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NALSAR UNIVERSITY OF LAW

THE M.K. NAMBYAR SAARCLAW CHAIR IN COMPARATIVE CONSTITUTIONAL STUDIES

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Editorial

The previous editorial note of the Indian Journal of Constitutional Law ("**IJCL**") spoke about how "at 7[4], only Constitutions, tortoises, and whales are dubbed 'young,'". With two more years passing by, our Constitution has aged well. It has been transformative and marks a significant departure from the colonial past.

The Constitution reflects a nation's identity and the values of its people. As the supreme law of the land, it demands adherence from both the state and its citizens. Constitutional values cannot be compromised by those entrusted with the authority to govern. Ensuring constitutional order is the state's foremost responsibility, and this order must be maintained through a genuine commitment to the rule of law and the internalization of constitutional values by public officials. However, this internalization requires concerted effort from the political class.

For the Constitution to remain relevant in a constantly changing world, it must be adaptable. The judiciary plays a pivotal role in ensuring this adaptability, balancing the original intentions of the legislature with the evolving values of society. The task of interpreting the Constitution is, therefore, an ongoing endeavor—one that

seeks to uphold the enduring principles of justice while responding to the needs of a dynamic, diverse nation.

This is an important challenge for the Indian Constitution – to be up to date with societal change and to create a safe and inclusive place for *all* its citizens. The fluidity of society and how societal moralities change necessarily keep even the Constitution guessing. The judiciary has a co-relative obligation to recognize and enforce newer manifestations of rights. Sometimes, the structural limits of the Supreme Court prevent it from doing the kind of substantial justice that the Constitution imagined for itself.[1] Sometimes, the Supreme Court dives back into its own jurisprudence to fish out seemingly unnecessary elements in the spirit of the same substantial justice. [2]

The one thing we can say with certainty is that the Supreme Court has certainly chosen to lend its ears wide open to matters of constitutional importance. In the span of 2022 to 2024, the scope of this journal, a number of important Constitutional Law judgments were passed by the Supreme Court. These include the *Economically Weaker Sections*, *Demonetisation*, *Marriage equality*, *Article 370*, *Electoral Bonds* among many others. In fact, in 2023, the Supreme Court gave a

1 Supriyo alias Supriya Chakraborty and Another v. Union of India, 2023 SCC OnLine SC 1348.

2 State of Punjab v. Davinder Singh and Others, 2024 SCC OnLine SC 1860.

record 18 constitutional bench judgments, which are only bound to increase this year.[3]

Yet, as American political scientist Charles Howard McIlwain observed decades ago in *Constitutionalism: Ancient and Modern*, the very principle of constitutionalism has never been more questioned or under threat.[4] From a liberal perspective, the ultimate aim of a constitution is to uphold the rights and dignity of individuals, with the government as merely the means to achieve this. Without the spirit of constitutionalism, a constitution is reduced to an empty shell, devoid of meaning.

Legal academic Hilaire Barnett identifies four core components of *constitutionalism*.[5] First, the principle of *intra vires*, which holds that those who exercise governmental power must be accountable to the law. Second, that *power must be exercised with respect for the rights of individuals and citizens*, regardless of the authority vested in those in power. Third, the *separation of powers* among state institutions—legislative, executive, and judicial—ensures that power is not abused. Finally, *the government and legislature must*

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3 Kohli T, 'Supreme Court Review 2023: Constitution Bench Decisions' (*Supreme Court Observer*, 16 January 2024).

4 *Constitutionalism*: Ancient and Modern (Indianapolis: Liberty Fund, 2008).

5 Barnett H, Constitutional and Administrative Law (Routledge 2024).

remain accountable to the electorate, from whom they derive their authority. These cardinal principles of constitutionalism are increasingly being questioned in the modern day and age. Some owing to the kind of technological and sociological developments, other owing to the kind and manner of governance that continue to dictate us.

This combined volume of the IJCL seeks to understand the developments in Indian Constitutional Law and address them through academic, comparative and global lens. To this end, we have pieces strictly focusing on Indian Constitutional Law, while also accommodating scholarship from the neighbouring country of Bangladesh.

Contributions

As earlier noted, the Supreme Court has been extremely active during the scope of this journal. This journal was able to significantly cover some of the more controversial developments, and provide readers with an accurate overview. It also threads a delicate balance between the past, the present and the future.

This edition starts with a delightful look at the past with **(Retd.) Justice Subhash Reddy** talks about the

constitutional philosophy of Justice Chinappa Reddy. He points towards the intellectual brilliance of Justice Chinappa Reddy, and his ability to remain steadfast in his commitment towards fundamental rights and political freedoms. He exemplifies his point through a discussion of Justice Reddy's role in *Mohd. Yusuf Rather* and *Bijoe Emmanuel*. His critique of *Golaknath* and his views on merit-based reservation system continue to occupy a central part of jurisprudence to this day.

Mr. Aymen Mohammed argues that the integrity of electoral democracy in India is under threat due to the increasing influence of corporate donations and globalized election campaigning methods. He emphasizes the importance of individual citizenship in electoral democracy and argues that corporate donations can distort electoral competition and marginalize the voices of individual citizens. Finally, he calls for a constitutional prohibition on corporate donations in political finance to safeguard the integrity of electoral democracy. In the postscript, he reflects upon the latest developments in relation to the political financing.

Mr. Shrutanjaya Bharadwaj undertakes an empirical analysis of all the 1,171 habeas corpus petitions, which he received through a Right to Information (RTI)

petition, filed in the Supreme Court from 2000 to 2023. He notes that the proportion of Writ Petitions decreased significantly after 2011. He tracks the average disposal time for cases to be resolved within a year to be 75.27 days. He suggests that the Court should aim to resolve cases within two weeks, given the importance of habeas corpus petitions to personal liberty.

Mr. Rushil Batra argues that the Supreme Court's framework for determining Essential Religious Practices (ERPs) is doctrinally unsustainable and practically impossible. The court creates a three-step inquiry – firstly, whether a claim is religious at all; secondly, whether the claim is *essential* to the religion; lastly, whether it satisfies constitutional restrictions. He believes that the court lacks expertise and authority to determine what practices are *essential* to a religion. He wholistically engages with literature on cultural rights and the conceptions of Indian securalism. He aims to prove his assertion through a doctrinal and statistical analysis of relevant Supreme Court and High Court judgements.

Mr. Sachin Dhawan addresses the lacunae left by the Karnataka High Court in the *X Corp v. Union of India* concerning users/originators. He argues that the judgement should have upheld the principles laid down

in *Shreya Singhal* and should have extended robust due process protections to individuals before depriving them of fundamental rights. More centrally, he highlights the role of *Shreya Singhal* in the evolving law on content blocking.

Mr. Aditya Rawat explores the concept of a homogenous constitutional identity in India by focusing upon the recent Supreme Court cases such as *Hijab Ban* and the political discourse. He argues that the pursuit of such an identity, as exemplified by the *Hijab Ban* and the push for Hindi as the national language, can lead to intolerance and discrimination. He criticizes the "Eurocentric liberal constitutionalism" that underpins these efforts and calls for a *decolonial* approach to constitutionalism in South Asia. He also questions whether a homogenous identity is desirable or even possible in a pluralistic society. Finally, he explores alternative ways of understanding and practicing constitutionalism.

Mr. Aurif Muzafar criticizes the dominant narratives surrounding Article 370 of the Indian Constitution, which have been shaped by liberal and right-wing perspectives. These narratives often view Article 370 as a symbol of special status or autonomy for Jammu and Kashmir, and

they fail to address the larger Kashmir problem. The author argues that these narratives are restrictive and do not offer any solutions to the ongoing conflict. The article calls for a more transformative approach to understanding Article 370 and its implications for the future of Kashmir.

Mr. Vivasvan Gautam compares the progress of same-sex marriage rights in India, the USA, and Canada. He highlights that Canada was one of the first countries to legalise same-sex marriage, while India is still in the early stages of this process. This emphasizes the importance of institutional dialogue in Canada's journey towards recognizing same-sez marriage rights, and argues that India could benefit from adopting a similar approach. He notes that India has the opportunity to learn from Canada's experience and create a more inclusive society by recognizing marriage rights for the LGBTQ+ community.

Mr. Archit Sinha argues for a broader interpretation of Article 17 of the Indian Constitution, which prohibits untouchability. He criticizes the current jurisprudence that often links social discrimination to religious rights, leading to a narrow focus on issues related to religion. He suggests that Article 17 should be interpreted more expansively to protect against all forms of social

discrimination, regardless of their basis. He also introduces a new concept, the "exclusionary effect," to highlight the ways in which social discrimination can occur without direct reference to religion. Overall, the paper aims to provide a new framework for understanding and addressing social discrimination in India.

Finally, **Mr. Zia Ahmed** argues that Bangladesh has a constitutional obligation to protect Rohingya refugees, despite not being a signatory to the 1951 Refugee Convention. It highlights that Bangladesh has provided refuge, rations, and basic services to over a million Rohingya who have fled Myanmar since 2017. While Bangladesh is not legally bound to protect refugees under international law, the author contends that its constitution still mandates the protection of human rights for those residing within its territory. The article emphasizes the need for awareness of these constitutional protections among the Rohingya and those seeking to assist them, as well as the financial resources to utilize the Bangladeshi legal system.

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We extend our most sincere thanks to Dr. Aditya Sondhi, Dr. Kamala Sankaran, Mr. Raghav Shankar, Mr. Sreenath Khemka, Mr. Vetha Philos, Mr. Talha Abdul

Rahman, Mr. Shubham Jain, Dr. Surbhi Shukla, Ms. Vandita Khanna, Dr. Balu Sunilraj, Ms. Aishwarya Birla for taking time out of their busy schedules to peer-review shortlisted pieces for this journal. Beyond that we would like to specially thank Mr. Siddharth Chauhan and Mr. Alok Prasanna Kumar for reviewing multiple pieces for this edition of the journal. We also thank Prof. Arun Thirunvengadam and Prof. Amita Dhanda for their guidance in finding peer-reviewers.

We are indebted to Mr. K.K. Venugopal as well as the M.K. Nambyar SAARCLAW Charitable Trust, and will always be grateful to them for their assistance, which has been critical to the IJCL's continued publication. We thank Prof. Murali Karnam for his continuous support to the journal in various capacities. We are incredibly grateful to our registrar and faculty editor, Dr. Vasanthi Nimushakavi, for always supporting us in undertaking this endeavour. We also thank Utkarsh Mani Tripathi from the previous editorial board for his continuous guidance which made this edition possible. Finally, we would like to express our gratitude to the administrative personnel for their continued support.

SOME SELECT ASPECTS OF THE CONSTITUTIONAL PHILOSOPHY OF JUSTICE CHINNAPPA REDDY[1]

Justice (Ret'd) B. Sudarshan Reddy
Supreme Court of India

At the very outset, let me express my deepest sense of honour at being asked to deliver this Justice O. Chinnappa Reddy Memorial lecture, on the occasion of the hundredth anniversary of his birth. This privilege is greater, on the account that I also happened to serve this country as a judge of the Supreme Court of India. That, in no way can ever mean that I was even remotely as worthy as the great man in whose memory this lecture is being delivered. I did not, I wish to emphatically state, in my wildest dreams ever imagine that I would hold the same position that he did. In comparison to the accomplishments of Justice Chinnappa Reddy, both before and after his appointment as a judge of the Supreme Court, let me state that my occupation of the same position has to be deemed, a simple twist of fate.

While I could not have avoided accepting this invitation from the legal fraternity, I must confess to a great deal of trepidation. And how could I not feel diffident? After all, I am talking about a person who was my hero in the judicial firmament, as he indeed was for so many of us who began our study of law, while he rose to prominence through his intellectual brilliance and his unparalleled capacity to combine it with empathy for the weakest among us. Let me place it on record that one of the reasons I joined law college was Justice Chinnappa Reddy. In my early years as a member of the bar, seniors in the profession spoke of him with unalloyed appreciation. We avidly followed his judgements, and afternoons spent in the courts where he presided were unforgettable lessons in graceful deportment, incredible

[1] Justice Chinnappa Reddy Memorial Lecture, 22nd October, 2022 Hyderabad

legal and sociological insights and above all, a palpable concern for justice with solicitous concern for the most vulnerable.

A special mention must be made of Justice Chinnappa Reddy's contributions as a judge of the A.P. High Court. As many of you may be aware, in the dark days of the Emergency, even as the judiciary of the Apex Court buckled and delivered the constitutional abomination that was *ADM Jabalpur*, a few Justices – indeed a mere handful across the country – insisted that Emergency powers could not be interpreted to mean the abandonment of core fundamental rights. Justice Chinnappa Reddy was one of the leading lights and a beacon of hope, when political and constitutional darkness enveloped the polity. In these times, I would suggest that Justice Chinnappa Reddy's tenure as a judge of the then united A.P. High Court should be taken as an example and guide for those serving on High Courts who might be tempted to yield to the executive, setting aside their moral obligation to uphold the values of an independent judiciary, the Constitution and the cause of justice.

As a member of the then younger cohort of the Bar, I can attest to the fact that Justice Chinnappa Reddy's unwavering protection of political freedoms and Indian democracy electrified and infused us with a great sense of idealism, engendering an understanding that there is a larger purpose to the practice of law. At the same time, we were also very dismayed, when the then regime considered him to be defiant and difficult and he was transferred to another High Court. When the Emergency period ended, Justice Chinnappa Reddy was offered the position of Chief Justice of the AP High Court, indicating an institutional atonement. He declined and chose to stay back at the High Court he was transferred to. The reason? Because he was also committed to the idea of protection of the dignity of the Court, and his moral framework would not allow something as trivial, in his mind,

as personal vindication to hint a mistake by the institution. What one of the leading jurists of India wrote about him is worth recounting here:

> *"Chinnappa Reddy occupies a secure and exalted place in the Indian judicial pantheon. The judicial virtues he pursued on the High Bench helped enormously to restore the bruised legitimacy…. of the Supreme Court of India….. the notion of avatar… never appealed to him. For Chinnappa, the virtue of rectitude assumed a concern for collegiality…. He strove to enhance the collective competence of the Court as an Institution of co-governance of the nation and contributed greatly to the sustenance of its collective constitutional wisdom…."* [2]

I believe that Justice Chinnappa Reddy's concern about the enhancement of "collective competence of the Court" is best exemplified by his discussion of the celebrated *Minerva Mills*[3] case in the *Sanjeev Coke*[4] case. The principal question for consideration was whether the Coking Coal Mines (Nationalisation) Act, 1972 was entitled to the protection of Article 31-C of the Constitution. In his arguments, Shri A.K. Sen had relied on certain sweeping observations of Justice Bhagwati, which effectively held that the "*connection has to be between the law and the directive principle and it must be a real and substantial connection*". A.K. Sen had creatively used the prolix language of Justice Bhagwati in *Minerva Mills* to submit that a "*law founded on discrimination is not entitled to the protection of Article 31-C, as such a law can never be said to be to further the Directive principle on Article 39(b)*".

How Justice Chinnappa Reddy addressed the rather creative manner in which A.K. Sen had sought to subvert the main principle of

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2 Baxi, Upendra: "*Foreword – The Court and the Constitution: Summits and Shallows*", Reddy, O. Chinnappa R, pg xi.

