

where the Bangladesh judiciary has invoked the "political question doctrine".

1. M/S Dulichand Omraolal vs. Bangladesh[77] (1981)

M/S Dulichand Omraolal v. Bangladesh was the first famous case in Bangladesh, in which the court applied the political question doctrine. The writ was an unsuccessful challenge of declaring the applicant firm's property as "enemy property". One of the applicant's contentions was that "President Ayub Khan in violation of his own Constitution" and "Yahya Khan without any legal or constitution authority abrogated the constitution of the then Pakistan."[78] The Apex Court held that the determining the constitutional legitimacy of Yahya Khan's military rule was a political question from which courts ought to refrain.[79] The highest court of Bangladesh showed no interest in engaging with this important issue despite an earlier decision of the Pakistani Supreme Court having held General Yahya Khan's military rule to be unconstitutional.[80] The Supreme Court avoided the issue of legitimacy of Yahya Khan's regime terming it a "political question".

2. Constitutional Reference No. 1[81] (1995)

In *Constitutional Reference No 1*, the court discussed a detail about the political question doctrine. This case is also known as *MPs' Resignation case*. ATM Afzal, C.J. held: "there is no magic in the phrase "political question". While maintaining judicial restraint the Court is

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[77] 1 BLD (1981) (AD) 1.
[78] *Id.*
[79] *Supra* note 77.
[80] Asma Jilani v. Punjb, PLD (1972) SC 139.
[81] Constitutional Reference No 1 of 1995 (MPs' Resignation) III BLT (Spl.) (1995) 159.

the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question."[82] The President asked the Supreme Court to advise whether a continuous boycott of Parliament by Opposition Party MPs for a period of 90 days would render their seats vacant for being "absent" for the constitutionally mandated period under Article 67(1)(b).[83] The Court advised the President that boycotting of the Parliament by opposition members for a consecutive period of ninety days rendered their seats vacant.

3. Nazmul Huda vs. Secretary, Cabinet Division[84] (1997)

A non-member of the Parliament, who was in charge of Ministry of Planning as a State Minister, answered questions relating to the Cabinet Division, the Prime Minister's Secretariat and President's Secretariat during a session of the parliament. The opposition party claimed that such a Minister could not answer questions unrelated to his portfolio. But the Speaker issued a memo ruling in favour of the Minister. Consequently, the opposition party challenged the constitutionality of this ruling. Although the court recognized its lack of jurisdiction to scrutinize internal proceedings of parliament, it held that the Speaker's rulings on a constitutional matter and the issue of the legality of a technocrat minister's speech unrelated to his portfolio were justiciable. The court engaged into the matter, analyzed the fact, and finally held that "the contention that a non-member of the Parliament being in charge of Ministry of

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82 *Id*, ¶ 31.

83 Article 67(1)(b) of the Constitution of Bangladesh provides that if any member of parliament remains 'absent' from parliament for such a period his or her seat would become vacant.

84 2 BLC (1997) 414.

Planning as a State Minister will not be entrusted to speak or to give answer unrelated to his portfolio in violation of the provisions of Article 73A[85] of the Constitution is negatived."[86]

4. Khondaker Modarresh Elahi vs. Government of the People's Republic of Bangladesh[87] (2002)

In this case, the legality of a *hartal* (political strike) was challenged. The Court remained passive in such a complex political issue. Mainur Reza Chowdhury J, Syed JR Mudassir Hussain J and M.A. Aziz J delivered the judgment. The judgment stated: "Call for hartal *per se* is not illegal but where any call for hartal is accompanied by threat it would amount to intimidation and the caller of hartal or strike would be liable under the ordinary law of the land'.[88] Syed JR Mudassir Hussain J. observed: "hartal cannot be declared illegal. It is, democratic right to call hartal but is should be observed peacefully without resorting to any illegal activities by the pro-hartal activists but at the same time hartal should also be allowed to be observed peacefully without any provocation, instigation, intervention and aggression of any kind by anti-hartal activists.[89]

M.A. Aziz J. termed a hartal to be a "political issue" and found "burden" to adjudicate by the court. He observed, "The determination whether hartal is good or bad depends on the position held by the political parties. As such, this political issue should in all fairness be decided by the politicians themselves without

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85 Article 73A of Bangladesh Constitution states, Every Minister shall have the right to speak in, and otherwise to take part in the proceedings of, Parliament, but shall not be entitled to vote or to speak on any matter not related to his Ministry unless he is a member of Parliament also.

86 *Id.*

87 54 DLR (HCD) (2002) 47.

88 *Id. per* Mainur Reza Chowdhury J. ¶ 16.

89 *Supra* note *87*, ¶ 30.

unnecessarily burdening this Court to adjudicate something it is not empowered to."[90] He also ruled that only the Government would be capable of dealing with the issues arising out of a hartal.[91]

5. Bangladesh Italian Marble Works Ltd. v. Bangladesh[92] (2005)

Popularly known as the *5th Amendment case*, the High Court Division held unconstitutional the 5th Amendment that validated the first martial law regime (15 August 1975 -9 April 1979). The case in appeal, the Appellate Division in 2010 stood in defense of the supremacy of the constitution.[93] In the case *Siddique Ahmed v. Bangladesh,*[94] High Court Division in its verdict held 7th Amendment to the constitution unconstitutional that validated the second martial law regime (24 March 1982 to 10 November 1986). The Appellate Division of the Supreme Court on May 14, 2011 upheld the High Court Division's verdict.

6. Mohammad Badiuzzaman v. Bangladesh[95] (2010)

In this case, the constitutionality of some provisions of the Rangamati, Khagrachari and Bandarban Hill District Local Government Council (Amendment) Acts 1998[96] and the Chittagong Hill Tracts Regional Council Act, 1998[97] was challenged. The specific challenge was that the relevant peace accords were entered into in violation of the Bangladeshi Constitution. The division bench of the

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90 *Supra* note *87,* ¶ 51.
91 *Supra* note 87, ¶ 52.
92 BLT (Special) (2006) (HCD) 1.
93 62 DLR (2010) (AD) 298.
94 39 CLC (2010) (HCD).
95 7 Law Guardian (2010) (HCD) 208.
96 Acts Nos. IX, X and XI of (1998).
97 Act No. XII of (1998).

High Court Division comprising with Justice Syed Refaat Ahmed and Justice Moyeenul Islam Chowdhury took the petition as justiciable. The court found certain provisions the Regional Council Act *ultra vires* the constitution. The Court was disinclined to interfere with the Peace Accord.[98] The Court also stated: "It is inevitable that the sustainability of the peace process will depend on innovation and progressive development of ideas and measures that shall, however, always need measuring against the Constitution. Should, in this regard, any kind of exigency demand action not strictly envisaged in the Constitution, lawmakers shall prudently henceforth allow for the Constitutional entrenchment of the same."[99]

Part III. Does Bangladesh need a political question doctrine?

The Bangladeshi judiciary, especially in recent decades, has started playing an active role to establish constitutionalism. The winds of judicial activism[100] to establish constitutionalism and public interest started since the Supreme Court's historic ruling in *Anwar Hossain Chowdhury v. Bangladesh*,[101] which invalidated the 8th Amendment to the Constitution. The court was seemingly motivated to uphold the greater public interest,[102] and this case arguably created a conceptual framework for public interest litigation (PIL)[103] that later emerged. Bangladesh has a transformative constitution, aimed at a just social order based on certain core values such as justice (social,

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98 *Supra* note *95,* guideline (a).
99 *Supra* note *95,* guideline (f).
100 HOQUE, *supra* note *51*, at 112.
101 BLD (spl) (1989) 1.
102 HOQUE, *supra* note *51*, at 113.
103 Naim Ahmed, *Litigation in the name of people: Stress and Strain of the development of public interest litigation in Bangladesh,* (February 1998) (Ph.D. Thesis, Department of Law, SOAS, University of London); *See also*, N. Ahmed, *Public Interest Litigation: Constitutional Issued and Remedies* (BLAST, Dhaka 1999) (cited in Hoque)

economic and political), human dignity, and rights-and-duty-based democracy, and hence judicial review here has its own unique indigenous instrumentality.[104] Hoque writes that after the restoration of democratic government in 1991, the Supreme Court of Bangladesh began to engage hearing increasing number of people with diverse causes.[105] In the meantime, Public Interest Litigation-based judicial activism also started.[106] Though at the early states, the Court was reluctant[107] to constant engagement in policy issues, but with time, the scope of judicial review has been expanding.[108] In the meantime, *suo moto* judicial intervention has become a common feature of the judicial engagements on different issues.[109] Public

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[104] Hoque, *supra* note *3*.

[105] HOQUE*, supra* note *51*, at 118.

[106] Dr. Mohiuddin Farooque v. Bangladesh 17 BLD (1997) (AD) 1 is the country's first true PIL case that relaxed the conventional *locus standi*.

[107] HOQUE, *supra* note *51*, at 126.

[108] *E.g.,* in Abdul Gafur v. Ministry of Foreign Affairs 17 BLD (1997) (HCD) 453, the court, in pursuance of the right to life and legal protection of a girl-victim of human trafficking interned in Kolkata, directed a diplomatic assistance for her rescue. It is also directed actions to bring back other women victims of human trafficking. (Cited in HOQUE, *Id*, at 127)

[109] *See,* State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and Others, Suo Motu Rule No. 5621 of 2009, High Court Division, Bangladesh (judgment on 3 Sept. 2009) (A 7 year-old girl was allegedly raped by her neighbour and distant relative. The police recorded the girl's case and sent her to the Magistrate Court. The Magistrate ordered the girl to be kept in a safe home managed by the Department of Social Welfare. The girl's parents were denied access to the safe home. The Court found that the Magistrate had acted illegally in ordering the girl to be kept in state custody. The Court also made a number of recommendations, calling for, among other things, the establishment of child-specific courts in every district, specialized training for police and other members of the criminal justice system who deal with children (including training for lawyers and judges on the CRC and other international instruments) and new laws implementing Bangladesh's obligations under international treaties and covenants (such as the CRC)); *See also*, Labu Mia v. State 53 DLR (2001) (HCD) 218, Daily Star v. State 53 DLR (2001) (HCD) 155 (Cited in HOQUE*, Id.*).

interest constitutional litigations have also been contributing to achieve constitutionalism.[110]

Academic debate over any judgment in Bangladesh is rare. In 2005, the judgment in the *5th Amendment case* led to serious academic debates. Imtiaz Omar and Zakir Hossain criticized the judgment. They opined that the Bangladesh Supreme Court should adopt an approach along the lines of the 'political questions doctrine' invoked by the Supreme Court of the USA on questions such as the invalidation of the 5th Amendment, or the legality of an Amendment to the Constitution.[111] They claimed that the Court could not define the limits of the exercise of power that relates to these 'political questions'. [112] In his reply Hoque identified "political question doctrine" as a trap for the Court and advocated that the Court should avoid that trap. He also made a reference to Parliament Boycott case (advisory opinion, 1995), where the "trap" had been beautifully avoided."[113] Omar and Hossain replied to Hoque via another article and hold that political questions should be debated and resolved in political or representative forums.[114]

Bangladesh judiciary has started its activism to achieve constitutionalism and already entered into an era of judicial activism. This judiciary has been passing a "threshold" to achieve its goal. Therefore, at this juncture, the application of the political question

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[110] *See*, BLAST v. Bangladesh, 55 DLR (2003) (HCD) 363, Ekushe Television Limited v. Chowdhury Mahmud Hasan, 54 DLR (2002) (AD) 130, BNWLA v. Bangladesh, 14 BLC (2009) (HCD) 694.