3 Minerva Mills v Union of India, (1980) 3 SCC 625.

4 Sanjeev Coke Manufacturing Company v M/S Bharat Coking Coal Limited & Anr, (1983) 1 SCC 147.

Minerva Mills ought to be taken as an essential lesson for judges writing on constitutional values that seemingly contradict each other. It is worth citing from the judgement at length:

> *"We have some misgivings about the Minerva Mills decision, despite its rare beauty and persuasive rhetoric…. We confess the case has left us perplexed. In the second place, the question of constitutional validity of Article 31-C appears to us to be concluded by the decision of the Court in Keshavananda Bharati*[5] *case…. the protection of Article 31-C was, at that time, confined to laws giving effect to the policy of clauses (b) and (c)…."*

Justice Chinnappa Reddy then brilliantly analysed the dialectics of the Constitutional structure in setting aside A.K. Sen's assertions as to what *Minerva Mills* stood for:

> *"While we broadly agree with much that has been said by Bhagwati, J ……. to accept the submission of Shri Sen that a law founded on discrimination is not entitled to the protection of Article 31-C as such a law can never be said to further the directive principle affirmed in Article 39(b), would indeed be, to use a hackneyed phrase, to put the cart before the horse. If the law made to further the directive principle is necessarily non-discriminatory or is based on a reasonable classification, then such a law does not need any protection such as that afforded by Article 31-C. Such law would be valid on its own strength, with no aid from Article 31-C. To make it a condition precedent that a law seeking the haven of Article 31-C must be non-discriminatory or based on reasonable classification is to make Article 31-C meaningless."*

5 Keshavananda Bharati v State of Kerala, (1973) 4 SCC 179.

Possibly realizing that the very prolixity of the language of Justice Bhagwati that made *Minerva Mills* a case of "rare beauty" was also leading to avenues for misinterpretation, and subverting the very principle that the Constitution sought to strike a balance between – that the legislation, for the achievement of progressive goals could not be set aside on the anvil of a simplistic and limited reading of egalitarianism – Justice Chinnappa Reddy rehabilitated both *Minerva Mills* and in the gentlest of, and yet effective, terms criticised Justice Bhagwati:

> *"If Article 14 is not offended no one need give any immunity from any attack based on Article 14. Bhagwati, J. did not say anything to the contrary. On the other hand he was at great pains to point out that the broad egalitarian principle of social and economic justice for all was implicit in every directive principle, and therefore, a law designed to promote a directive principle, even if it came into conflict with formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and desirable constitutional goal of social and economic justice for all. Never for a moment did Bhagwati J., let in by another door the very controversy which was shut out by Article 31-C."*

And then he continued:

> *"While we agree with Bhagwati J. that the ……. connection with directive principle must not be some 'remote or tenuous connection', we deliberately refrain from the use of the words "real and substantial", "dominant", "basically and essentially necessary" and "closely and integrally connected" lest anyone chase after the meaning of these expressions…….and what we have now said about the qualifying words is only to caution ourselves against adjectives getting the better*

> *of the noun. Adjectives are attractive forensic aids but in matters of interpretation they are diverting intruders."*

And finishing the lesson on the need to be careful of what one writes, and not let eloquence get the better of the need to be very careful in uttering more than what is necessary, the master of terse formulation ended with a gentle arm over the shoulder of his fellow judge:

> "*These observations have the full concurrence of Bhagwati, J.*"!

Notwithstanding such mastery over the Constitutional imperatives, and a deep and abiding concern for judicial statecraft, Justice Chinnappa Reddy was allowed to write for the majority in only a few five judge Constitution benches. This is often thought of as a big mystery, which hushed whispers suggested ought to be unravelled. Especially, given that scholars like Gadbois and Baxi have opined that Justice Chinnappa Reddy must surely rank as one of the few towering intellects to have graced the Supreme Court of India.

One does not have to posit or subscribe to a theory that the judges of the Supreme Court overtly discriminate against fellow judges on the basis of their social background to begin to untie the strings of this mystery. Given that a majority of the judges of the Supreme Court have come from social back grounds in which lyricism of the written text is a paramount virtue, the emphasis placed by Justice Chinnappa Reddy – hailing from the hardscrabble peasant social background – on moral urgencies of the consequences for the weakest may have been less palatable. Moreover, for those hailing from social backgrounds in which equivocation of reality of the social condition of the masses was an inherent cultural imperative, the terseness of his articulation may have engendered an uncomfortable level of cognitive dissonance.

Whatever the forces that may have conspired or conjugated to prevent a brilliant humanist from setting the parameters of modes of

constitutional adjudication, contents and contours of constitutional identity, and inscribing a framework of discourse that was always mindful of moral urgency in the efforts to achieve a more progressive and socially just state of affairs without allowing the State to turn authoritarian or fascist, we also necessarily have to wonder whether the predicament that our democracy finds itself could be attributed to an undertheorized and undercooked progressive liberalism, making it shallow. Notwithstanding the eloquent exegesis of egalitarianism and social justice by favoured mandarins that was put on show, less emphasis was placed on the material consequences for the less fortunate, and how that might impact the ability of the masses to understand and protect the project of democracy in India. If only Justice Chinnappa Reddy had been allowed to clearly articulate the main contours of constitutional identity, and if the moral urgency that he felt animated the Indian Constitution had been allowed to be the central focus, maybe we would have had the benefit of a more brilliantly and persuasively articulated as well as a lasting constitutional jurisprudence- something that would have cautioned us that unless the nation heeds and acts upon the moral urgency of establishing conditions of social justice in which the inherent dignity of the hitherto deprived masses is reasserted and protected, political equality will be of mere platitudinal value and potentially unprotected from depredations by the elite classes. This would be because those very masses, due to their continued material and cultural deprivations – relative and absolute – would be left with limited social capacities, individually and as groups, to defend the substantive aspects of even political freedoms.

This was the very fear that Babasaheb Ambedkar pointed out so presciently when our Constitution was ratified. The continuing of vast and graded socio-economic inequalities with just notional equality

in the political sphere may be argued as having created the current crisis of our democracy marked by a strident, and evil, discourse against political freedoms of those who seek to speak for the weakest.

Normally, in speeches such as this, the speaker would move towards a rendering of issues of more current purport and may refer to the person being honoured only parenthetically. But, Justice Chinnappa Reddy was no ordinarily great man. It would be an unpardonable mistake, intellectually, to not recount the many warning bells he had sounded, most of which we as a nation did not fully heed, which inevitably wound our way to our current predicaments.

Of course, in a long and distinguished career as a judge, Justice Chinnappa Reddy delivered many hundreds of judgements of exquisite logic, redolent perspicacity and deep clarity. Hence, the very process of choosing a few to talk about would necessarily begin to be a bit arbitrary. However, the following few cases that I wish to highlight are those which have deeply influenced me, and as I sketch them, I am hoping that the audience will pick up on the deep strains of constitutional angst we must all feel with the current status of constitutional jurisprudence in India.

The first case I wish to describe and discuss is *Mohd. Yousuf Rather v. State of J & K*.[6] In this particular case, the main issue was about how irrelevant grounds in an order of preventive detention vitiate it. Justice Singhal authored the majority opinion for himself and Justice Sarkaria. Justice Chinnappa Reddy was flabbergasted "*by a good deal of vehement argument …. advanced by Dr. Singhvi to sustain the order of detention*" and chose to add a brief note with his concurrence. He begins with a characteristically brilliant formulation that encapsulates the

6 Mohd Yousuf Rather v State of Jammu and Kashmir, (1979) 4 SCC 370.

constitutional anxieties and constitutional checks. As always, it is worth citing him extensively:

> *"[T]he Constitution of India recognizes preventive detention as a necessary evil, but, nonetheless, an evil. So, we have by Constitutional mandate, circumscribed the making of laws providing for preventive detention…….. The law is now well settled that a detenu has two rights under Article 22(5)…. (1) To be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (2) to be afforded the earliest opportunity of making a representation against the order of detention, that is to be furnished with sufficient particulars to enable him to make a representation which on being considered may obtain relief for him. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the first of the rights, and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second of the rights. In either case there is an invasion of the constitutional rights of the detenu entitling him to approach the Court for relief. The reason for saying that inclusion of even a single irrelevant or obscure ground… is an invasion of the detenu's constitutional rights is that the Court is precluded from adjudicating upon the sufficiency of the grounds ……."*

With regard to Dr. Singhvi's argument that all the other purported charges that are vague and inchoate should be disregarded and only the last one be taken into account, the following observation of Dr. Chinnappa Reddy was so characteristic of the great man's capacity for a brilliant metaphor, that is both precise and also compelling: "*The last straw which breaks a camel's back does not make weightless the other loads on the camel's back.*"

As I re-read the case of *Mohd. Yousuf Rather* in preparation of this lecture I smiled wryly to myself. Just a few days ago we read in the newspapers that the Union of India declared in the Supreme Court that "*jail is the only place for all 'urban naxals'*". In the newspaper reports there was no indication that the Supreme Court asked about the meaning of that expression. Anyone following the current socio-political discourse, even with a modicum of effort, would probably be aware that the expression is now used for any one and all who voice any kind of support for the weaker segments or engage in criticism of authorities or of a particular socio-political stance.

In *Mohd Yousuf Rather*, one of the first grounds cited was that the detenu was a "Naxalite", which on closer examination only involved the detenu believing that meant no more than that he was a believer in the Marxist-Leninist ideology and Dr. Singhvi confessed that the expression Naxalite was too imprecise and vague. The other ground pressed for detention was that the detenu made a speech in which he asked the audience to shun the life of dishonour and rise in revolt against oppression. As he always did, Justice Chinnappa Reddy's observations convey the correct constitutional position, which we all can then compare with what we are seeing and hearing now:

> *"Some think of Naxalites as blood thirsty monsters; some compare them to Joan of Arc. It all depends on the class to which one belongs, one's political hues and ideological perceptions…….. Dr. Singhvi had, ultimately to confess that the expression…. was as definite or vague as words describing ideologies…….It is enough to say that it is just a label which can be as misleading as any other and is, perhaps, used occasionally for that very purpose…..Now, expressions like "revolt" and "revolution" are flung about by all and sundry….Every turn against the establishment is called a "revolt" and every new idea is labelled as "revolutionary"……. Neither paragraph three nor four*

> *of the grounds of detention specifies the particular form of revolt or revolution which the detenu advocated. Did he incite people to violence? What words did he employ? What, then, is the connection between these grounds and 'acting in a manner prejudicial to the maintenance of the public order"? There is no answer to be gleaned" and hence the alleged grounds are "held to be both irrelevant and vague."*

Lest some misguided souls engage in a knee jerk criticism of the foregoing as the response of a judge who was a socialist, we can reassure them that Justice Chinnappa Reddy's defense of political freedoms – of conscience, of ideological persuasions and of expression – was equally felicitously extended to those who could be deemed to hold entirely opposing socio-political opinions. In the case of *Ramashankar Raghuvanshi and Anr*[7] the Supreme Court was dealing with the legality of termination from a government job on the grounds that the appellant, Ramashankar Raghuvanshi, had taken part in "RSS and Jan Sangh" activities. And I must again repeat, as always citing Justice Chinnappa Reddy extensively is worthwhile:

> *"India is not a police state. India is a democratic republic. More than 30 years ago, on January 26, 1950, the people of India resolved to constitute India into a democratic republic and to secure to all its citizens "Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity", and to promote "Fraternity, assuring the dignity of the individual". This determination of the people, let us hope, is not a forgotten chapter of history. …… All that is said is that before he was absorbed in Government service, he had taken part in some 'RSS or Jan Sangh activities.' What those activities were has never been disclosed. Neither the RSS nor the Jan Sangh is alleged to be engaged in any , subversive or other illegal*

7 State of Madhya Pradesh vs Ramashankar Raghuvanshi and Anr, (1983) 2 SCC 145.

activity; nor are the organisations banned. Most people, including intellectuals, may not agree with the programme and philosophy of the Jan Sangh and the RSS or, for that matter of many other political parties and organisations of an altogether different hue. But that is irrelevant. Everyone is entitled to his thoughts and views. There are no barriers. …….. What then was the sin that the respondent committed in participating in some political activity before his absorption into Government service?..... The whole idea of seeking a Police report on the political faith and the past political activity of a candidate for public employment appears to our mind to cut at the very root of the Fundamental Rights of equality of opportunity in the matter of employment, freedom of expression and freedom of association…… Politics is no crime. Does it mean that only True Believers in the political faith of the party in power for the time being are entitled to public employment ? Would it not lead to devastating results, if such a policy is pursued by each of the Governments of the constituent States of India where different political parties may happen to wield power, for the time being ? Is public employment reserved for "the cringing and the craven"…? We do not have the slightest doubt that the whole business of seeking police reports, about the political faith, belief and association and the past political activity of a candidate for public employment is repugnant to the basic rights guaranteed by the Constitution and entirely misplaced in a democratic republic dedicated to the ideals set forth in the preamble of the Constitution. We think it offends the Fundamental Rights guaranteed by Arts. 14 and 16 of the Constitution to deny employment to an individual because of his past political affinities, unless such affinities are considered likely to affect the integrity and efficiency of the individual's service. ***To hold otherwise would be to introduce 'McCarthyism' into India.***

'McCarthyism' is obnoxious to the whole philosophy of our constitution. We do not want it.'"[8]

Apart from laying out, with his usual felicity, the correct constitutional position, Justice Chinnappa Reddy also pointed to another aspect of constitutionalism and constitutional values. If the power vested in a particular regime, due to electoral victories, were to be used to illegally target people and opponents holding opposing views, then reciprocation by others who may come to power at a later date would lead the country to chaos of mutually aided destruction. The caution that Justice Chinnappa Reddy urged, when the Congress party was in power – both at the Centre and in the State of Madhya Pradesh- should be borne in mind by all political parties now holding or aspiring to hold political power.

We have heard often, especially over the past decade or so, of vigilante justice being promoted by some political factions, and enforced by spontaneously forming mobs of a particular politico-religious formation, demanding that individuals belonging to other denominations prove their patriotism by singing the National Anthem or another poem deemed by many to be the National Song. In *Bijoe Emmanuel*[9], the Supreme Court was dealing with the issues raised on behalf of three school children who belonged to a denomination "Jehovah's Witnesses" and who refused to sing the National Anthem even though they always stood up whenever the anthem was played. Justice Chinnappa Reddy wrote:

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8 Also read the commentary of R. Venkataramani, recently appointed as the Attorney General of India, on this case in his book "*Judgements by Chinnappa Reddy – A Humanist*", pb. International Institute of Human Rights Society, New Delhi (1983). Indeed that book is a small treasure trove of commentaries and insights into various decisions by Justice Chinnappa Reddy.

9 Bijoe Emmanuel & Ors v State of Kerala & Ors, (1986) 3 Supreme Court Cases 615.

> *"We are afraid the High Court misdirected itself and went off at a tangent. They considered, in minute detail, each and every word and thought of the National Anthem and concluded that there was no word or thought…. Which could offend anyone's religious susceptibilities. But that is not the question at all. The objection of the petitioners is not to the language or sentiments of the National Anthem wherever….. In their words '[T]hey desist from actual singing only because of their honest belief and conviction….." we have to examine whether the ban imposed by Kerala education authorities against silence when the National Anthem is sung on pain of expulsion from the school is consistent with the rights guaranteed by articles 19(1)(a) and 25 of the Constitution….. we have no option but to hold that the expulsion of the children from the school for not joining the singing of National Anthem, though they stood respectfully… was violative of Article 19(1)(A)".*

Continuing further, and examining Article 25, he wrote:

> *"Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind interpreting Article 25….. Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practice and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such an act is to protect public order, morality and health, and whether it is to give effect to other provisions of Part III of the Constitution or whether it is authorized by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice for social welfare and reform.* ***It is the duty and function of the Court to so do.****"*

While *Bijoe Emmanuel* is justifiably celebrated as a blow for religious freedoms, we must also not jump to the conclusion that Justice Chinnappa Reddy held the view that all religious views, even if held genuinely, are beyond the pale of the law. In particular, if the law is to promote other provisions of Part III or for social welfare and reform, then protections of Article 25 may not be extended. I am sure many of you would agree that such a balanced perspective between the ideas of "religious freedom and their protections" and the need for "social welfare and reform"[10] have been relatively rare, and even rarer has been the clarity of language and conviction. It is no wonder that Justice Chinnappa Reddy was one of the judges concurring with the views of Justice Y.V. Chandrachud in the *Shah Bano case* (which upheld the views of Justice Krishna Iyer in both *Bai Tahira*[11] and *Fazlunbi*[12] (Justice Chinnappa Reddy was a member of the three-judge bench in the latter case).

It is inevitable that patriarchal attitudes (or unquestioned or unexamined beliefs influenced by patriarchy), religious views and beliefs would often clash with the more modern value structures (arguably more aspired for than achieved) in which women are deemed to be equal in every way with men. Justice Chinnappa Reddy was definitely of the opinion that Article 25 ought not to be a hindrance for social welfare and reform. For instance, in the chapter on Women and Women's rights, in his book "*The Court and the Constitution of India: Summits and Shallows*"[13]. He wrote:

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10 Attorney General R. Venkataramani points out that many Members of Parliament, including one from the largest minority, had reacted very sharply to the Bijoe Emmanuel decision, and had used extreme language against Justice Chinnappa Reddy. Supra n. 7, at page 15.

11 1979 AIR 362.

12 1980 AIR 1730.