[111] Imtiaz Omar and Zakir Hossain, *Coup D' Etat, Constitution and Legal Continuity*, THE DAILY STAR (Dhaka) September 24, 2005.

[112] *Id.*

[113] Hoque, *supra* note *3*.

[114] Imtiaz Omar and Md. Zakir Hossain, *Constitutionalism, parliamentary supremacy, and judicial review: A short rejoinder to Hoque*, THE DAILY STAR (Dhaka) November 26, 2005.

doctrine can be harmful to the emerging judicial role. Bangladesh has witnessed a bad use of this doctrine in 1981 by *M/S Dulichand Omraolal v. Bangladesh*[115]*,* where court showed no interest to declare Yahya Khan's martial law regime unconstitutional, perhaps which led Bangladesh judiciary to take another 24 years to declare a martial law unconstitutional in 2005 by the *5th Amendment case*. To achieve promised constitutionalism, it is time to take a clear stand on the application of this doctrine.

Some scholars have already opposed the application of political question doctrine in Bangladesh. Mahmudul Islam writes, "in our constitutional system there is no justification for the application of the doctrine of political question." [116] Hoque argues, "it is jurisprudentially dangerous to induce it [the Court] to permanently adopt such a doctrine (political question), as it would then become permanently disempowered to deal with peculiarly Bangladeshi (constitutional) issues such as, e.g., legality of martial law regimes/regulations."[117]

Bangladesh Judiciary has yet to rule on important constitutional issues with political ramifications such as emergency powers,[118] the President's unchallenged prerogative powers,[119] etc. In

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115 1 BLD (1981) (AD) 1.

116 ISLAM, *supra* note *2,* at 446.

117 Hoque, *supra* note *3*.

118 *See*, M. Saleem Ullah and Others v. Bangladesh*,* W.P. No. 5033 of 2008 (Pending) and M Asafuddowla and Others v. Bangladesh*,* W.P. No. of 24 November 2008. (Pending) (It now remains to be seen how the Court responds to this fundamental constitutional issue brought before it 35 years after the provisions for Emergency have been declared constitutional.)

119 Sarwar Kamal v. State*,* 64 DLR 2012 (HCD) 331 (A Division Bench of the High Court Division expressed that the powers of the president and the government to pardon, suspend or remit sentences of any convict should be exercised fairly and on unbiased relevant principles. If a fugitive from law is given pardon knowing his status then the exercise of power under Article 49 of

this regards, the Bangladeshi judiciary may take Barak's view that the judiciary assesses the "legal aspect of politics" and not its wisdom. Thus, when a judge has to examine the legality of a political determination, he will only determine the question according to legal standards, which is an essential judicial function.[120] Power oriented politics have led political parties to a focus on acquiring state power, where the interests of the people and the future of the nation bear no consequence at all.[121] Though, it seems sound that judiciary is not going to interfere in pure political issues, but in reality, it vests unfettered powers followed large scale of immunities to politicians. Until the political institutions of this state are fully democratized, no other branches of the state but the judiciary is the most reliable.[122] The public still regards the judiciary as the "last resort" for protection against any injustice or excesses.[123]

On the other hand, if Bangladesh judiciary applies this doctrine, it would certainly hamper its progress towards establishing constitutionalism. Such an action would not inspire the Bangladeshi people's confidence in their judiciary. Meanwhile, judiciary needs its development continued in transparency and accountability to constitution and people. In the prevalent socio-political context in Bangladesh, the need for judicial vigilance for the protection of

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the Constitution or section 401 (1) of the Code certainly be arbitrary, malafide, unreasonable, irrational and improper and such exercise of power is against the principle of the rule of law and an abuse of power*)*

120 BARAK, *supra* note *12*.

121 Sayed Javed Ahmad, *Good Governance in Bangladesh: A Quest for a Non-Political Party Approach,* 2 J. of Politics and Law, 144 (December 2009).

122 In Bangladesh, the most trusted institution is the Judiciary. *See,* GOVERNANCE IN SOUTH, SOUTHEAST, AND EAST ASIA: TRENDS, ISSUES AND CHALLENGES, (Ishtiaq Jamil, Salahuddin M. Aminuzzaman, SK. Tawfique M. Haque eds.), (Springer International Publishing 2015).

123 Ridwanul Hoque, *Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms',* in ASIAN COURTS IN CONTEXT, 447-486, (J. Yeh and Wen-Chen Chang eds. Cambridge: Cambridge University Press, 2014).

justice and good governance is an ever-present one. Moreover, judiciary needs its own initiatives to achieve and maintain public trust and confidence. Therefore, the Bangladeshi judiciary should take a clear stance to not use the "political question doctrine".

Part IV. Political Question Doctrine: Experience from India and Pakistan

In India, the doctrine stands on somewhat flimsy grounds. The question has been discussed only in a string of President's Rule cases, in the context of limits on the power of the Governor under Article 356. *First* discussed in cases such as *State of Rajasthan v. Union of India*[124] and *State of Karnataka v. Union of India*,[125] the doctrine has since been eroded by what Baxi aptly terms "expansion of the frontiers of judicial power". However, after the authoritative exposition of the law in *S.R. Bommai v. Union of India*[126], the position seems to be settled on the "sufficiency of materials" test alone. The judicial position has at all times been cognizant of the fact that what is followed as a "strict separation of powers" in the United States does not apply in India, where checks and balances are preferred to watertight compartmentalization[127]. However, Justices Bhagwati and Chandrachud have spoken of the "political thicket" that judges should "scrupulously" keep away from.