13 Reddy, O. Chinnappa, OUP, New Delhi 2008, pages 115 and 117.

> *"One of the outstanding unresolved problems of humanity is that of the liberation of women, humanity's oppressed half…. In the ultimate analysis the measure of democracy in a country's polity and the measure of the general emancipation of the people is the degree of emancipation of its women…. Much has been said; not so much has been achieved….. [T]hese special provisions" such as Articles 14, 42, 44 etc., "have made no impact whatsoever on the general condition of Indian women, although it may have produced here and there a few professionals like doctors, lawyers, teachers etc.,. Notwithstanding the equality clauses of the Constitution, the gender bias against women of all religions in matters of succession to property, marriage and divorce still persist….. [T]hen there are the laws, laws to be made, laws to be abolished, laws to be amended. Instead of ad hoc revision of some provisions here and another provision there, the Law Commission may be asked to take up a comprehensive revision of all laws where women are discriminated against, where women need protection and where women need advancement….. the need has become urgent with the passage of time but political games and conveniences seem to prevent the government from bringing forward any legislation to implement the Directive Principles"*

Justice Chinnappa Reddy's unabashed, eloquent and persuasive stance that equality clauses of the Indian Constitution necessarily also encode a socially progressive agenda to undo unconscionable damages in the past, continuing in the present and which might continue or re-emerge in the future, could be fruitfully studied as one of truest renditions of Constitutional identity. It is such a travesty that even the so-called progressive voices of the left have not borrowed his reference frame to articulate and build a moral movement. Few have expressed as clear views as the following:

> *"**Golaknath was a tragedy**. The judges led by Chief Justice Subba Rao, otherwise a liberal judge, showed **a near obsessive percipience of the Fundamental Rights in the Constitution…. But no perception of the Directive Principles** which were also part of the Constitution. There was **a flow of high-sounding rhetoric** about the 'transcendental' nature of the Fundamental Rights **but hardly a thought for the welfare of the 'People of India mentioned in the Preamble**…. [T]here was then no indigenous jurisprudence in the making. Judges…. Were steeped in British jurisprudence and where "that "did not help them, they were ready to look to American jurisprudence…. concepts of 'reasonable classification', 'police power'…. Were needlessly borrowed… to" narrowly "construe some of the Fundamental Rights instead of giving them an expansive interpretation in the light of the Directive Principles and the Preamble…… **and an individual as a member of society was displaced by an individual, pure and simple**."*[14]

He continues:

> ***"They failed to realise** the great truth that in Constitutional Law more than elsewhere, there are no absolutes which are absolutely true. They waxed eloquent on the 'great freedoms' of the right to property and the right to compensation, **but denied to the whole people of the country freedom of choice, the freedom from the tyranny of archaic dogma, the freedom to make a new and different choice to alleviate poverty…. Concerned as they were with the 'great freedoms', they showed little awareness of the great problems of the millions of little men…….** [T]hey were*

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14 *Ibid*, page 48.

> *highly conscious that it was a Constitution that they were expounding but appeared to be unconscious that simultaneously it was the right to property in an economy of scarcity they were expounding. It was as if the right to property was the centre of the constitutional universe around which other Fundamental Rights including the right to equality revolved.* ***The effect of Golaknath was to stop constitutional progress and to fossilize the Constitution****".*

I am sure many of you would immediately appreciate that the so called "neo-liberal agenda", often times fusing with (and sustained by a socio-political discourse painting) an extreme form of "laissez faire free markets" (bordering on being "anarcho-capitalist") rhetoric, which has come to increasingly dominate the Indian polity for the past three decades, is on course to eviscerate the idea of an "individual as a member of society" and displace it with "an individual, pure and simple". Pushed forward by "I, Me, Mine" mindsets of the elite classes (and increasingly and shockingly now the middle classes too), there is seldom any thought about what is to be done about the masses – the hundreds of millions suffering from absolute as well as relative poverty that leaves them unable to self-actualize their potential – who are left behind. Are we on our way to establishing a policy framework that the Supreme Court once described as "tax break after tax breaks for the rich, and the gun for the poor" to man the "security state" protecting the gated communities for the "few"?

As the neo-liberal agenda was being heralded in 1991, my good friend and a distinguished parliamentarian, Shri. S. Jaipal Reddy, cautioned the then Prime Minister and the then Finance Minister that they must at least be careful that their policy agendas do not lead to the emergence of a dystopia in which the "state behaves like the market, and the market behaves like the state". Many reasonable

people are apprehending that that might be where we are headed, if we aren't already there. This is the inevitable consequence of a neo-liberal agenda – all over the world – in which the right to property is deemed to be the sole purpose and center of the Constitutional universe and of the socio-economic spheres of human action. This view necessarily engenders a fascist "security state" with a remit of protecting not just the borders of the nation, but also the borders of "the gated communities" of the few. But we need to ask ourselves- What would the support of the "security state" be limited to? As many discuss in whispers of the nation's policing powers and agencies being used to aid the rapid accumulation of assets and wealth of the very few, and to brow beat even those with considerable wealth (but not possessing the same level of patronage of those wielding political power), what should we expect of our constitutional future? Would the effect again be the stoppage of "constitutional progress and to fossilize the Constitution"? And fossilize the lives of hundreds of millions, with a view that accumulation of unlimited wealth by the very few is the primordial national purpose, some being given the gun to protect the very few, and the rest to remain silent (and if some of the more irresponsible and strident commentary on social media is to be believed) or even allowed to disappear?

The above uncomfortable questions are seldom asked, as the very foundations of notions of welfare of all communities are decimated, as the views and reality that human beings are also social animals are removed from consideration, and the expectations that there is great merit in serving others in the society, especially the weakest scorned (and even potentially subject to criminalization).

The decisions of Justice Chinnappa Reddy in the areas of socio-economic policies are too well known to be repeated here in extenso. Nevertheless, a brief recounting of his brilliant articulation in

at least a few of the cases is necessary, at least, to find some emotional and intellectual relief for ourselves.

As the Covid pandemic raged, and millions were likely to perish, two judges of the Supreme Court observed that it may be necessary for the Union of India to provide free testing to save lives. This raised the hackles of the neo-liberal coterie, and some went so far as to deride the judges in most contemptuous and un-parliamentary of language on social media. Their gripe was that any kind of attempt at moderating prices, even with the threat of millions dying, was unacceptable. The cost to the society, of potential death of millions, was apparently of no consequence to them. In the case of *Union of India v Cyanamide India Ltd*[15], Justice Chinnappa Reddy wrote:

> *"Profiteering, by itself, is evil. Profiteering in the scarce resources of the community, much needed life sustaining foodstuffs, and lifesaving drugs is diabolical…. It must be remembered that Article 39(b) enjoins a duty on the State towards securing 'the ownership and control of material resources of the community are so distributed as best to subserve the common good…… No doubt the order as made on November 25, 1981 has the manufacturers on terms, but the consumer public has been left high and dry. Their interests have in no way been taken care of. In matters of fixation of price", once a determination of essentiality is made "it is the interest of the consumer public that must come first".*[16]

In the *Sanjeev Coke* case, Senior Counsel, Shri. A.K. Sen asserted that "*neither a coal mine nor a coke oven plan owned by private parties*

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15 (1987) 2SCC 720.

16 It must be noted that Justice Chinnappa Reddy was very careful in using the word "profiteering" and not "profits". Cambridge Dictionary defines profiteering as: "**the act of taking advantage of a situation in order to make a profit, usually by charging high prices for things people need**: The pharmaceutical company has been charged with profiteering from the AIDS crisis."

was a 'material resource of the community…. According to the learned counsel they would become material resources of the community only after they were acquired by the State".

Further, Shri A.K. Sen also used Krishna Iyer, J's prolixity in State of *Karnataka v. Ranganatha Reddy*[17]…. to urge that if the word 'distribute' was given its proper emphasis (based on what Krishna Iyer, J wrote), it would inevitably follow that "*material resources must belong to the community as a whole, that is to say, to the State or the public, before they could be distributed as best to subserve the common good*."

As I have said again and again in this speech, Justice Chinnappa Reddy could make short work of specious arguments. His response was classic "Chinnappa" (as he himself would occasionally ask people to address him as):

> *"We are unable to appreciate the submission of Shri Sen. The expression 'material resources of the community' means all things which are capable of producing wealth for the community. There is no warrant for interpreting the expression in so narrow a fashion…… The expression involves no dichotomy. The words must be understood in the context of constitutional goal of establishing a sovereign, socialist, secular, democratic republic. Though the word 'socialism" was introduced in the Preamble by an amendment…. That socialism has always been the goal is evident from the Directive Principles of State Policy. The amendment was only to emphasise the urgency".*

And then he continued:

> *"……. everything of value or use in the material world is material resource and the individual being a member of the community his resources are part of those of the community. To exclude ownership of*

17 (1977) 4 SCC 471.

> *private resources from the coils of Article 39(b) is to cipherise its very purpose…. A directive to the State with a deliberate design to dismantle feudal and capitalist citadels of property must be interpreted in that spirit and hostility……"*

And finally, let us take the case of *K.C. Vasantha Kumar & Anr v State of Karnataka*[18], which involved the question of legality of reservations in the context of Articles 15(4) and 16(4). Justice Chinnappa Reddy's opinion in this case, covered a wide gamut of issues. But what he said about the so-called argument "from merit" is of particular importance, as that is always brought forth, again and again, in a very glib fashion, by purveyors of the opinions of upper classes, whenever the topic of reservations is brought forth:

> *"Over three decades have passed since we promised ourselves "justice, social, economic and political" and equality, of status and opportunity"…… the social and economic disparities are indeed despairingly vast.* ***The Scheduled Castes and the Scheduled Tribes and other socially and educationally backward classes have long journeys to make……. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity and not charity…….****"*

And he continues:

> "*Before we attempt to lay down guidelines for the Commission….. we will do well to warn ourselves and the commission against* ***the pitfalls of the 'traditional' approach towards the question of reservations…. which has generally been superior, elitist and therefore ambivalent****.* ***A duty to***

[18] 1985 (Supp) SCC 714.

> ***undo an evil*** *which has been perpetrated through the generations* ***is thought to betoken a generosity****….. so a superior and patronizing attitude is adopted. The result is that the* ***claim…. to equality as a matter of human and constitutional right is forgotten*** *and their rights are submerged in what is described as the 'preferential principle' or 'protective or compensatory discrimination'…. Unless we get rid of these superior, patronizing and paternalist attitudes…. it" would be "difficult to truly appreciate the problems involved in the claim of Scheduled Castes, Scheduled tribes and other backward classes* ***for their legitimate share of the benefits arising of their belonging to humanity and to a country whose Constitution preaches justice, social, economic and political and equality of status and opportunity for all".***

After setting the context as to why reservations are to be advanced, not as charity but as a matter of right owed on account of inherent human dignity of the beneficiaries, he addresses the pernicious meritorian argument of the elites:

> "*One of the results of the superior, elitist approach is* ***that the question of reservation is inevitably viewed as the conflict between the meritorian principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis.*** *There is not enough fruit in the garden and so those who are in, want to keep out those who are not.* ***The disastrous consequences of the so called meritorian principle to the vast***

majority of under-nourished, poverty stricken, barely literate and vulnerable people of our country are too obvious to be stated".[19]

*"**And what is merit**? **There is no merit in a system which brings about such consequences.** Is not a child of the Scheduled Castes, Scheduled tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition, no books and magazines to read at home, no radio to listen, no T.V. to watch, no one to help him with his his homework, who goes to the nearest local board school and college, and whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice…… has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40% or 50% ….. **surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life.[20] If spring flower he cannot be, autumn flower he may be. Why then, should he be stopped at the threshold on an alleged meritorian principle?**..... Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so called meritorian principle be put against the mediocrity when we come to the" weaker sections?"*

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19 At that point of time, in 1985, the prevailing cultural zeitgeist was still at least that of acknowledgement that these were real problems, even if sufficient moral courage was not always forthcoming to address them with great moral vigour and urgency. In our current denouement, the approach seems to be a cultural zeitgeist to ignore or deny any such problems (at best) or bitterly attacked as being an "anti-national discourse".

20 Kenneth Arrow, a Nobel laureate, speaks of how empirical evidence (sometime in 2004 or so) has shown that those who suffer early childhood deprivations, can make up and approach higher levels of achievements of the non-discriminated if they are allowed to pursue their studies for a longer period of time.

The ontological blunder of removing the individual from within the context of her belonging to a social context, and coupling that with locating human beings as nothing more than individuals has led to a metaphysical tragedy with significant consequences to our ability to cooperate and undertake collective action necessary to solve many structural and consequential problems. The problem lies with the value frame we have chosen, which is based on the neo-liberal frameworks of thought that an individual is capable of greed, and hence must only be expected to strive for personal aggrandizement. By removing the individual from the society and eliminating the duty to also be considerate of the social context and welfare of others, we have effectively created an atmosphere of accumulating negative externalities that can devastate the physical and the social world. And in the "I, Me, Mine" world, "merit" is only all about the individual and not the commonality of purpose. This is what agitated Justice Chinnappa Reddy, and what he repeatedly warned against.

Some of what Justice Chinnappa Reddy cautioned us, many decades ago, is now being spoken of with great concern by major philosophers. For instance, Michael Sandel writes, in the "*Tyranny of Merit*[21]":

> *"The debate over who is a maker in today's economy, and who a taker, is ultimately an argument about contributive justice…… thinking this through requires public debate about what counts as a valuable contribution to the common good…. My broader point is that renewing the dignity of work requires that we contend with the moral question underlying our economic arrangements, questions that the technocratic politics of recent decades have obscured…."*

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21 Sandel, Michael J: "Tyranny of Merit: What's Become of the Common Good?", pages 221 -222.

> *"One such question is what kinds of work are worthy of recognition and esteem. Another is what we own one another as citizens. These questions are connected. For we cannot determine what counts as a contribution worth affirming without reasoning together about the purposes and ends of common life we share. And we cannot deliberate about common purposes and ends without a sense of belonging, without seeing ourselves as members of a community to which we are indebted. Only insofar as we depend on each other, and recognize our dependence, do we have reason to appreciate their contributions to our collective well-being. This requires a sense of community….. to enable us to say…. "we are all in this together" ….. Over the past four decades, market driven globalization and meritocratic conception of successes, taken together have unraveled these moral ties…….. Meritocratic sorting taught us that our success is our own doing, and so eroded our sense of indebtedness. We are now in the midst of the angry whirlwind this unraveling has produced."*

Which again brings us to what Justice Chinnappa Reddy meant when he wrote "*Golaknath was a tragedy……. and an individual as a member of society was displaced by an individual, pure and simple*". While Michael Sandel's concerns in *Tyranny of Merit* are still within the framework of "utilitarian calculus", Justice Chinnappa Reddy combined that with notions of (i) "inherent dignity" of a human being that needed to be protected for their own sake by an unwavering commitment to complete justice – identified in the Preamble as being comprised of social, economic and political , (ii) equality of opportunity and status, and the (iii) existential need for fraternity – both from the perspective of utilitarian fraternity and also human dignity that flows from such fraternity. His lament, about *Golaknath* fossilizing the Constitution, has to be understood from that perspective.

We have to ask: Given the reluctance, over the past few decades, to talk about the Directive Principles as being *sine qua non* for realizing the national purpose, have we effectively brought back the tragedy of *Golaknath* to play itself out in the lives of hundreds of millions of our fellow citizens? And we must also ask ourselves in these times, given that he was such a passionate soldier for the progressive agenda of the Constitution and his ever-present concern for the weakest, whether Justice Chinnappa Reddy might have also been labelled an "urban naxal".

In this lecture, I have tried to weave a narrative taking into account just a small portion of the work of a truly remarkable mind. A much more nuanced, and exhaustive rendering of the true scale and complexity of his work is probably in hundreds of cases – which I submit, without hyperbole, might be some of the finest works in law and jurisprudence. Consequently, this lecture must necessarily be viewed as a tentative foray and hence, might also be susceptible to error. However, I hope that this would engender interest amongst the legal fraternity, especially among the young scholars, to research his works, his life story and his written notes (if they have been preserved). This would serve the purpose of bringing back to life Justice Chinnappa Reddy, and also bring greater vigour to our life as practitioners of the law.

And let me end my speech here the way he ended his book, "*Shallows and Summits*":

"Endaro mahanubhavulu
Andariki Vandanamulu"

And on a personal note, let me say –

"Naa kritagnathulu
Ee saati leni mahanubhavudiki"

Jai Hind.