In Pakistan, the Supreme Court has been very clear in dealing the issues of political questions. In *Pakistan Lawyers Forum v. Federation of Pakistan and Others*, the Supreme Court ruled against adopting the "political question doctrine" as a means of keeping away from

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[124] AIR (1977) 1361.
[125] AIR (1978) 68.
[126] AIR (1994) SC 1918.
[127] *See Ram Jawaya Kapur v. State of Punjab* AIR (1955) SC 549

difficult legal questions with political undertones. The Court observed that applying the doctrine would amount to abdication of judicial power.[128] In *Watan Party and others v. Federation of Pakistan and others*, the Pakistani Supreme Court observed that the existence of a political question did not suffice to oust the court of its jurisdiction. Whether there existed a non-justiciable political question was to be determined on a case-by-case basis.[129]

Conclusion

Tracing its origin to American constitutional law, the "political question doctrine" was a measure to keep the judiciary away from matters that were within the scope of other sovereign bodies. Nevertheless, today, the political question doctrine seems to have disappeared from American case law.[130] This paper does not advocate that the judiciary should resolve every political dispute. Instead, I argue against disempowering the judiciary to in the name of the "political question doctrine". For this purpose, I argue so by relying on Bangladeshi constitutional jurisprudence, and case laws and scholarly opinions from the United States, Israel, India and Pakistan, amongst others.

Constitutional law involves difficult questions of government power and politics. However, that does not mean that the judiciary can completely avoid such questions. It is submitted that the

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128 P L D (2003) LAHORE 371

129 Watan Party and others v. Federation of Pakistan and others PLD (2012) SC 292 [Constitution Petition under Article 184(3) of the Constitution regarding alleged Memorandum to Admiral Mike Mullen by Mr. Husain Haqqani, former Ambassador of Pakistan to the United States of America]

130 Symposium, *Baker V. Carr: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket: Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 NORTH CAROLINA L. REV. 1203 (2002).

judiciary should determine its own criteria for judicial intervention on a case-by-case basis. The judiciary should not abdicate its role of adjudication by applying the "political question doctrine". In the context of Bangladesh, there are no distinct advantages to be gained by applying this doctrine, as the judiciary marches towards strengthening the Bangladeshi democracy and constitutionalism.

The Evolving Jurisprudential Paradigms of Privacy Rights: A Juridical Analysis

Ivan Jose Nazhicheril and Anandhapadmanabhan Vijayakumar[*]

Abstract

The right to privacy is an emerging field of socio-legal and political jurisprudence, with its expansive interpretation finding its way into the fundamental rights milieu of the Indian constitution. The privacy right owes its genesis to a variety of socio-political issues that incorporates various degrees of non-interference by another into one's life into the civil rights discourse of the world population. Privacy rights assume significance as it represents diverse notions of human rights, spread across an expansive politico-legal milieu ranging from privacy rights of a crime victim from third party scrutiny, to the immunity from online surveillance. Privacy can be observed, analyzed and deduced from diverse jurisprudential sources, constituting itself with the intersection of civil rights discourse in each social issue. This paper intends to study various dimensions of privacy rights and to analyze its significance on the emerging notions on civil liberty with respect to recent legal developments.

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Introduction

"Privacy - like eating and breathing - is one of life's basic requirements."

Katherine Neville

As Justice Louis Brandeis wrote more than 100 years ago, we all are endowed with "the right to be let alone."[1] This includes the right to control the disclosure of personal information. Philosopher and Harvard Law Professor Charles Fried put it this way in a treatise on the subject: "*the ability to control what others know about us*"[2] is essential to the preservation of an autonomous self. The right to privacy - as an element of human rights, which restricts the intervention of both the state and another private individual in another person's life - is a long discussed one. But privacy rights require a detailed jurisprudential analysis with respect to the socio-political and economic milieu of the context in which they developed.

The right to privacy has been critically undervalued throughout the history and the argument of Governments and its supporters in most cases seems to be quite interesting. They assert that the Right to privacy cannot be deemed to be on the same pedestal as that of the other rights nor has it been encompassed as a freedom as such under the Indian Constitution. Nonetheless, this disposition of the Government needs to be necessarily evaluated as it places a formidable challenge in the current socio-legal context.

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1 Murphy, W. (2011). Rape Victims' Privacy is Matter of Law, Not Shame. [online] Available at: http://www.readperiodicals.com/201101/2257568031.html [Accessed 10 Oct. 2015].

2 Murphy, W. (2011). Rape Victims' Privacy is Matter of Law, Not Shame. [online] Available at: http://womensenews.org/2011/01/rape-victims-privacy-matter-law-not-shame/ [Accessed 7 Oct. 2015].

Zeroing in on the considerably evolving legal system in India, it is to be taken into account that Privacy is one of the ingredients which is contained in Article 21 and it owes to personal liberty which is entailed in the same.

A. Privacy Rights under the Universal Declaration of Human Rights and the Evolution of General Principles in American Jurisprudence

The right to privacy is explicitly stated under Article 12 of the Universal Declaration of Human Rights: "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*."[3] Even though privacy rights found mention as a universal human right under the UN declaration, it was only under Earl Warren, the Chief Justice of US Supreme Court between 1953-1969, that privacy jurisprudence was revolutionized as a constitutional right. Known for the dramatic expansion of civil rights and civil liberties using constitutional law as an effective tool for progressive social and political reform,[4] Warren held in 1969 in *Griswold v. Connecticut*[5] that the American Constitution provided the right to privacy. The Supreme court invalidated the legislation that prohibited the use of "*any drug, medicinal article or instrument for the purpose of preventing conception*", giving shape to the privacy with respect to Marital and intimate affairs of individuals. It has to be noted that the landmark developments in privacy

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[3] The Universal Declaration of Human Rights. (1948). Paris: United Nations General Assembly, p.12.