GLOBALIZED ELECTORAL DEMOCRACY IN INDIA AND THE NATURAL INDIVIDUAL CITIZEN

*Aymen Mohammed**

I. INTRODUCTION

Theories of electoral law in scholarship have been limited in scope.[1] This is perhaps because the electoral law itself has been 'sired by administrative law and constitutional law'[2] and therefore, is studied in a limited manner. However, as demonstrated above, the law relating to elections has strong philosophical underpinnings in India. Therefore, as a "core" value of the Constitution, protecting the universal franchise is closely bundled with the integrity and health of electoral democracy.

While the role of money in politics has been an essential site of judicial oversight, little attention has been paid to the increasing role of corporate donations in financing political parties and election campaigns. Furthermore, the role of 'Big Data' in influencing electoral outcomes has only begun to be discussed.[3] This paper argues that globalized models of election campaigning and management have potentially corrosive effects on the integrity of electoral discourse and process, and without definite safeguards, the viability of this constitutional method takes a significant backseat.

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1 Graeme Orr, 'Ritual in the Law of Electoral Democracy', Contemporary Questions, ed., Glenn Patmore and Kim Rubenstein, (2014) ANU Press.

2 ibid.

3 "George Monbiot, 'Big data's power is terrifying. That could be good news for democracy' (*Guardian*, 6 March, 2017) <https://www.theguardian.com/commentisfree/2017/mar/06/big-data-cambridge-analytica-democracy>.

At the heart of safeguarding electoral democracy is ensuring that individual citizenship is the critical determinant of who exercises political power in the country. Therefore, this conception of individual citizenship in electoral democracy must not be corroded by notions of 'corporate citizenship' that allow corporations to disproportionately distort electoral competition and marginalize the speech of 'natural citizens.

This paper argues that there is a constitutional imperative to prohibit corporate donations in political finance. The paper focuses on the rise of globalized forms of political finance – for example, increased reliance on corporate donations through complex legal structures – and its influence on electoral politics. Secondly, it focuses on the role of globalization in fundamentally challenging electoral democracy as we know it. This is reflected not only in recent allegations of 'foreign meddling' in the US elections[4] but also in the links between global capital and political finance.[5]

This paper begins by outlining the close ties between universal franchise and the practice of citizenship that informed the drafters of the constitution of India. It then proceeds to look at the extant law of electoral democracy in India. The law of electoral democracy centers the natural individual citizen as its basis.

II. UNIVERSAL ADULT FRANCHISE AND PERSONHOOD

In the history of electoral democracy, India has a significant place. Unlike most Western liberal democracies, Indian electoral

4 For a fairly comprehensive coverage of the ongoing controversy over Russia's alleged intereference in US elections, see *New York Time's* "Russian Hacking and Influence in the U.S. Election" at <https://www.nytimes.com/news-event/russian-election-hacking>.

5 Ed Pilkington and Jon Swaine, 'The seven Republican super-donors who keep money in tax havens' (*Guardian*, 7 November, 2017) <https://www.theguardian.com/news/2017/nov/07/us-republican-donors-offshore-paradise-papers>.

democracy was premised, *ab initio*, on universal suffrage.[6] More importantly, the demand for universal adult suffrage was integral to the modern Indian nationalist movement.[7] This principle finds an important place within the Constitution of India. During discussions pertaining to universal adult suffrage in the Constituent Assembly, certain members did raise objections to universal suffrage, arguing that an overwhelmingly illiterate mass could not be trusted to make rational electoral decisions.[8] However, universal adult suffrage found overwhelming support in the Constituent Assembly.

"Instant universal suffrage"[9] is rare in the history of modern global democracy. In most Western democracies, suffrage was restricted on the basis of gender, class, property and race.[10] While various theories exist to explain the expansion of suffrage in Western democracy,[11] the need to mitigate a significant possibility of revolution played an important role[12]. Historically, demands for the expansion of

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6 Swati Ramanathan and Ramesh Ramanathan, 'The impact of instant universal suffrage' (2017) 28 (3) Journal of Democracy, <http://janaagraha.org/files/The-Impact-of-Instant-Universal-Suffrage-by-Swati-and-Ramesh-Ramanathan.pdf>.

7 For example, the Motilal Nehru Committee Report (1928) recommended adult suffrage on the grounds that it is the only definite means of achieving parity between voting populations across communities. The Committee also refused to consider restricting franchise on the basis of literacy or property or gender. Available at: <https://archive.org/details/in.ernet.dli.2015.212381>.

8 For example, see, Das Bhargava in Constituent Assembly Debates: *"In regard to the rest, I also wanted to propose an amendment to clause (6) that illiteracy should also be regarded as one of the grounds for not giving a vote on the basis of adult suffrage. If a person is illiterate, he should not be granted the right to vote."* VII Volume, 4th January 1949, para. 104.

9 *Supra* 1.

10 See, for example, Neil Johnston 'The History of Parliamentary Franchise', House of Commons Library <https://archive.org/details/in.ernet.dli.2015.212381>.

11 Daron Acemoglu and James Robinson, 'Why did the West Extend the Franchise? Democracy, Inequality and Growth in the Historical Perspective' (2000) 115 (4) Quarterly Journal of Economics, 1167-1199 <https://scholar.harvard.edu/jrobinson/files/jr_west.pdf>.

12 ibid.

the franchise have often been articulated in terms of exercising political agency or in broader terms, such as personhood[13] and full citizenship[14].

In other words, a key indicator of personhood and citizenship in the modern nation-state is the ability of individuals to exercise the right to vote or contest in elections. These underlying considerations of recognizing individual agency (and, therefore, personhood) and finding alternatives to 'revolution' are important themes in the Constituent Assembly (CA) debates. While various members referred to the egalitarian aspects of universal suffrage, an important principle was recognizing the potential conflict of excluding any section. A. Thanu Pillai, a member of the CA from Travancore, responded to those opposing universal franchise, arguing that it "*is really the core of our Constitution* and it is but just and right that we have adopted it. I am really surprised that even today objections are raised to Adult Franchise. *Not only from the standpoint of democratic principles but from the facts of the situation in the country, it is clearly indispensable. We must look at the temper of the nation today. Will anything other than adult franchise satisfy the people?* I am definitely of the view that nothing short of it could have formed the basis of our Constitution."[15] (emphasis supplied). Another key justification, that of individual agency, was made by O. V.

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13 *August v. Electoral Commission* 1999 (4) BCLR 363 (1 April 1999) <http://www.saflii.org/za/cases/ZACC/1999/3.html> "Universal adult suffrage on a common voter's roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. *The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.*". Also see, Robert J. Sharpe and Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007) as cited by Colleen Sheppard in (2008) 53 McGill Law Journal p. 367-373. <http://lawjournal.mcgill.ca/userfiles/other/3816560-Sheppard_Book_Note1.pdf>.

14 Irma Sulkunen and Seija-Leena Nevala-Nurmi and Pirjo Markkola, *Suffrage, Gender and Citizenship*, 'Introduction' (Cambridge Scholars Publishing, 2009).

15 Constituent Assembly Debates, Vol. XI, 24th November, 1949, paragraph 136.

Alagesan, who was responding to certain demands for institutionalizing 'village republics':

> "There is another criticism that the village as a political unit has not been recognized. *I fear that behind the back of this criticism is distrust of adult franchise.* What was conceived under the village unit system was that the village voters would be called upon to elect the Panchayats and only the members of the Panchayats were to take part in the elections to the various assemblies, Provincial and Central. *But now, it is the village voter himself who will be called upon to weigh the issues before the country and elect his representative, and so he will directly participate in the election. I claim this to be a more progressive arrangement than having village units which elect the electorate indirectly*" (emphasis supplied).

In the CA debates, universal adult franchise was seen as something central to the working of the Constitution.[16] The debates also reflect that universal adult franchise was closely linked to operationalizing the egalitarian objectives of the Constitution.[17] Therefore, another key theme during debates on adult franchise was guaranteeing personhood and unconditional citizenship to those individuals previously excluded from the political process. Recognizing the vast social and political disparities in the country, Ambedkar asserted that "power in this country has too long been the monopoly of a few and the many are only *beasts of burden, but also beasts of prey*. This

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16 For example, ibid paragraph 204, Sarangdhar Das, in the CA argued that "Although I have pointed out a few of the very great defects, in as much as adult franchise has been conceded by this Constitution, I have no doubt, that the mass of people who will exercise the franchise in the future, can change the entire Constitution, if they so desire, and they will desire. *So I do not condemn, nor disapprove, of the Constitution, as some of my friends have said that nobody has condemned it. It is no use condemning it. When adult franchise is there, by exercising that right, we can change the Constitution according to the needs of our society in the future.*"

17 ibid.

monopoly has not merely deprived them of their chance of betterment, *it has sapped them of what may be called the significance of life. These down-trodden classes are tired of being governed. They are impatient to govern themselves.*" (emphasis supplied).

Furthermore, Ambedkar asserted that with the enactment of the Constitution, an important aspect of democracy, "not merely in form, but also in fact"[18] would be to:

> "…. hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. *When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods.*"[19]

Therefore, the key philosophical underpinnings in incorporating adult franchise were that political power and the ability to self-govern were now accessible to even those belonging to the "down-trodden classes". More importantly, the enactment of the Constitution meant that certain 'constitutional methods' were available to citizens that allowed them to pursue socio-economic emancipation. It is possible to envisage that the provision of justiciable fundamental rights was one of these constitutional methods. However, the emphasis on ensuring political power for the marginalized indicates the importance of the principle of 'one person one vote' (and therefore, electoral democracy)

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18 Constituent Assembly Debates, Vol. XI, 25th November, 1949, paragraph 329.

19 ibid.

as an important constitutional method of furthering social and economic objectives.

III. PROHIBITING CAMPAIGN FINANCE BY JURISTIC ENTITIES

1. Background

India's constitutional framework recognizes the rights of citizens to participate in the country's parliamentary democracy. These rights include the right to vote, contest and campaign in various elections. In various judgments, the Supreme Court of India has held that rights in relation to elections are constitutional and statutory rights,[20] and the import of Fundamental Rights guaranteed in the Constitution is limited in scope. Therefore, the exercise of rights in relation to elections is subject to the limitations placed by the governing statute.

In this context, it must be noted that the Supreme Court of India has addressed the question of campaign finance and the role of money in elections in various judgments, including *People's Union of Civil Liberties*[21] and *Association for Democratic Reforms.*[22]

The Supreme Court was primarily addressing questions pertaining to ensuring the integrity of representative parliamentary democracy. The Supreme Court, in *Association for Democratic Reforms* held that free and fair elections are an essential part of parliamentary democracy, and parliamentary democracy forms part of the basic structure of the constitution. Therefore, maintaining and protecting the integrity of the electoral process is essential to safeguarding constitutional and statutory guarantees pertaining to elections.

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20 *Shyamdeo Prasad Singh v Nawal Kishore Yadav* (2000) 8 SCC 46, *Javed v State of Haryana & Others* (2003) 8 SCC 369.

21 *People's Union for Civil Liberties (PUCL) v Union of India* (2003) 4 SCC 399.

22 *Union of India v Association for Democratic Reforms* 2002 (5) SCC 294.

2. Legislative Changes to Political Finance Framework

The Finance Act of 2017 amended certain provisions of the Companies Act, 2013 that governed corporate donations to political parties. Section 182 of the Companies Act capped corporate political donations at seven and a half per cent of the company's average net profits during the three immediately preceding financial years.[23] However, the amendment removed the cap on the quantum of donations and further provided anonymity to political donations by removing the requirement of naming political parties in the company's accounts.[24] Furthermore, the Finance Act also amended Section 29C of the Representation of the People Act, 1951. Section 29C imposes reporting requirements on political parties and mandates disclosure of high-value donations. The Act exempted such declarations in cases of contributions made through anonymous 'electoral bonds.'[25]

Similar dilutions to political finance laws were made by the Finance Act of 2016 to the Foreign Contribution (Regulation) Act, 2010 ("FCRA"). The amendment essentially allowed political parties to receive funding from subsidiaries of foreign-owned companies. Prior to the amendment, FCRA prohibited the receipt of "foreign contributions" from "foreign sources". However, following the amendment, contributions from foreign owned companies, as long as the ownership structure of such companies is in compliance with FEMA,[26] would not be considered as "foreign contributions".[27]

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23 Proviso to s.182(1) of the Companies Act 2013 (omitted by Finance Act 2017).

24 Part XII of the Finance Act, 2017

25 Jagdeep Chhokar, 'Much Ado About Nothing: Electoral Bonds and an Unapologetic Lack of Transparency', (*The Wire*, 4th January, 2018) <https://thewire.in/210430/electoral-bonds-transparency-in-political-funding/>.

26 Foreign Exchange (Management) Act 1999.

27 Part XIII, Finance Act 2016.

While the receipt of "foreign contributions" is subject to a relatively complex regime under the FCRA, the Foreign Direct Investment (FDI) regime under FEMA has seen continuing relaxation of norms and expansion of "automatic and direct routes" for foreign capital. Ironically, this amendment, to some extent, streamlines this anomalous treatment of foreign capital as "problematic" when it is in the form of contributions, but "necessary" when it is in the form of investments.

Taken together, these legislative changes expand the potential field of activity of corporations in electoral politics. Furthermore, corresponding amendments limiting disclosure and declaration norms, increase the opaqueness of how political parties, campaigns and candidates are funded.

In this section, I argue that there is a strong constitutional imperative to prohibit corporate donations to political parties. I argue this on three grounds. Firstly, the Supreme Court's jurisprudence on freedom of speech and expression has recognized that the right to receive information about the antecedents of candidates and political parties forms an inherent part of "speech and expression". [28] Secondly, essential rights of participation in electoral democracy, the rights to vote or to contest elections or to form a political party, are exclusively available to citizens.[29] The Supreme Court has held that juristic persons

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28 *Supra* 22, 23.

29 This proposition of law, interestingly found relevance in a recent judgment of the Brazillian Supreme Court (ADI 4.650, 24th February 2017, *On the merits, the Court held that the exercise of citizenship, in the strict sense, presupposes three modalities of procedure: the right to vote; the right to be voted; and the right to influence the formation of political will by the instruments of direct democracy. The Justice Rapporteur emphasized that such rules are inherent to singular individuals and therefore they could not be extended to companies, whose main purpose is obtaining profit. The Court pointed out that article 14.9 of the Federal Constitution prohibits the influence of economic power over the elections and that the participation of legal entities may turn the campaign costs very expensive, without causing, on the other hand, the improvement of the political process.* Judgment summary at <http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfJurisprudencia_en_us&idConteudo=159922>.

cannot exercise Fundamental Rights that are only guaranteed to citizens. Thirdly, the integrity of the electoral process is contingent on safeguarding it from distortive effects of capital on political discourse. In the absence of such safeguards, the possibility of a free and fair election is subject to serious skepticism.

Article 325 of the Constitution prohibits discrimination on the basis of religion, race, caste and sex in the inclusion of electoral rolls. More importantly, Article 326 of the Constitution provides that elections to the House of People and respective Legislative Assemblies of every State shall be on the basis of adult suffrage. Adult suffrage extends to "*every person who is a citizen of India* and who is not less than eighteen years of age…." (emphasis supplied). Similarly, another key aspect of electoral democracy, candidature, is subject to a person being a citizen of India.[30]

Therefore, we see that the two key aspects of electoral democracy, the right to contest and the right to vote, are premised on citizenship. Therefore, a brief discussion of the legal framework applicable to citizenship may be necessary.

3. Citizenship and Rights: Constitution of India

The term "citizen" has not been defined in the Constitution. Part II of the Constitution deals with Citizenship, and lays down that citizenship shall be by birth, by descent, by migration and by registration. The Constitution of India does not envisage any other means by which citizenship may be acquired by any person. As is clear, it is only natural persons that can acquire citizenship and enjoy the rights of citizenship.

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30 For example, *see* Article 84 and 173, Constitution of India.

The Constitution empowers Parliament to regulate the right to citizenship. The Citizenship Act, 1955 provides for the various means through which citizenship may be acquired (or terminated). The Act defines "person" by excluding juristic or corporate personhood from within its scope.[31]

The Supreme Court of India, while interpreting the scope of the meaning of "citizen" as used in the Constitution held that, on the basis of section 2(1)(f), *"[i]t is absolutely clear on a reference to the provisions of this statute that a juristic person is outside the purview of the Act"*.

4. Right to Freedom of Speech and Expression and Electoral Democracy

The right to freedom of speech and expression under Article 19(1)(a) is guaranteed to all Indian citizens. It is clear from a plain reading of the constitutional framework that certain protections are available to "persons" (such as Article 14) and certain rights are exclusively meant for citizens alone (such as the freedoms under Article 19). Therefore, rights under the Article 19(1) are solely available for citizens, who can only be natural persons under the existing constitutional and legal framework.

The expression "freedom of speech and expression" in Article 19(1)(a) has been held to include the right to acquire information and disseminate the same. In *People's Union for Civil Liberties*,[32] it was recognized that the right of citizens to obtain information on matters relating to public acts flows from the Fundamental Right enshrined in Article 19(1)(a). Securing information on the basic details concerning the candidates contesting elections promotes freedom of speech and expression and therefore forms an integral part of Article 19(1)(a).

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31 Section 2(1)(f), Citizenship Act 1955.
32 (2003) 4 SCC 399.

Furthermore, while noting that a ballot is the instrument by which the voter expresses his choice between candidates, the Court held that while the initial point of conferment of the right to vote would not attract the protections of 19(1)(a), the final act of casting a ballot itself would attract the protections of 19(1)(a), and therefore, it is crucial that citizens have the right to have essential information of candidates contesting an election.

Therefore, it is important to recognize that electoral rights, despite being constitutional and statutory in nature, do have an import of protections of Fundamental Rights. These protections are primarily sourced from the right to information jurisprudence that has been developed by the Supreme Court. Exercise of these rights are primarily sourced under Article 19(1)(a), which is solely available to citizens.[33]

Moreover, it must be noted that the right to seek essential information pertaining to a candidate and a political party would include the right to know the source of funding of a political party and a candidate. It is essential for a voter to know the source of campaign funds to determine a candidate's or a political party's suitability for a voter.

In the case of campaign finance by juristic persons, a citizen is not in a position to identify the *actual* source of funding. In this context, an average citizen would require to pierce the corporate veil and navigate complex corporate structures to determine the actual ownership and management of a corporation that has made a donation to a political party. In practice, citizens would have no identifiable and accessible mode by which they would be able to understand the sources of campaign finance being utilized by a political party or a candidate.

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33 *State Trading Corporation v Commercial Tax Officer* 1963 AIR 1811.

5. Political Parties, Citizenship and Corporate Funding

The Representation of the People Act, 1951, similar to the provisions contained in the Constitution, is geared towards recognizing the rights and obligations of individual citizens *vis-à-vis* elections. For example, a political party is defined as follows:

> "political party" means an association or a body of *individual citizens* of India registered with the Election Commission as a political party under section 29A.

The purpose of the Representation of the People Act, 1951, is to "*provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences*….". When read together with provisions of the legislation, it is clear that the Act is aimed at enabling free and fair elections to the Parliament and State Legislations. Furthermore, it is clear from the nature of the provisions that the rights and obligations envisaged in this framework are focused on ensuring that individual citizens enjoy their rights to participate in the electoral process in a free and fair manner.

In *Rama Kant Pandey,*[34] the Court observed that political parties are a vital part of parliamentary democracy (which forms part of the basic structure of the constitution) and cannot be ignored. Furthermore, in *Thampy*[35] the Court recognized that political parties wield power "in the administration of government affairs" and are therefore provided with certain special benefits.

Therefore, it must be understood that political parties play an important and distinct role in electoral democracy. In this regard, the

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34 *Ram Kant Pandey v Union of* India 1993 AIR 1766.
35 *P Naila Thampy v Union of India* AIR 1985 SC 1133.

RPA explicitly recognizes political parties solely as entities constituted by *individual citizens*. Therefore, if the control and management of political parties is subsumed by interests of corporations rather than individual citizens, the very nature of political parties would stand changed. Thus, effecting a break from the centrality of the natural person as the basis of parliamentary democracy. It would be possible that the extent of corporate funding would evaluate the independence and nature of functioning of political parties – in effect, political parties could become mere conduits for corporate activity despite the fact that they are excluded from forming political parties.

6. Safeguarding the "purity of elections"

In *Kanwar Lal Gupta,*[36] the Supreme Court observed that the "pernicious influence of big money would then play a decisive role in controlling the democratic process in the country. This would inevitably lead to the worst form of corruption and that in its wake is bound to produce other vices at all levels."

As stated earlier, the right to freedom of speech and expression includes the right to receive information. In *Ministry of Information and Broadcasting vs. Cricket Association of Bengal,*[37] the Supreme Court observed that *"one-sided information, disinformation, misinformation and non-information will equally create an uninformed citizenry which makes democracy a farce…freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions."*

The Court's finding in *Kanwar Lal Gupta* clearly recognizes that the source of political funding has a significant impact on the electoral process and "big money" reduces the scope of a free and fair election. Moreover, the Supreme Court's jurisprudence on the freedom of

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36 [1975] 2 SCR 259.
37 1995 AIR 1236.

speech and expression clearly identifies a right to receive information as an essential feature of "speech and information".

In addition, the *Ministry of Information and Broadcasting* also recognizes the need to ensure safeguards against distortive information and misinformation to ensure the integrity and quality of parliamentary democracy. When read together, the propositions in *Kanwar Lal Gupta* and *Ministry of Information and Broadcasting* focus on providing the integrity of the democratic process, for which citizens (as voters) must be informed about those whom they choose to elect. It is insufficient that voters merely have a theoretical right to receive information but also that the information is accessible and available.

The prohibition or regulation of corporate funding is sourced from the overarching principle of ensuring the "purity of the electoral process". Successive Supreme Court judgments, including *Association for Democratic Reforms*[38] and *A. Neelalohithadasan Nadar vs. George Mascrene,*[39] have recognized that for maintaining the *"purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates"*.[40] The court recognized that the antecedents of the candidate, their economic situation and their criminal background are all important and that there is *"no necessity of suppressing the relevant facts from the voters"*.[41]

As has been demonstrated, there have been significant findings linking the role of "big money" to the broader electoral process. Furthermore, it is also clear that, in the presence of complex corporate ownership and management structures, it is extremely difficult for a citizen to exercise their right to receive information in any significant

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38 2002 (3) SCR 294.
39 *A. Neelalohithadasan Nadar v George Mascrene* 1994 SCC, Supl. (2).
40 Para 22, *Association for Democratic Reforms.*
41 ibid.

manner. These two factors indicate substantial harm to the purity of elections, and preventing such harm is essential to safeguard the rights of individual voters, as well as the overall health of the democratic process in the country.

IV. GLOBAL ELECTORAL DEMOCRACY: CAPITAL AND CAMPAIGN FINANCE

1. *Overlapping themes*

One of the key recurring themes in global discussions surrounding electoral reforms focuses on 'electoral integrity' – a phrase indicating the overall health of electoral processes in a particular jurisdiction. In this context, concerns pertaining to transparency and accessibility are key priorities. More importantly, sourcing of political finance is closely linked to outcomes: '*Who has the voice to participate in political discourse?* and '*who can determine policy?*'.[42] Therefore, a key focus is setting standards and embedding 'integrity' within broader electoral frameworks.[43]

Closely linked to this is the role of third-party campaigning elections and the kind of regulatory frameworks they are subject to. Third-party campaigns are political campaigns operated by persons or associations or entities that are not political parties and may not be supporting candidatures, but instead endorsing specific issues. In the United States, "SuperPACs" supported by large corporate donations have played an increasingly distortive role in domestic electoral politics.[44] While certain countries, such as Canada, regulate third-party

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42 "Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture", (2016) OECD Publishing <http://dx.doi.org/10.1787/9789264249455-en>.

43 Elin Falguera, et al., "Funding of Political Parties and Election Campaigns", (2014) International Institute for Democracy and Electoral Assistance.

44 Alex Slater, 'Super PACs' distortion of democracy', (*Guardian*, 4th October, 2017) <https://www.theguardian.com/commentisfree/cifamerica/2010/oct/04/superpacs-political-funding-midterms>.

campaigning, most jurisdictions are yet to address this significant gap in electoral oversight.[45]

2. *Globalization of Political Finance*

Authoritative links between political finance and the determination of policy are difficult to make unless they are explicitly transactional in nature. Therefore, perhaps, Teachout suggests we understand corruption as a *"description of emotional orientation, rather than description of contract-like exchange"*. Such a view would allow us to look at larger structures and draw reasonable inferences, rather than meet the cynical requirement of formally linking finance to outcomes. In other words, Teachout's approach allows us to analyze corruption as more than just *quid pro quo*. It allows us to expand it to not just look at corruption but also to develop frameworks that prevent the *appearance or possibility* of it.[46]

In India, the logic of globalization – especially the policies of disinvestment and deregulation – has simultaneously transformed and accentuated the electoral system. Like many developing countries, political financing in India has become closely linked to illicit financing, i.e., undisclosed cash and proceeds of crime.[47]

With disinvestment, privatization (outsourcing of obligations previously discharged by the government) and deregulation, opportunities opened up for "policy capture" through political finance.[48] In more immediate forms, this nexus between political

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45 S. 353, Canada Elections Act 2000

46 Zephyr Teachout, "Corruption in America" (Harvard University Press, 2014), as cited in: "Private funding of political campaigns: comparative analysis of the law in the United States and in Brazil", Alberto Monteiro, 2015

47 See generally, "Reforming India's Party Financing and Election Expenditure Laws", Rajeev Gowda and E. Sridharan, Election Law Journal, 2012 <https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/upiasi/Reforming%20India%27s%20Party%20Financing%20and%20Election%20Expenditure%20Laws.pdf>.

48 Michael W Dowdle, 'Public accountability: Conceptual, historical and epistemic

finance and globalization is reflected in corruption cases involving public procurement.[49]

In other ways, it reflects the possibilities of an overarching 'policy capture' by financiers: determining, not just qualifications for tendering, but also the scope of (de)regulation, and deprioritizing concerns emanating from citizenry.

In India, for example, an important study showed a close correlation between a decline in construction activity during the election cycle. Kapur and Vaishnav demonstrated that there was a strong indication of a nexus between real estate interests and legislators.[50] Similarly, donors to important Republican Party SuperPACs were also closely linked to having large sums in offshore tax havens.[51]

The globalization of certain aspects of electoral democracy – especially the manner in which complex corporate structures are being utilized for campaign finance and how similar forms and modalities of corruption are reflected across diverse jurisdictional contexts.[52] Furthermore, the role of globalized professionals and intermediaries such as financial consultants and lawyers in developing complex structures that underpin the movement of global capital[53] furthers the understanding of embedded "lawyers as brokers".[54]

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mappings', "Regulatory Theory" Ed., Peter Drahos, ANU Press. (2017) <http://www.jstor.org/stable/j.ctt1q1crtm.20>.

49 *Supra* 46. Also, see "Money In Politics: Sound Political Competition And Trust In Government", OECD Background Paper, 2013 <http://www.oecd.org/gov/ethics/Money-in-politics.pdf>.

50 Supra 46.

51 Supra 20.

52 Supra 41.

53 For example, see "Role of advisors and intermediaries in the schemes revealed in the Panama Papers", Directorate General for Internal Policies, European Parliament. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602030/IPOL_STU(2017)602030_EN.pdf

54 Yves Dezalay and Bryant Garth, "Introduction", 'Lawyers and the Era of Globalisation'

3. *Big Data and Electoral Integrity*

Political communications have seen rapid transformation in the era of social media. With rapid growth of the Big Data, its deployment in elections was only natural. Reports of the use of Big Data in the Brexit referendum and the 2016 Presidential elections,[55] while exaggerated, do point to a possible electoral future where 'micro-targeted' political campaigns can be run on the back of measuring citizens' personality from their digital footprints.[56] Furthermore, the fact that only a limited proportion of the Indian electorate is presently online has not dissuaded Big Data and micro-targeting finding their way into Indian electoral politics.[57] The deployment of Big Data in electoral politics has serious consequences for political discourse: Big Data can be (and has been) technologies that have been used to craft 'fake news' and manipulate voters.[58]

This distortion in political discourse is obviously harmful as it results in altering a level playing electoral field. Furthermore, the role that global capital takes – sometimes as technology and sometimes as finance – further enmeshes policymaking and electoral considerations. For example, the role of Facebook – which attempts to represent itself as a politically agnostic platform – in actively assisting political campaigns (not merely 'passively' hosting advertisements) reflects the

(2011) Routledge

55 "The Data That Turned the World Upside Down", Hannes Grassegger & Mikael Krogerus (*Motherboard*, January 28, 2017), <motherboard.vice.com/en_us/article/mg9vvn/how-our-likes-helped-trump-win>.

56 ibid.

57 Michael Safi, 'India's 'big data' election: 45,000 calls a day as pollsters target age, caste and religion' (*Guardian*, February 2017) <https://www.theguardian.com/world/2017/feb/16/india-big-data-election-pollsters-target-age-caste-religion-uttar-pradesh>.

58 "Russians used Facebook the way other advertisers do", USA Today, November 2017 https://www.usatoday.com/story/tech/news/2017/11/01/russians-used-facebook-way-other-advertisers-do-tapping-into-its-data-mining-machine/817826001/

varied ways in which global capital, Big Data and electoral democracy intersect:

> "In the U.S., the unit embedded employees in Trump's campaign. (Hillary Clinton's camp declined a similar offer.) In India, the company helped develop the online presence of Prime Minister Narendra Modi, who now has more Facebook followers than any other world leader. In the Philippines, it trained the campaign of Rodrigo Duterte, known for encouraging extrajudicial killings, in how to most effectively use the platform. And in Germany, it helped the anti-immigrant Alternative for Germany party (AfD) win its first Bundestag seats, according to campaign staff."[59]

Besides distorting political discourse, globalized forms of election systems also institute an accelerated cooption of policymaking. As discussed earlier, 'policy capture' can severely limit the scope of independent policymaking. For example, Facebook, following the 2014 Indian elections, trained "more than 6,000 government officials".

Therefore, globalization has produced newer models of political finance that have now been imported or adapted in various jurisdictions. While harms stemming from these models remain similar – distortive discourse, risks of policy capture and reduced trust in electoral democracy – the processes by which they manifest may vary. Moreover, it was not merely the globalization of models. Liberalizing controls on foreign capital and the transnational nature of technology and data has meant that globalization has produced newer challenges to the integrity of electoral democracy.

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[59] Lauren Etter et. al., 'How Facebook's Political Unit Enables the Dark Art of Digital Propaganda' (*Guardian* 21 December 2017) <https://www.bloomberg.com/news/features/2017-12-21/inside-the-facebook-team-helping-regimes-that-reach-out-and-crack-down>.

V. CONCLUSION

One could argue that the threat of money and the role of misinformation in elections precedes the era of globalization. However, globalization produced very specific models through which political finance would be channeled and technology could be used to distort political discourse. Furthermore, neo-liberal economic policies created newer opportunities for capital to capture decision-making processes, and in the process, expand its economic power as well.

Like most processes associated with globalization, the consequence of globalized elections has been to accentuate disparities in political and economic power, and to enable a framework where economic and political power perpetuate each other.[60] In the absence of frameworks that allow for alternative means of political finance, economic and gender disparities disproportionately hurt the "dispossessed and deprived". Perhaps the best example of this in India is how the Dalit party, Bahujan Samaj Party accesses its political finance: the party is the only major political party in the country to have not received a single corporate donation.[61] Where political actors' key interests are fundamentally at odds with interests of capital, parties that aim to raise issues of marginalized communities can do little to position themselves as "pro-business". This is another warning that Ambedkar made in his speech before the CA:

> "[We] must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these

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60 Elmer E. Schattschneider, The Semi-Sovereign People (Fort Worth, TX: Harcourt Brace Jovanovich College Publishers, 1975 [1960]) as cited in supra note 47. *"When political power is merely a mirror image of economic power, the principle of "one person, one vote" is rendered meaningless, and democracy ceases to be an "alternative power system, which can be used to counterbalance the economic power."*

61 PTI, At Rs 706 Crore, BJP Got Maximum Corporate Donations: Report (*The Quint*, 19 August 2017) <https://www.thequint.com/news/politics/bjp-received-maximum-donations-from-corporates-says-report>.

> is equality. *On the social plane, we have in India a society based on the principle of graded inequality which we have a society in which there are some who have immense wealth as against many who live in abject poverty.* On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. *In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value.* How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril." (emphasis supplied).

If, indeed, Ambedkar's argument – that, with the constitution, all methods involving 'bloody revolution' are now unconstitutional – then, it is also time that we recognize this: what happens when 'constitutional methods' are hollowed out processes that do not allow their genuine deployment? Will methods involving 'bloody revolutions' still be considered unconstitutional?