[4] The Supreme Court Historical Society. (2003). *The Warren Court, 1953-1969*. [online] Available at: http://supremecourthistory.org/timeline_court_warren.html [Accessed 4 Jun. 2016].

[5] [1965]381 U.S. 479.

jurisprudence emanate from the principle of substantive due process under the fourteenth and fifth amendments of the US Constitution, giving the court the power to protect certain rights deemed fundamental from government interference. *Griswold* marks the interpretation of privacy rights as an aspect falling under the substantive due process, marking its recognition as a deemed fundamental right. This would prove vital in the days to come in extending the principles of privacy into diverse socio-legal and political issues.

Earl Warren was however succeeded by Warren Earl Burger who was as opposed to his predecessor, a conservative, raising expectations that he rule differently on various issues, unlike his liberal predecessor and may even reverse the precedents of Warren courts. However, he did not reverse any of the rulings of Warren courts and instead extended several doctrines of the liberal court under Warren. In *Roe v. Wade*[6], the Supreme Court under Burger struck down a Texas abortion law and thus restricted state powers to enforce laws against. Even though he later abandoned this precedent by the time of *Thornburgh v. American College of Obstetricians and Gynecologists*[7], *Roe v. Wade* is seen as a significant step in extending the privacy jurisprudence, which was in its infant stage back then. *Lawrence v. Texas*[8] was another landmark decision in 2003 that explicitly overruled *Bowers v. Hardwick*[9], which upheld a challenged Georgia statute and did not find a constitutional protection of sexual privacy. It struck down the sodomy law that previously facilitated the state to enforce its authority against sodomy in Texas, thereby

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6 [1973]410 U.S. 113.
7 [1986] 476 U.S. 747.
8 [2003] 539 U.S. 558.
9 [1986] 478 U.S. 186.

invalidating the authority of the state to invade the space of people practising sodomy. The Supreme Court held that intimate consensual sexual contact is a subject matter well within the interpretation of the liberty protected by substantial due process under the 14th amendment. It is interesting to note that privacy rights, in the USA in its nascent stage, have been interpolated into the socio-juridical jurisprudential discourse through tort law, under four heads: 1) unlawful interference upon private affairs or seclusion or solitude; 2) public disclosure of private information that is embarrassing to the aggrieved on the event of disclosure; 3) publicity which positions an individual in false light in the public eye; and 4) appropriation of name or likeness.

The global surveillance disclosures of Edward Snowden in 2013 revealed the massive scale of online surveillance of NSA, CIA and other intelligence agencies under programmes such as PRISM and MYSTIC under the pretext of counter-terrorism.[10] They have been successful in misappropriating large quantities of metadata, Internet history, chat data, even recordings of phone calls, etc. The global surveillance leaks confirm that more than ten million online sources have been under surveillance. This includes even embassies and heads of other states, breaking numerous provisions under various treaties and constitutions. It has also resulted in the blatant intrusion of agencies into the sovereignty of another country.

This has provoked widespread international debates on the evolving jurisprudence of the right to privacy. The argument in favour of privacy has therefore come under a larger opposition to

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10 VítorFaria, J. (2014). *Edward Snowden: Leaks that exposed US spy programme*. [online] BBC News. Available at: http://www.bbc.com/news/world-us-canada-23123964 [Accessed 25 May. 2016].

intelligence operations carried out for political purposes and has become a contentious issue since it undermines the perceived need of nations to spy on the general population in order to maintain their power structures. However, privacy cannot be seen through the one-way definition of non-interference as it involves diverse discourse, filtering into the cross-sections of multi-aspects of social, economic and political life of people. Each aspect has to be understood differently in terms of the extent of interference it could undergo in order to maintain security, tranquility and normality of the society. The difficulty in analyzing the right to privacy as a homogeneous legal concept is due to the diverse considerations involved in the relation between the public domain and the personal life of an individual.

For example, privacy has to be seen differently in the case of a family, who is bound by a relationship covenant. However, a person's right to privacy even from the scrutiny of his family members may have to be taken into consideration. Similarly, the concept of privacy changes with the interpersonal relationship of an individual with the state, and the extent of privacy rights would rest on the nature of relation the individual shares with the state and society.

B. Indian Constitutional Jurisprudence on Privacy Rights

In India, apart from the physical security aspect that was only recognized by law, the latter started to consider and accommodate concepts such as the security of the spiritual self, which is basically inevitable and concerned with a human being. Article 21 that upholds the right to life and personal liberty was thus given a new

dimension and its horizons were expanded beyond the pre-conceived limits.

The concept of the right to privacy was ushered in 1963 in the case of *Kharak Singh v. State of Uttar Pradesh*[11], which was mainly concerned with the validity of certain regulations that permitted surveillance of suspects. In this case, the Supreme Court held that Regulation 236(b)[12] of U.P. Police Regulations, which authorised domiciliary visits, was unconstitutional. This power of regulation that was conferred upon the police by the State was contrary to Article 21 of the Indian Constitution assuming that a right of privacy was a fundamental right[13] derived from the freedom of movement guaranteed by Article 19(1)(d) as well as personal liberty guaranteed by Article 21.[14] However, in this particular case, the Court denied that "*personal liberty*" was confined to freedom from physical restraint or "*freedom from confinement within the bounds of a prison*" and held that '*personal liberty*' was used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "*personal liberties*" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with

11 [1964] 1 SCR 332.

12 Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures: (a) Secret picketing of the house or approaches to the houses of suspects; (b) Domiciliary visits at night; (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation; (d) the reporting by constables and chaukidars of movements and absences from home; (e) the verification of movements and absences by means of inquiry slips; (f) the collection and record on a history- sheet of all information bearing on conduct.

13 *Ram Swarup v. The State* [1957]AIR 1958 All 119 p.121.

14 *Satwant Singh Sawhney v. Asst. Passport Officer* [1967]AIR 1967 SC 1836 pp.1844-45.

particular species or attributes of that freedom, "*personal liberty in Article 21 takes in and comprises the residue*."[15] The right to privacy was acknowledged as "an essential ingredient of personal liberty" and that the right to personal liberty is "*a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures*".[16] Applying the test it was found that the entire regulation was violative of Article 21, and also of Articles 19(1)(a) and (d).

It was further held by the Court that the right to privacy is a part of the right to protection of life and personal liberty and thus the petitioner Kharak Singh could legitimately plead that his fundamental rights, both under Articles 19(1)(d) and 21, were infringed by the State. The Court asserted that "*the right to privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III*".[17]

The question of privacy was raised again in *Govind v. State of Madhya Pradesh*,[18] wherein it was stated that the regulation that provided for surveillance by various means is not disregarding Article 21 as the regulation was carried out through "*procedure established by law*". The Court contemplated a right of privacy included, among others, in the right to personal liberty but upheld regulations similar to the one invalidated in the *Kharak Singh* case because the regulations had statutory basis. It was stated that such right would not be absolute but must be subject to reasonable restrictions so that a provision for domiciliary visits would not be unreasonable if

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15 *Kharak Singh v. The State Of U. P. & Others* [1962]AIR 1963 SC 1295

16 *Id.*

17 *Id.*

18 [1975] 2 SCC 148

confined to habitual criminals or persons having criminal antecedents.[19]In this case, it was also identified that even if a right is not specifically mentioned under Article 19(1) [20], it may still be regarded as a fundamental right if it can be regarded as '*an integral part*' of any of the fundamental rights specifically mentioned in Article 19. Privacy right, however, is considered as an integral part of the freedom of movement under Article 19(1)(d).[21] Further, Matthew, J. made the interesting observation: "*The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy an emanation from them which one can characterize as a Fundamental Right, we do not think that the right is absolute*." Having said that, it is noteworthy that the court accepted the impact this case had on the Right to privacy within a limited sphere. The court held that many of the fundamental rights of citizens could be described as contributing to the right to privacy in this case.

In yet another case, *R. Raja Gopal v. State of Tamil Nadu*[22] (1995), the right to privacy was identified with more clarity. The Supreme Court observed that "*the right to privacy is implicit in the right to life and liberty guaranteed to the citizens*" of this country by Article 21. It is a "*right to be let alone*". A citizen has a right "*to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education*

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19 *Govind v. State Of Madhya Pradesh & Anr* [1975] AIR 1975 SC 1378 p.28; *State Of Maharashtra And Another v. Madhukar Narayan Mardikar* [1990] AIR 1991 SC 207 p.8.

20 *Maneka Gandhi v. Union of India* [1978] AIR 1978 SC 597.

21 *Kharak Singh v. The State Of U. P. & Others* [1962] AIR 1963 SC 1295.; *Govind v. State Of Madhya Pradesh & Anr* [1975]AIR 1975 SC 1378.

22 [1994] 6 SCC 632.

among other matters."[23] None can publish anything concerning the above matters without his consent– whether truthful or otherwise and whether laudatory or critical. If he does so, he would be "*violating the right to privacy of a person concerned and would be liable in an action for damages*".[24] With this case, the Right to Privacy was given a much broader range.

There are some other prominent cases which paved the way for the evolution of Right to Privacy like that of Peoples Union for Civil Liberties v Union of India.[25]This case discussed whether the act of phone tapping is an infringement of the right to privacy under Article 21. The Supreme Court, in this case, observed that: "*We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed except according to procedure established by law."* Through this case, the view that right to privacy is a part of the right to life and personal liberty enshrined under Article 21 was re-emphasized.

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23 In an American case, *Jane Roe v. Henry Wade*, 410 US 113, the U.S. Supreme Court has observed regarding the right to privacy: "*Although the Constitution of the U.S.A. does not explicitly mention any right of privacy, the U.S. Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the XIV Amendment and that the "right of privacy is not absolute*"

The Supreme Court in India has taken into consideration the U.S. position as well as Art. 8 of the European Convention on Human Rights that defines the Right to Privacy.

24 Chhibber, M. (2015). The many public battles over the right to privacy. *The Indian Express*. [online] Available at: http://indianexpress.com/article/explained/the-many-public-battles-over-the-right-to-privacy/ [Accessed 11 Aug. 2015].

25 *Peoples Union for Civil Liberties v. Union of India* [2003]AIR 2003 SC 2363.

In another case, *State of Maharashtra v. Madhukar Narayan Mardikar*[26], the argument that even the Right to Privacy of a Prostitute was fairly esteemed was underscored when the Court stated that even a "*woman of easy virtue*" is entitled to her privacy and no one can invade her privacy as and when he likes. Thus, the Supreme Court exhibited great concern for the right to privacy of a prostitute in this case. "*The right to privacy has now become established in India as part of Art. 21 and not as an independent right in itself, as such a right, by itself, has not been identified under the Constitution*."[27] However, the right to privacy remains too broad and moralistic to be defined judicially as a concept. Whether it can be claimed or has been infringed in a given situation would hinge on the facts of the particular case.

Privacy is weighed equivalent to personal liberty by virtue of the aforementioned cases in the history. The UPA government's endeavour to enact a law on privacy by putting forth a bill in 2011 ended in vain. This happened mainly due to some discrepancies and shortcomings, one of them being that the UPA overlooked the inevitable clause that should have been incorporated in the bill for it corresponded to Article 21 of the Indian Constitution. However, the Committee of Experts which was set up by the UPA government was headed by Justice A.P. Shah, the former Chief Justice of Delhi High Court and this panel under him was supposed to study and make suggestions regarding the privacy laws and related bills promulgated by various countries. The Committee had cited nine exceptions to privacy such as "national security, public order, disclosure in the public interest, prevention, detection, investigation and prosecution of criminal offences and protection of the rights of freedom of

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[26] *State Of Maharashtra And Another v. Madhukar Narayan Mardikar* [1990]AIR 1991 SC 207.