Electoral integrity or "purity of elections" is at the heart of protecting the key 'constitutional method' of elections. When discourse at the electoral site is distorted to drown out other voices, or worse, when the only voices that are heard are of juristic (rather than natural) persons, it negates the first premise of India's constitution: one person, one vote, one value. Any dilution of this standard deprives the large mass of people from mobilizing for "self-realization"[62] to find again their "significance of life".

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62 *Supra* 13.

Postscript

Since this essay was written, some significant developments must be acknowledged. Firstly, in 2024, the Supreme Court of India struck down the electoral bonds scheme and unlimited corporate donations to political parties.[63] The court grounded its judgement on grounds of the right to information and the need to protect electoral integrity. It is important to note that writ petitions challenging these changes to the electoral framework were pending since 2017, during which time various state general elections and one national election had taken place. The Court's orders required disclosure of electoral bonds data. The data showed that the ruling BJP received the lion's share of donations through electoral bonds.[64] This is a trend consistent with the fact that the BJP has also been the single largest recipient of corporate funding.[65]

Secondly, fundamental changes have been made to the overarching framework pertaining to digital governance in India. The 'triangle' of universalization of Aadhaar, 'digital public infrastructure' and detailed citizen data[66] has enabled governments to profile voters and to target them at an unprecedented scale.[67] Added to this triangle is the linkage of voter identity cards ("EPIC") with Aadhaar, allowing

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63 *Association for Democratic Reforms & Anr. v. Union of India & Ors*, 2024 INSC 113

64 The Hindu Data Team, "Electoral bonds data | BJP received Rs. 6,060 crore, highest among all parties" (*The Hindu,* 14 March 2024) <https://www.thehindu.com/data/electoral-bonds-data-bjp-received-rs-6060-crore-highest-among-all-parties/article67951830.ece>

65 The Hindu Bureau, "BJP received nearly 90% of all corporate donations to national parties in 2022-23" (*The Hindu,* 14 February 2024) <https://www.thehindu.com/news/national/bjp-received-nearly-90-of-all-corporate-donations-in-2022-23/article67845754.ece>

66 Shikhar Singh, "When Does Welfare Win Votes in India?" (*Carnegie*, 25 January 2024) <https://carnegieendowment.org/research/2024/01/when-does-welfare-win-votes-in-india >

67 "*There are increasingly blurred lines between the data available for political campaigning and data available for governance*." Safina Nabi, "Government data in political hands: Aadhar citizen ID and the 2024 Indian election campaigns" (*The Influence Industry Project,* 20 December 2023) <https://influenceindustry.org/en/explorer/case-studies/india-nabi-government-data/>

political actors to not only reach out to voters at a large scale, but to also personalize their outreach at a granular level.

The linking of EPIC and Aadhaar was first carried out without any legal sanction, resulting in the collection of 3 crore Aadhaar numbers.[68] Following the Election Laws (Amendment) Act, 2021, the Commission was empowered to seed connect Aadhaar with EPIC. Despite claims that it was 'voluntary' to link EPIC with Aadhaar, 60% of voters' data was already linked.[69] The creation of such interlinked databases in the hands of public bodies has raised serious concerns.[70] These are about the possible dangers to individual privacy and governmental surveillance. However, these also raise serious concerns pertaining to electoral integrity. Since Aadhaar and beneficiary data is now effectively connected, voters can be identified and targeted by parties in power.[71] These suspicions have been confirmed in instances where political parties, through private corporations, have not only been found to have collected such data but to have illegally accessed public records in order to build voter profiles in order to run campaigns.[72]

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68 Anuj Srivas, "How Did the EC Link 300 Million Voter IDs to Aadhar in Just a Few Months?" (*The Wire, 9 November 2018)* <https://thewire.in/political-economy/how-did-the-election-commission-link-300-million-voter-ids-to-aadhaar-in-just-a-few-months>

69 The Hindu Bureau, "Over 54 crore voters have linked Aadhaar with electoral rolls, Law Minister says in a reply in the Rajya Sabha" (*The Hindu,* 15 December 2022) <https://www.thehindu.com/news/national/over-54-crore-voters-have-linked-aadhaar-with-electoral-rolls-law-minister-says-in-a-reply-in-the-rajya-sabha/article66268396.ece,>

70 "*Then there is beneficiary data from the state and central government databases*," said Venkatanarayanan. "*But to build a complete picture of a voter, you need a common connector to link all these databases. That is why you need Aadhaar*." Kumar Sambhav, "Govt Has Cleared Linking of Aadhar & Voter Data. Past Experience Reveals How it Can Be Manipulated" (*Article 14,* 27 December 2021) <https://article-14.com/post/govt-has-cleared-linking-of-aadhaar-voter-data-past-experience-reveals-how-it-can-be-manipulated-61c937a621c09>

71 Disha Verma, "Your personal data, their political campaign? Beneficiary politics and the lack of law" (*Internet Freedom Foundation, 10 April 2024)* https://internetfreedom.in/personal-data-political-campaigning/>

72 Srinath Vudali, "Aadhar details of 7.82 crore from Andhra Pradesh and Telangana found in possession of IT Grids (India) Pvt Ltd" (*The Times of India*, *13 April 2019*) https://timesofindia.indiatimes.com/city/hyderabad/aadhaar-details-of-7-82-crore-from-telangana-and-andhra-found-in-possession-of-it-grids-india-pvt-

Another important development has been reportage over the role of multinational digital platforms in the electoral space. There is now more information available to understand the connections between new technologies, data collection practices and how they are being deployed in the electoral space.

Despite being privately owned, they play an undeniably public role. Reports indicate a close proximity between parties in power and large digital platforms.[73] Parties have used digital platforms to not only conduct routine outreach, but to actively seed disinformation and misinformation. This is primarily carried out through surrogates and 'diffuse' actors that are not subject to the law that parties and candidates are subject to.[74] The result is an ecosystem dedicated to spreading hate speech and disinformation. In combination with publicly collected data, the use of digital platforms has allowed political parties to distort the level playing electoral field.

Thus, corporations have increasingly transformed from being mere 'interest groups' whose financing of political speech is to be regulated. Rather, in their role as owners of digital platforms, they are expected to play the role of neutral 'regulators.' For example, social media platforms and the ECI agreed to a 'voluntary code of ethics.'[75] Yet, reports indicate that social media platforms not only permitted electoral hate speech, but also allowed for its lopsided monetization.[76]

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ltd/articleshow/68865938.cms; Srishti Jaiswal, "The data collection app at the heart of the BJP's Indian election campaign" (*Rest of world,* 20 January 2024) <https://restofworld.org/2024/bjp-saral-app-data-gathering/>

73 Billy Perrigo, "Facebook's Ties to India's Ruling Party Complicate Its Fight Against Hate Speech" (*Time*, 27 August 2020) <https://time.com/5883993/india-facebook-hate-speech-bjp/>

74 Amber Sinha, "Regulating Diffuse Actors in the 2024 Indian Elections" (*The Influencing Industry Project,* 20 December 2023) <https://influenceindustry.org/en/explorer/case-studies/india-sinha-diffuse-actors/>

75 PIB Delhi, "Voluntary Code of Ethics" by Social Media Platforms to be observed in the General Election to the Haryana & Maharashtra Legislative Assemblies and all future elections" (*PIB,* 26 September 2019) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1586297>

76 For example, a report on the online political advertisements not only indicated that a particular party received cheaper ad-rates on Facebook, that surrogate advertising for a

While it may be possible to regulate the electoral space using pre-existing models, such as regulation of campaign finance, the outsized role played by social media platforms might need more sustained interrogation. There is not only a need to balance informational privacy with electoral integrity but to also investigate traditional categories such as the idea of a 'campaign period.' Misinformation campaigns, microtargeting of welfare beneficiaries, or hate speech are not strictly things that happens in the run up to polling day. Nonetheless, .their purpose is geared towards electoral victories.

Therefore, as India's electoral democracy globalises even further, there will be a need to devise regulatory frameworks that keep up with such developments. This is even more pronounced as the 2024 general elections saw the first widespread use of synthetic media.[77] It must also be noted that the transformations in India's electoral democracy are not absolute. Rather, these changes have been *built on* existing structures. As one former campaign manager remarked:

> "Everyone who wants to know how the BJP operates looks for hi-fi, extraordinary tech, and some of that exists. But the reality is, it's mostly brute, manual labor."[78]

This indicates a need for electoral law to renew its focus on protecting the natural individual citizen, and to actively reduce the role of juristic persons that are able to distort the political field by virtue of their hold over global capital. Perhaps one way in which the law may be reoriented is to distinguish between the 'collective' from the 'corporate.' A 'collective interest' is premised on *individuals* coming

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particular party was permitted by Meta and that when surrogate advertisements were targeted, it was primarily the opposition party's surrogates that were most targeted <https://www.reporters-collective.in/projects/eyeballpolitics-facebook-investigation>

77 Fahad Shah, "AI companies are making millions producing election content in India" (*Rest of world,* 30 April 2024) <https://restofworld.org/2024/india-elections-ai-content/>

78 Gerry Shih, "Inside the vast digital campaign by Hindu nationalist to inflame India, (*The Washington Post,* 26 September 2023) <https://www.washingtonpost.com/world/2023/09/26/hindu-nationalist-social-media-hate-campaign/>

together and designing a political agenda: political parties and labour unions may be a good example. In contrast, a corporate interest is premised on shareholder ownership and the furtherance of possible commercial interests. A political party is premised on voluntariness of association, a certain degree of deliberation and compromise. However, when parties become corporatised:

> The questions posed are not democratically inspired. Rather, formulating initiatives and referenda are typically the work of independent political entrepreneurs and special interest groups unconnected to established, broad-based political groups. They are promoted through privately funded campaigns organized by political professionals employing targeted direct mailing, market testing, and paid signature gatherers.[79]

With newer technologies and increased corporate influence, the 'collective' is even more thoroughly subsumed by the 'corporate.'

Thus, the centrality of the natural individual citizen must be the guiding light for laws protecting electoral integrity. In contrast, laws merely regulating personal data are inadequate. Especially in the case of India, where the party in power may exempt itself from data protection law[80] while simultaneously being in a position to access and repurpose large amounts of citizen data collected on behalf of the government.[81]

Lastly, the overlaps between new technologies and electoral democracy can be found in how India's elections are conducted. For example, the Election Commission of India itself deploys facial

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79 Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493 (2000).

80 Apar Gupta, "An Act to cement digital authoritarianism" (*The Hindu,* 17 August 2023) <https://www.thehindu.com/opinion/lead/an-act-to-cement-digital-authoritarianism/article67202493.ece>

81 Safina Nabi, "Government data in political hands: Aadhar citizen ID and the 2024 Indian election campaigns" (*The Influence Industry Project,* 20 December 2023) <https://influenceindustry.org/en/explorer/case-studies/india-nabi-government-data/>

recognition technology to identify "similar entries" in electoral rolls.[82] It has also used the technology – the accuracy and impartiality of which is questionable[83] – to verify voter identity at polling stations.[84] Attempts were also made to use these technologies to surveil polling stations.[85]

The 'purity' of elections is no more just a concern with the design of electoral frameworks, or with the conduct of election management bodies. Rather, the fundamental transformations in how elections are increasingly carried out makes it essential that the law responds to the intrusion of newer actors, and the kind of power they have come to exercise. This paper outlined the constitutional underpinnings of representative democracy in India. The constitutional framework pertaining to electoral democracy centers the individual citizen, and the purpose of electoral democracy is to provide for constitutional means to achieve political objectives. The fundamental transformations to the law and practice of electoral democracy fundamentally reduces the scope of such constitutional means. Therefore, the concern with 'electoral integrity' must center the individual citizen at its heart.

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82 "*ECI is taking a host of initiatives to leverage new and emerging technologies for improving voter experience and electoral management. It is working on launching a new version of ERONET, making NVSP portal and all citizen mobile apps even more accessible and voter friendly, using facial recognition and artificial intelligence technology to purify electoral rolls, linking Aadhar with EPIC for identification, authentication and deduplication purposes, GIS tagging of polling booths, households and public facilities to enhance voter friendliness, launching e-learning platform to enhance electoral literacy and developing robust booth monitoring systems for ensuring free and fair poll.*" https://ceodelhi.gov.in/PDFFolder/Publications/SVEEP_Strategy_2022_25.pdf

83 Aishwarya Jagani, "No facing away: Why India's facial recognition system is bad news for minorities" (*The unbiased the news)* <https://unbiasthenews.org/no-facing-away-why-indias-facial-recognition-system-is-bad-news-for-minorities/> ; Marissa Gerchick and Matt Cagle, "When it Comes to Facial Recognition, There is No Such Thing as a Magic Number" (*American Civil Liberties Union,* 7 February 2024) <https://aclu.org/news/privacy-technology/when-it-comes-to-facial-recognition-there-is-no-such-thing-as-a-magic-number>

84 Reuters, "Telangana tests facial recognition in local polls as privacy fears mount" (*The Hindu,* 22 January 2020) <https://www.thehindu.com/sci-tech/technology/telangana-tests-facial-recognition-in-local-polls-as-privacy-fears-mount/article30623453.ece>

85 Damini Nath, "After EC intervention, NICSI cancels tender for facial recognition of voters" (*The Indian Express,* 20 January 2024) <https://indianexpress.com/article/india/after-ec-intervention-nicsi-cancels-tender-for-facial-recognition-of-voters-9118075/>

HABEAS CORPUS IN THE SUPREME COURT'S DOCKET

Shrutanjaya Bhardwaj[*]

I. Introduction

This is a scoping study of all '*habeas corpus*' matters filed in the Indian Supreme Court from 2000 to August 29, 2023. *Habeas corpus* is a writ that is issued to set a person free from illegal detention. The detention which is challenged to be 'illegal' may be of several kinds:

a. Preventive Detention: The State detains an individual apprehending that she is likely to commit an offence in the near future.

b. Enforced Disappearance: A State authority, such as the police or an armed force, picks up an individual without the authority of law.

c. Continued arrest: Despite being acquitted of criminal charges by a competent court, the individual continues to be detained in jail for no reason.

d. Detention by private actors:[1] A child is removed from the custody of its parent(s), an individual is forcibly confined to prevent her from exercising her choice of marriage or relationship, etc.

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[*] Advocate, Supreme Court of India. I would like to thank G. Srivar Venkat Reddy, KV Vinaya, Aditi Kanoongo, Gayatri, Harsh Jain, Jahnavi Y, Pranav Shidhaye, Sneha, Tanvi Chhabra and Ishaan Sharma (students of NALSAR, Hyderabad), Ramsha Khan (student, Aligarh Muslim University), Rohan Mishra and Amish Gulzari (students, GGSIPU) for their research assistance in data collection for this project from the website of the Supreme Court of India.

[1] E.g. Nirmaljit Kaur (2) v. State of Punjab, (2006) 9 SCC 364; Rashmi Ajay Kumar Kesharwani v. Ajay Kumar Kesharwani, (2012) 11 SCC 190; Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.

In an earlier paper, I examined the Supreme Court's behaviour in a specific kind of *habeas corpus* matters—i.e., those involving preventive detention.[2] It was found that by the time a preventive detention case was decided by the Supreme Court, the detenu would already have spent about 9-10 months in detention on an average.[3] The statistics in that paper are based on data obtained from judgments reported on 'SCC Online', a privately-owned online legal research tool.[4] However, no similar empirical study is available for *habeas corpus* matters as a class. As the above list would show, all *habeas corpus* matters implicate the fundamental right to personal liberty under Article 21 of the Indian Constitution. Therefore, Indian courts have traditionally accorded great importance to *habeas corpus* matters—for instance, the ordinary rule that writs are issued only against the State has been relaxed for *habeas corpus* matters.[5]

II. Methodology

On July 20, 2023, I applied to the Central Public Information Officer, Supreme Court of India ("**CPIO**") under the Right to Information Act, 2005 seeking a list of all Writ Petitions and Special Leave Petitions filed in the Supreme Court in or after the year 2000 under the category '*habeas corpus*'. The CPIO responded on August 29, 2023 with a list of Diary Numbers and Case Titles of all *habeas corpus* matters for the indicated period (total 1171).[6] Accordingly, this scoping study was conducted on the data received from the CPIO.

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2 Shrutanjaya Bhardwaj, 'Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study', 13 NUJS L. Rev. 2 (2020).