[27] Jain, M. (2014). *Indian constitutional law*. 7th ed. LexisNexis, p.1170.

others"[28]. They even recommended a new law to protect privacy and also the appointment of privacy commissioners at the Centre and in states.

Since the new government has assumed power, it has been crusading on various ventures to bring about changes in the Privacy laws in India. Another aspect about Privacy laws is that they may conflict with the RTI Act if a fine balance is not maintained between these two, i.e., a person's right to know may turn out to be in dissonance with another person's right to privacy. So basically, one's liberty should not be of the nature that which may likely curtail the right of another. The notion that the right to information and the right to privacy emanate from the right to life and personal liberty should be noted and more importantly, they should go in conformity with each other.

C. The Right to be Forgotten: An Evolving Paradigm

The growing jurisprudential milieu of privacy rights should be analyzed also with the help of diverse considerations surrounding privacy, generated from the perspectives of those who are affected by the intrusion. An interesting example of such notion of privacy is the right to be forgotten, which has got the approval of a large majority of people. The right to be forgotten includes the right of a person who has a 'history' recorded in an unofficial portal about his life to be taken down at his discretion. This could range from an age-old crime record relating to the person to the news reports of a 'party night' against the aggrieved party. The supporters of this unusual right have

[28] Chhibber, M. (2015). The many public battles over the right to privacy. *The Indian Express*. [online] Available at: http://indianexpress.com/article/explained/the-many-public-battles-over-the-right-to-privacy/ [Accessed 19 Sep. 2015].

raised concerns in support of the victim who would be forever blamed and seen in a low light by the right-thinking members of the society. The European Court of Justice ruled in *Google Spain v AEPD and Mario Costeja Gonzalez*[29] (2014) that European Union citizens have a "*Right to be Forgotten*" which was highly unprecedented and even unexpected. Despite this being an unusual right, it was encouraged and embraced by a large number of people, especially the ones who had suffered the ignominy by virtue of their online reputation being injured as well as the privacy advocates who had strived to see the light of this decision.

These changes started setting about after a Spanish man complained in 2010 that when his name was being searched on the Internet, the results that came up were regarding his home being repossessed in the 90s. Since this incident, Google has run into over 2 lakh requests to take down pages ranging to more than 1 million from its search index as a matter of safeguarding the privacy of the people. On the other hand, the Internet is an ocean of information where every scrap of data is preserved and stacked away when postulated and it is maintained so as to ensure the convenience of the citizens, to provide them with information whenever mandated. Google does not commission these posts whereas they just enlist them in its subject index. Considering the fact that it is done to ensure the easy access of data by the citizens, they can argue that they are not liable to bear the brunt of something they did *bonafide*. To the contrary, it does not extenuate in any way the smudge branded on the image of the person who had to endure through the same. However, the Court's ruling in 2014 that sprung up from the conflation of

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[29] *Google Spain v. AEPD and Mario Costeja Gonzalez* [2014] C‑131/12 Vol.1 p.70-79 (Grand Chamber).

desires of the majority brought about a vast aura of rapture.[30] This decision reaffirmed the faith of the people in the system by rendering them recourse to law if such cases of infringing personal privacy are likely to happen in the future. If we analyze these events, the fact that citizens have transcended from the orbit of "*Right to Privacy*" to a higher level of even "*Right to be forgotten*" is really intriguing. The demand for one's rights which is right to privacy, in this case, ought to be respected as it is absolutely justified but the way in which this right is being surpassed in such a way that it is superseding the different domains of personal life is disputable and indeed a food for thought.

Nevertheless, the privacy rights, currently in India is in a nascent stage as compared to the European counterpart, and furthermore, confined to an informed minority of the population. The shortfall of privacy rights is that it is neither well defined by the constitution nor the exact boundaries of privacy rights pertaining to diverse spheres of public life are accurately interpreted. This creates confusion as to the extent of interference an individual, state or society can have on another person's life. Furthermore, the real problem of the right to privacy is that it is something to be fought for and not readily given as contrast to the well-defined fundamental rights. Although it falls under the broad classification of the right to life and personal liberty, it is not ascertained in definite terms even under the constitution or by the precedents that followed that right to privacy remains something to be proved and fought for to a great extent. There is no predetermined regulatory legal mechanism to ensure the privacy of a person under the scrutiny of another entity. This should be seen as a major problem behind the enforceability,

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30 *Id.*

considering the fact that litigation under article 32 and 226 represent a minority of total dispute that is addressed by the legal system. The absence of well-laid provisions limits the capability of law and enforcement machinery (Police) in approaching issues involving infringement of privacy Concurrent to this situation, people who have limited access or limited awareness to the privacy enforcement remedies are systematically excluded from the very ambit of the privacy rights. Unless it is guaranteed as a predetermined right with the boundaries of its extent and degree clearly analyzed and interpreted, it is impossible to guarantee the privacy rights to people as a right on its own.

D. Privacy And Data Protection In An Information Intensive Social Order

The correlation of privacy rights and commerce has emerged recently, as a prominent area of enquiry in privacy jurisprudence, especially in the light of globalization and the increasing global interdependence of various economic systems in the realms of trade and investments. An even more profound area of inquiry is the correlation between privacy and data protection. This is in the backdrop of advanced industrial societies all over the world undergoing a paradigm shift from capital and labour based economies into knowledge economies as an aftermath of the recent information technology revolution, made possible by worldwide interconnectedness through the Internet. Crucial services, innovation, commerce, communication is being increasingly digitalized, which raises significant questions intertwined with the privacy rights of persons. The understanding of privacy in relation to information is inextricably linked to all sorts of human activities that had been prone to the influence of digitalization. Be it trade and commerce,

intellectual property protection, defense and security and several more. Cyber-crime is one among the most frequent and the most intensively impactful activity in the modern Information age that carries crucial questions on privacy rights also.

Lack of uniform laws against cyber-crimes involving abuse of computer systems made prosecution of cross-border hackers difficult. In spite of being the third largest IT market in the Asia pacific, Indian companies on an average spent only 0.8 percent of their technology budgets on security, against a global average of 5.5 percent.[31] The office of National Statistics of the UK said in its report that the incidents of cyber-crime amounted to 25 million in 2015 alone, representing almost 10 per cent of the population of England and Wales. But experts believe that this only represents a fraction of those who've been victims of cyber-crime.[32] Hacking attacks are no longer isolated to just the computer you use to send emails and browse the web. In April of 2011, the Sony PlayStation network had to shut down for a few days as well as their Qriocity service due to an "*external intrusion*" that compromised an external intrusion that compromised an estimated 77 million user accounts.[33] In the year 2008 alone there was an estimated $1 Trillion dollars' worth of

31 Shetty, S. (2016). *Gartner Says India IT Spending to Reach $71.0 Billion in 2016*. [online] Gartner. Available at: http://www.gartner.com/newsroom/id/3161319 [Accessed 1 Jun. 2016].

32 Palmer, D. (2015). *2.5 million cyber crimes committed in UK in a year, says Office for National Statistics*. [online] http://www.computing.co.uk. Available at: http://www.computing.co.uk/ctg/news/2430622/25-million-cyber-crimes-commited-in-uk-in-a-year-says-office-for-national-statistics [Accessed 27 May. 2016].

33 Poulter, S. (2011). *Credit card alert as hackers target 77 million PlayStation users*. [online] Mail Online. Available at: http://www.dailymail.co.uk/sciencetech/article-1381000/Playstation-Network-hacked-Sony-admits-hackers-stolen-77m-users-credit-card-details.html [Accessed 29 May. 2016].

intellectual property stolen due to hackers gaining access to confidential data stored on enterprise systems worldwide.[34]

Privacy Discourse becomes a necessity in the light of these atrocities that is an attack on the fundamental right of privacy, guaranteed by the Constitution and threatens the very economic foundations of the society. As a move to counter the infringement of privacy of data, encryption has been seen as an effective counter method, which gives rise to another set of debate into the extent of privacy a person can have from the eyes of society especially when it involves a social cost, and often, security interests. The recent FBI-Apple encryption dispute is part of the debate that encompasses highly relevant jurisprudential paradigms on the privacy of users, irrespective of who the user is. The tech giant Apple Inc. received at least 11 orders by the United States District court under the All Writs Act of 1789 to override the security encryption that iPhone has, to extract information from the phone, to assist the criminal investigation.[35] The problem, however, lies in the fact that creating an overriding software could itself be hacked or be misused, leaving the entire user population of iPhone vulnerable to privacy infringement. Doubts persist that such vulnerability could be abused by even terrorist organizations in achieving their objectives. Therefore, the

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[34] Cybersecurity. (2016). *Statistics.* [online] Available at: http://bewareofcybersecurity.weebly.com/statistics.html [Accessed 26 May. 2016].

[35] Yadron, D. (2016). *FBI confirms it won't tell Apple how it hacked San Bernardino shooter's iPhone.* [online] The Guardian. Available at: https://www.theguardian.com/technology/2016/apr/27/fbi-apple-iphone-secret-hack-san-bernardino [Accessed 26 May. 2016].; Kharpal, A. (2016). *Apple vs. FBI: All you need to know.* [online] CNBC. Available at: http://www.cnbc.com/2016/03/29/apple-vs-fbi-all-you-need-to-know.html [Accessed 27 May. 2016].; Raghavan, R. (2016). *Why Apple refuses to oblige the FBI.* [online] The Hindu Business Line. Available at: http://www.thehindubusinessline.com/opinion/why-apple-refuses-to-oblige-the-fbi/article8264565.ece [Accessed 29 May. 2016].

line of demarcation on the necessity to uphold privacy is bleak and depends on the facts and circumstances, which are densely contested with conflicting interests and lasting effects. This could even necessitate in the total discarding of the rule of precedents and *stare decisis*, as the interests involved in each case of invasion of privacy could be radically different in scope, objectives and its effects on society. Observers indicate judicial hyper activism as the natural consequence of such a situation, if efforts address this, is not initiated in its onset.

Conclusion

The right to privacy, even though is read into the fundamental rights of our Constitution, it is not considered to be an absolute right. Instances might arise when the right to privacy ought to be repressed as to ensure the unruffled flow and protection of rights and freedom of others. Therefore, when there is a conflict between the right to privacy and the public interest, the latter prevails. However, the advancement of science and technology put forth formidable challenges in realms of its knowledge economy, necessitating the need to safeguard privacy, sometimes even at the cost of public interest The efficacious safeguarding of privacy seems to be a baffling matter, taking into consideration the deeply contested stakes that the new world order has in question. On a more personal note, we can see that using unnecessary and untrammelled means to impinge on the right to privacy of a person is precluded whatsoever. Privacy is emerging as one of the most pivotal rights of social change and to an extent, even a necessary instrument in safeguarding humungous stakes involved in the protection of information, which accounts fundamentally in modern day knowledge economy. Principles of privacy are therefore an area that needs immediate

structural, functional and conceptual overhaul, in order to encompass within itself the challenges put forth by the widening information age.

The paradigms put forth in this paper commingled with the intrinsic nature of the privacy domain are thought provoking as much as it elicits new insights on the deeper aspects of the subject. Furthermore, analyzing the much disputed question of privacy, its origin, and how it has been identified from time to time by the courts in India as well as across the globe is nothing less than engrossing.