3 Id.

4 See 'About Us', SCC Online, available at https://www.scconline.com/about-us, last accessed March 7. 2024.

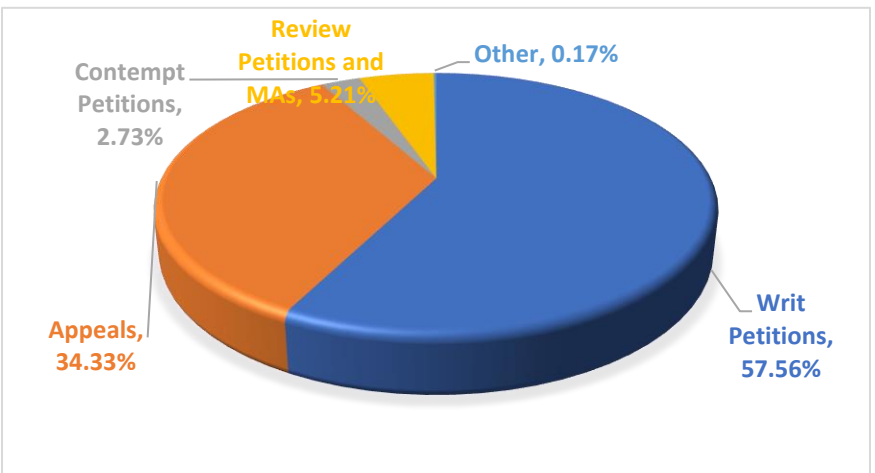
5 Mohd. Ikram Hussain v. State of U.P., (1964) 5 SCR 86, ¶12.

6 The response received from the CPIO is available on OneDrive https://onedrive.live.com/?authkey=%21AHR5McYz%5FnAflV4&id=C7D445193D6E97A7%2119262&cid=C7D445193D6E97A7&parId=root&parQt=sharedby&o=OneUp

Using the Diary Numbers in the CPIO's reply, the researchers collected further information from the website of the Supreme Court of India (main.sci.gov.in): Case Type, Date of Filing, Date of Registration, Date of Disposal, and Number of Hearings. The following parts of this paper discuss the findings of the scoping study. Readers may note that the dates of 'Filing' and 'Registration' are different because after a case is 'filed' in the Supreme Court, the Court's registry scrutinizes the case file for defects, and if any defects are found, communicates them to the filing advocate. The case gets 'registered' once the defects are cured (or if none are found). Owing to the steps involved in this process, the date of 'Registration' is mostly different from the date of 'Filing'.

III. Case Types

Of the 1171 cases studied, there are 674 Writ Petitions, 402 Appeals/SLPs,[7] 61 Review Petitions, 32 Contempt Petitions, 1 Curative Petition and 1 Transfer Petition.



7 A Special Leave Petition ('SLP') is filed under Article 136 of the Indian Constitution seeking permission from the Supreme Court to appeal against a judgment passed by another court, typically a High Court, because no right to appeal exists from such judgment.

One striking aspect is the small number of appeals and SLPs (402). In other empirical studies focussing on High Courts, approximately 9,000 judgments passed by High Courts in preventive detention matters in or after the year 2000 have been examined.[8] The figure of ~9,000 only pertains to judgments that are reported on SCC Online and is probably smaller than the actual number of judgments passed by the High Courts. In contrast, merely 402 appeals/SLPs were filed in the Supreme Court. In other words, most judgments rendered by High Courts in *habeas corpus* matters generally, and preventive detention matters specifically, are not carried in appeal to the Supreme Court. The reason for this is not clear. To speculate, however, this is likely because the High Courts allowed most of the aforesaid 9,000 petitions,[9] and the State may not have felt the need to detain the concerned individual for any further period. Alternatively, since most laws do not allow preventive detention for more than one year, and since High Courts also take more than six months to decide *habeas corpus* petitions, litigants may feel that any appeal or SLP filed before the Supreme Court may become infructuous before it is decided.

Another interesting aspect is the dominance of Writ Petitions in the docket (57.56%). Writ Petitions are filed under the Supreme Court's original jurisdiction under Article 32 of the Indian Constitution, which provides that the right to move the Supreme Court for the redressal of any fundamental right is "guaranteed".[10] The Supreme Court's understanding of this provision has changed

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8 Shrutanjaya Bhardwaj, 'Empirical Study: Delay at the Madras High Court in Preventive Detention Cases', National Law School of India University Review (forthcoming 2024), available as an advance article at https://www.nlsir.com/advance-articles, last accessed March 7, 2024; Shrutanjaya Bhardwaj, 'High Courts, *Habeas Corpus* and Preventive Detention: Law and Practice', National Law School of India University (forthcoming 2024).

9 Id.

10 Constitution of India, 1950, Article 32.

drastically over time. In 1950, a six-judge bench rejected the argument that a petitioner challenging a Madras law must first approach the Madras High Court "as a matter of orderly procedure".[11] In view of the text of Article 32, the bench declared that the Supreme Court "*cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights*".[12] Another Constitution Bench affirmed this understanding in 1959, despite explicitly noting the concern that litigants may flood the Supreme Court with writ petitions.[13] Curiously, however, a new trend emerged in 1987 when smaller benches of the Supreme Court, without even referring to the earlier Constitution Bench judgments, held that writ petitioners must be relegated to High Courts.[14] In respect of *habeas corpus* petitions, a divison bench in 2002 went one step further, observing that petitioners invoking Article 32 in habeas corpus matters are "unscrupulous".[15] The Court held as under:

> "*Another aspect which has been highlighted is that many unscrupulous petitioners are approaching this Court under Article 32 of the Constitution challenging the order of detention directly without first approaching the High Courts concerned. It is appropriate that the High Court concerned under whose jurisdiction the order of detention has been passed by the State Government or Union Territory should be approached first. In order to invoke the jurisdiction under Article 32 of the Constitution to approach this Court directly, it has to be shown by the petitioner as to why the High Court has not been approached, could not be approached or it is futile to approach the High Court. Unless satisfactory reasons are indicated*

11 Romesh Thappar v. State of Madras, 1950 SCR 594 ¶3.
12 Id.
13 K.K. Kochunni v. State of Madras, 1959 Supp (2) SCR 316 ¶12.
14 Kanubhai Brahmbhatt v. State of Gujarat, 1989 Supp (2) SCC 310 ¶3; P.N. Kumar v. Municipal Corpn. of Delhi, (1987) 4 SCC 609.
15 Union of India v. Paul Manickam, (2003) 8 SCC 342 ¶22.

in this regard, filing of petition in such matters directly under Article 32 of the Constitution is to be discouraged."[16]

In view of these pronouncements, it is interesting to see the trend of filing of writ petitions over the years. The next part of this paper will study the year-wise number of habeas corpus cases filed in the Supreme Court. It will also specifically study as to what proportion of the filings every year were writ petitions.

IV. Year-wise filings

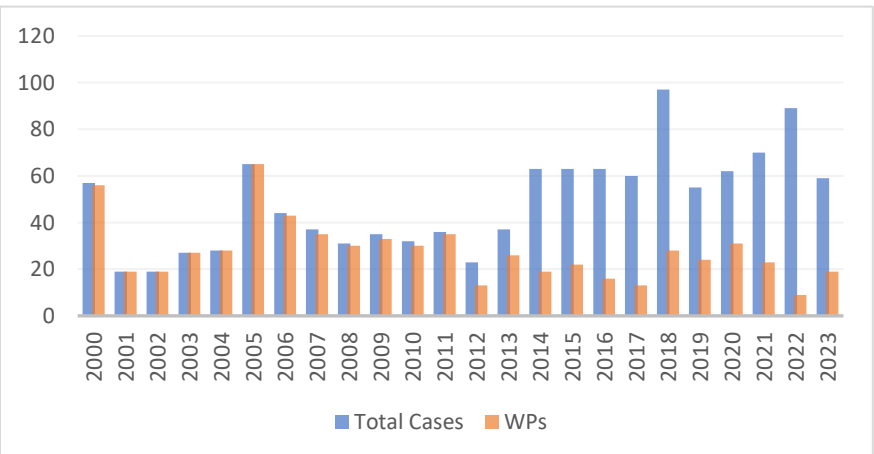
The year-wise number of *habeas corpus* cases filed in the Supreme Court are:

Year	Total cases	Writ petitions
2000	57	56
2001	19	19
2002	19	19
2003	27	27
2004	28	28
2005	65	65
2006	44	43
2007	37	35
2008	31	30
2009	35	33
2010	32	30
2011	36	35
2012	23	13
2013	37	26
2014	63	19
2015	63	22

[16] Id.

2016	63	16
2017	60	13
2018	97	28
2019	55	24
2020	62	31
2021	70	23
2022	89	9
2023	59	19

Speaking roughly, the total number of *habeas corpus* filings every year seem to have increased since the year 2014. However, no general observation is forthcoming from this data. What is more interesting is the proportion of writ petitions every year, which consistently seems to decrease after the year 2011. Until 2011, writ petitions constitute almost the entirety of habeas corpus cases filed in the Supreme Court. In the subsequent years, they are reduced to less than half—sometimes even close to only 10%—of the total cases. The following graph demonstrates this fluctuation:



There are, of course, two lessons from this data. The first is that prior to 2012, litigants barely filed appeals/SLPs against High

Court judgments in *habeas corpus* matters. That trend seems to emerge only 2012 onwards, though it is not clear why. The second is that the Supreme Court's avowed aim of "discouraging" habeas corpus petitions appears to be working.

V. Disposal time

Given that all *habeas corpus* matters implicate personal liberty in some way, it is critical for the Supreme Court to dispose of these matters with alacrity. The previous study revealed that the Supreme Court took about 5-6 months in deciding a preventive detention matter which, in most cases, was half of the maximum period of detention permitted under the relevant law.[17]

The larger dataset reveals a somewhat different picture. Taking all 1104 cases for which both the Date of Filing and the Date of Disposal were available,[18] the Supreme Court takes 213.35 days on an average to decide a case. The average figure for Writ Petitions is 225.42 days while that for Appeals/SLPs is 204.19 days. But these 'average' figures are somewhat distorted by a few cases with unusually large disposal periods, possibly because they involve questions of law that are to be decided by the Supreme Court after a detailed hearing. For example, the petitions challenging the twin bail conditions in the Prevention of Money Laundering Act, 2005 are also *habeas corpus* petitions which were filed in 2017 and are pending till date.[19] Readers may note, however, that it is not necessary for the detenu in all such cases to remain in illegal detention until the Court decides the matter.

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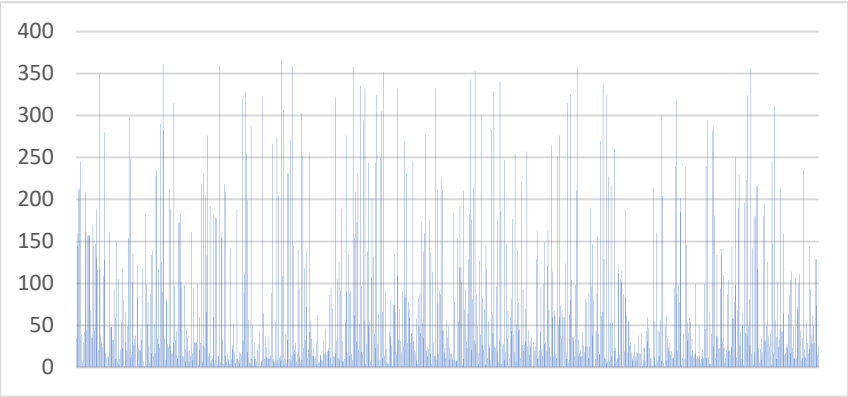
17 Shrutanjaya Bhardwaj, 'Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study', 13 NUJS L. Rev. 2 (2020).

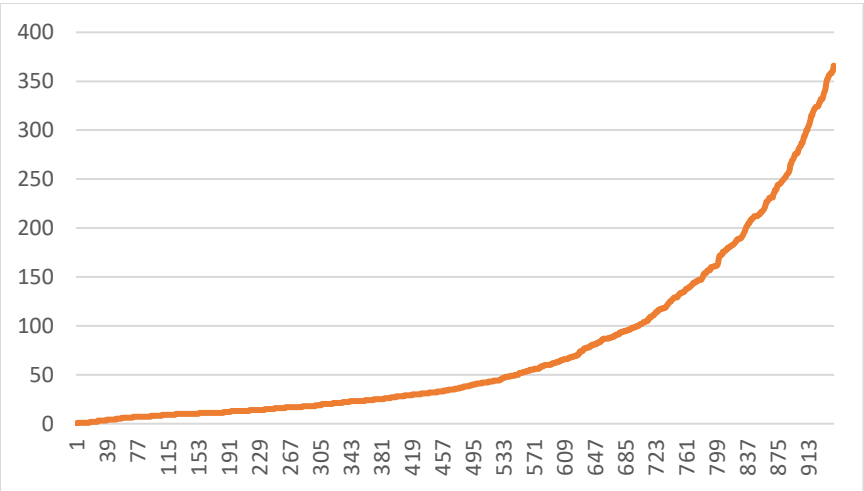
18 The other cases are either pending as on the date of writing this report, or have been 'lodged' by the registry for non-rectification of filing defects, which means that there is no official date of 'disposal' in these cases.

19 Vijay Madanlal Choudhary v. Union of India, Diary No. 21763/2017.

To get a more realistic picture of the Court's alacrity, therefore, we can reduce the dataset to study only the 938 cases where the case was disposed of within one year. A chronological plotting of these cases on a bar graph produces the following result:



The average figure for these set of cases is 75.27 days, i.e., two months and a half. For Writ Petitions, the average figure is 74.40 days, and for Appeals/SLPs, it is 70.12 days. In fact, most cases are decided in less than 50 days. At the same time, many cases touch the 350 day-mark as well. There does not seem to be any consistent increase or decrease in the Court's speed with the passing years. The information in the above graph can be re-plotted in increasing order of the number of days taken by the Court to dispose of the matter (as opposed to chronologically) to give a clearer picture of the number of cases in which the time taken is relatively higher. The following picture would emerge after the re-plotting:



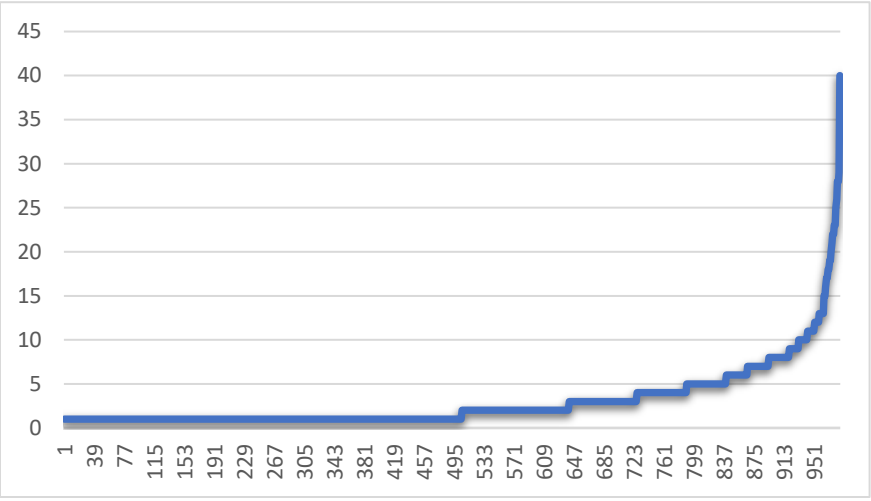
While these figures present a better picture than the figures revealed in the previous study focussed on preventive detention, there is significant scope for improvement. A Court that prioritises *habeas corpus* matters should endeavour to dispose them of within two weeks. Two months and a half are too long a time for any person to spend in potentially-illegal detention. Further, many of these cases are Appeals/SLPs filed against High Court judgments, and so the total time spent by the detenu/ person in illegal detention is likely much more than simply two months and a half. Equally so in preventive detention cases in which the detenu would have spent a few months before the Advisory Board prior to approaching the Court, even though approaching the Court is not strictly barred pending proceedings before the Advisory Board.[20]

VI. Number of hearings

Another parameter to measure the Court's alacrity is the number of hearings taken by the Court to decide a *habeas corpus* case. Of the 1171 cases, 984 cases were found to be disposed of. In these

[20] Prabhu Dayal Deorah v. Distt. Magistrate, Kamrup, (1974) 1 SCC 103 ¶16.

984 cases, the average number of hearings taken by the Court to dispose of a matter is 3.07, which could appear reasonable at first blush. If these values are plotted on a graph in ascending order, the following picture emerges:



However, on closer inspection, it emerges that most cases (504 out of 984 cases) were disposed of on the very first hearing, thus bringing down the average number of hearings for the entire dataset. It is only from the 505th case in the dataset that the number of hearings rise above 1. Equally, there are some cases with unusually large number of hearings (close to 40) which would pull the overall average in the other direction. If all the single-hearing orders are removed from the dataset, the average number of hearings in the balance cases (480 cases) is 5.25 hearings, while the median value is 4 hearings.

At least as far as preventive detention is concerned, the Court can very well decide the matter in two hearings. There should be no requirement of a "counter-affidavit" in these matters other than a simple production of the grounds of detention. This is because a counter-affidavit cannot supplement or add to the grounds of

detention.[21] In fact, if the counter-affidavit discloses new material which was not communicated to the detenu even though he was detained based on such material, the detention would breach Article 22.[22] As such, the requirement of filing a "counter-affidavit" should be dispensed with entirely in preventive detention proceedings, and the case law to the contrary should be revisited.[23]

VII. Conclusion

The purpose of this scoping study was to provide a springboard for further research into the Supreme Court's *habeas corpus* docket. Information obtained from the Supreme Court's CPIO was analysed based on the case types, year-wise distribution of case filings (including the proportional distribution of writ petitions), disposal time taken by the Supreme Court in *habeas corpus* cases over the years, and the number of hearings ordinarily spent by the Court in such cases. Some broad observations made in this paper are:

1. Most *habeas corpus* cases filed in the Supreme Court in or after the year 2020 are 'writ petitions' filed under the Court's original jurisdiction.

2. In the initial few years up to 2012, hardly any appeals/SLPs were filed in the Supreme Court against judgments passed by High Courts in habeas corpus matters. In and after 2012, the number of appeals/SLPs has suddenly shot up.

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21 State of Bombay v. Atma Ram Sridhar Vaidya, 1951 SCR 167 [Kania, C.J. (for himself and 2 others)] ¶¶9-10,17; Ramveer Jatav v. State of U.P., (1986) 4 SCC 762 ¶2.

22 Sk. Hanif v. State of W.B., (1974) 1 SCC 637 ¶¶11,14; Sasthi Keot v. State of W.B., (1974) 4 SCC 131 ¶2; Fogla v. State of W.B., (1974) 4 SCC 501 ¶¶3-4.

23 See, e.g., Sebastian M. Hongray v. Union of India, (1984) 1 SCC 339 ¶31, holding that the normal practice in habeas corpus proceedings is to issue notice and seek a counter-affidavit from the respondents. These observations should be read only as implying that notice is essential and the matter would ordinarily not be decided *ex parte*.

3. The Supreme Court's deliberate "discouragement" of writ petitions appears to have had some effect on the number of writ petitions filed after 2011-12.

4. The disposal time of *habeas corpus* cases, along with the number of hearings being spent by the Court on each case, does not paint an ideal picture and leaves a lot to be desired in terms of judicial alacrity.

Unfortunately, the brevity of the Court's orders in most cases makes it tricky to identify the precise category of *habeas corpus* case being studied (e.g., preventive detention, enforced disappearance, prolonged custody, unlawful confinement, etc.). Further research can be conducted by accessing the actual case files in these cases and studying the facts of the cases.

THE ESSENTIAL RELIGIOUS PRACTICE TEST: A SORRY TALE OF JUDICIAL MISREADING

*Rushil Batra**

'Religion is too personal, too sacred, too holy to permit its "unhallowed perversion" by a civil magistrate'[1]

Abstract

The Essential Religious Practice Test has been consistently applied by the Supreme Court of India in almost all cases revolving around Article 25 and 26 of the Indian Constitution. It has been argued by scholars that the ERP test makes it impossible for any practice to be protected under the Constitution. This paper aims to prove this assertion by a doctrinal and statistical analysis by analyzing all cases decided by various High Courts post-2015 and Supreme Court post 2004. The conclusion obtained from an analysis of these cases supports the assertion that the ERP test reduces the scope of religious freedom without any textual or logical basis. This paper also attempts to highlight how the birth of the ERP test itself was a result of judicial misreading. In conclusion, it argues that as it stands, the ERP test must be withered down or done away with.

Introduction

The Constitution of India provides to all its citizens the freedom of religion as a fundamental right. The Constitution protects the freedom of religion under Articles 25 and 26[2] ('A-25' and 'A-26')

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1 *Engel v. Vitale* 370 U.S. 421, 432 (1962).

2 The author uses Article 25 and Article 26 synonymously in certain places. That is purely for the reason that the ERP inquiry remains the same in both.

subject to public order, morality, and health.[3] While it does not provide any limitation on the scope of the right *per se*, it does provide restrictions for the same. However, in the course of judicial interpretation, the Supreme Court ('SC') has held that what is protected under the freedom of religion is not all religious practice but only 'essential religious practices' ('ERP'). By doing so, the SC has restricted the scope of the right without any textual basis. Various scholars have criticized this approach by arguing that the Court has neither the expertise nor the right to determine what practices constitute the essential religious practices of a given religion.[4] As some put it 'with a power greater than that of a high priest, maulvi or dharmasastri, judges have virtually assumed theological authority'.[5]

The ERP framework requires a three-step inquiry. *First*, an inquiry is made to check if a claim is religious at all; *second*, if it is 'essential' to the faith; and *last*, even if essential, if it satisfies the restrictions placed in the Constitution.[6] This paper argues that the second step in the process, i.e., to evaluate if any given practice is essential to the religion is doctrinally unsustainable and practically impossible.[7] This paper aims to prove this assertion by doing a doctrinal and statistical analysis of *all* relevant SC judgments post-2004 and High Court judgments rendered post-2015.[8] However, such a claim cannot be comprehensively made without first providing the

[3] The Constitution of India 1950, arts 25-26.

[4] Rajeev Dhawan and Fali S Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in B.N. Kirpal, Ashok Desai, Rajeev Dhawan and Raju Ramachandran (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2004) 259.

[5] ibid.

[6] ibid 260.

[7] Akilesh Meneze and Priyanshi Vakharia, 'To Practice What is Preached: Constitutional Protection of Religious Practices vis-à-vis Reformative Secularism' (2020) 7(1) NULJ Law Review 211, 216.

[8] A detailed research methodology can be found in the Annexure.

relevant context and discourse in which debates on protecting religion in constitutional democracies take place.

Thus, this paper *first*, underscores the debates in the current literature on the vexed question of protecting religious freedom in the Indian Constitution and argues that the 'rationalization of religion' has long been understood and criticized by various scholars. *Second*, it highlights that the essential religious practice test came about due to a case of judicial misreading. *Third*, it looks at the standard of essentiality itself and how it has undergone a change over time especially post the case of *Acharya Jagadishwarananda*[9] ('*Acharya*') in 2004, and has now reached a point where practically no practice can be given protection. This is done by doing an empirical analysis of all relevant cases post a given time period. *Fourth*, it analyses the possible reasons behind the unflinching acceptance of the ERP test by the Courts and analyses the reasoning of Dhulia J. in *Aishat Shifa v State of Karnataka* that moves away from the ERP jurisprudence.[10] Lastly, it concludes by saying that the SC has the perfect opportunity now to reconsider the ERP test in the Sabarimala Review Petition and that the test should either be withered down or done away with.

CONSTITUTIONAL SECULARISM: THE DISCOURSE SO FAR

India is admittedly following an innovative model of secularism when compared to Europe or America.[11] It promises to protect religious freedom, while in the same breath trying to implement social welfare legislation to bring about reforms and implement the promise of equality.[12] Numerous such 'anomalies' have been

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9 *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 770 ('*Acharya*').

10 *Aishat Shifa v. State of Karnataka* (2022) SCC OnLine SC 1394.

11 Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (OUP 2019) 22.

12 Donald Eugene Smith, *India as a Secular State* (Princeton University Press 1963) 14.

documented by scholars since the framing of the Constitution and interpreted and rationalized in different ways.[13]

Various commentators writing in the early 1960s were hopeful that the forces of westernization and modernization would triumph over religious claims. For instance, Donald Eugene Smith concluded that "many of the constitutional anomalies regarding the secular State would have disappeared" in the early years of the Indian Constitution.[14] Smith was writing at a time when theories concerning the decline of religion were dominant and the implicit hope was that religious reform embedded in secular thought would triumph over religious freedom.[15] Marc Galanter went so far as to argue that the Indian State was primarily concerned with religious reform as opposed to being in the 'business' of religious freedom.[16] Similarly, Jacobsohn calls this the 'ameliorative model' of secularism which embraces the 'social reform impulse' of Indian nationalism.[17]

Unfortunately, the impact of religion on society has turned out to be much more complicated than imagined by Smith. Peter Berger, who once was the leading proponent of 'secularisation of society' has changed his view and admitted that the world is 'as furiously religious' as it has ever been.[18] In hindsight, it is fair to say that such hopes of religion fading away in the backdrop of ideas of secularism were

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13 In the early years after independence, social reform was prioritized over religious freedom even by scholars. See P.K Tripathi, 'Secularism: Constitutional Provisions and Judicial Review' (1966) 8(1) Indian Law Review 165, 192.

14 Donald Eugene Smith, *India as a Secular State* (n 13) 14.

15 Nikki R. Keddie, 'Secularism and Its Discontents' (2003) 132(3) Daedalus 14, 16.

16 Marc Galanter, 'Secularism: East and West' (1965) 7 Comparative Studies in Society and History 133, 136.

17 Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (OUP 2003).

18 Peter Berger, *The Desecularization of the World: Resurgent Religion and World Politics* (William B Eerdmans Publishing Co. 1999) 2. For a comprehensive analysis of the fall of secularism see: Dylan Reaves, 'Peter Berger and the Rise and Fall of the Theory of Secularization' (2012) 11 Denison Journal of Religion 11, 15.

unlikely to be true, given how 'religious and secular life is entangled' in India that the idea of the indifference of the State cannot be justified to either side politically.[19]

How then does one interpret the ideas of Indian secularism? Rajeev Bhargava in his work had rationalized the Indian model of secularism to be that of a 'principled distance', i.e., "the secular State neither mindlessly excludes all religions nor is it merely neutral towards them."[20] Such a 'principled distance' interpretative model which attempts to highlight the 'essential-secular' binary has however been criticized, especially in light of specific Articles in the Constitution concerning religious reform and prohibiting certain religious practices.[21] Bhargava would perhaps argue that the ERP test was a necessity given that the construction of the 'essential-secular' was both a pragmatic and counter-majoritarian choice to pave the way for social reform of religious institutions. When, however, one might be able to say 'thus far and no further' is a question that haunts us all even in this paradigm.

Motivated by such concerns, Ronojoy Sen highlights that a 'better description' of the Indian model of secularism is offered by Rajeev Dhavan wherein he highlights the three components of Indian secularism.[22] Dhavan argues that Indian secularism can be summed up in the three ideas of religious freedom, celebratory neutrality, and reformatory justice. In this paper, we are concerned with the two seemingly incompatible ideas of religious freedom and reformatory

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19 Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (n 18) 10.

20 Rajeev Bhargava, 'Reimagining Secularism: Respect, Domination and Principled Distance' (2013) 48 Economic and Political Weekly 79, 86.

21 Ronojoy Sen, 'Legalising Religion: The Indian Supreme Court and Secularism' (Policy Study 30, East-West Centre Washington 2007) 5.

22 Rajeev Dhavan, The Road to Xanadu: India's Quest for Secularism' in Gerald Larson (ed.,) in *Religion and Personal Law in Secular India: A Call to Judgement* (Indiana University Press 2001).

justice. Sen has concluded in his work that these two ideas are, more often than not, in conflict with each other and it is such conflict that has often led to 'homogenization' and 'rationalization' of religion by the Court.[23]

The ERP test is one manifestation of such rationalization and homogenization of religion which is inimical to internal variations in the practice of religion.[24] It is rationalization insofar as the Court believes its version of the religious practice to be forming the core (or essential part) of the religion, which deserves constitutional protection, and homogenization insofar as only one way (the Court's way) of practicing a religion is protected. Such unusual powers arrogated by the Court to itself have been a subject of criticism for a long time. For instance, J.D.M Derret has highlighted the paradoxical role of the Court in the following words:

> *"Courts can discard as non-essential anything which is not proved to their satisfaction – and they are not religious leaders or in any relevant fashion qualified in such matters –to be essential with the result that it (such practices) would have no constitutional protection".*[25]

Similarly, Galanter questions whether the Constitution gives the Court the power to 'actively participate in the internal re-interpretation of Hinduism' that eventually leads to the demise of religious pluralism and diversity.[26] More recently, Baxi has helpfully

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23 Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (n 12) 33. Similarly, Bhikhu Parekh argues that "the modern state is a 'deeply homogenizing institution' because it 'expects all its citizens to subscribe to an identical way of defining themselves and relating to each other and the state. See Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2000) 8–9.

24 ibid.

25 Upendra Baxi, 'Commentary: Savarkar and the Supreme Court' in Ronojoy Sen, *Legalising Religion: The Indian Supreme Court and Secularism* (n 22) 48.

26 Marc Galanter, *Law and Society in Modern India* (OUP 1993) 251; Mary Kavita Dominic, 'Essential Religious Practices' Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding' (2020) 16(1) Socio-Legal Review 46.

distinguished the kinds of cases concerning religious freedom jurisprudence into rights-oriented secularism (ROS) and governance-oriented secularism (GOS).[27] In ROS, the principal concern remains how to best realise 'the normative proclamation of the right to freedom of conscience to religious belief and practice'. GOS is linked to ROS, but is more concerned with the 'integrity of the secular structure and reformatory justice'.[28] Thus, when religious reform is given precedence over religious freedom, it is actually a preference of GOS over ROS.

Some scholars like Robert Braid have highlighted that the primary (if not only) reason for utilizing the ERP test is to widen the reformatory powers of the State.[29] In other words, the preference of GOS over ROS is an *intentional* choice keeping in mind the promise of reformatory justice, even if it comes at the cost of religious freedom.

Others like Pratap Bhanu Mehta have also concurred with this and argued that the ERP test has been useful for the Court as it can minimize the conflict between the free exercise of religion and the secular purposes of the State by constructing an argument to the effect that the practices being regulated were not essential to that religion in any case.[30] Such reasoning, that the loss of religious freedom is attributable in some measure to concerns of religious reform, while intuitively correct, is questioned by the findings in this paper.

No doubt such arguments of attaining reformatory justice at the cost of religious freedom are valid to some extent. However, there are numerous cases where petitioners have claimed constitutional protection for religious practices, and the Court has denied protection

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27 Upendra Baxi, 'Commentary: Savarkar and the Supreme Court' (n 26) 50.

28 ibid.

29 Robert D. Baird, 'Religion and Law in India: Adjusting to the Sacred as Secular' in Robert D Baird (ed), in *Religion and Law in Independent India* (Manohar Publishers 2005).

30 Pratap Bhanu Mehta, 'Passion and Constraint: Courts and the Regulation of Religious Meaning' in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (OUP 2008).

even when there are no corresponding social reform measures being brought by the State.[31] The Supreme Court has also now recognized that applying the ERP test in *all* cases, even when no reformatory measure is being pushed by the State, is questionable in itself.[32] Thus, this paper, with an analysis of all cases over the past few years, argues that the Court is doing something more than just preferring GOS over ROS, or more broadly social reform over social freedom.

In short, there is almost a consensus that the restriction on religious freedom and usage of the ERP test is because of, and has a *causal* effect on religious reform.[33] Many commentators have already highlighted the problems with the ERP test from the lens of separation of powers, judicial propriety, and the reducing contours of religious freedom.[34] This paper goes one step forward in attempting to empirically prove whether such claims have been true by exhaustively looking at all HC and SC cases during a given period. Surprisingly, even with the vast literature on this subject, there has never been a critique of the *origins* of the test. This paper attempts to add to the current literature by questioning the dubious origins of the ERP test and arguing that such jurisprudence is a result of judicial misreading and

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31 *South Central India Union of SDA v. Government of Karnataka* (2016) SCC OnLine Kar 8342; *Riza Nahan v. State of Kerala* (2021) SCC OnLine Ker 9861. The Annexure has a detailed factual matrix of all cases.

32 *Aishat Shifa v. State of Karnataka* (n 11) [235]. Dhulia J. made a distinction between cases where the State intervenes to bring forth reformatory measures under Article 26 and cases where no reformatory measures are pushed by the State. He held, "The test of ERP has been laid down by this Court in the past to resolve disputes of a particular nature, which we shall discuss in a while. By and large, these were the cases where a challenge was made to State interference on what was claimed to be an " essential religious practice".

33 In the early years of the ERP jurisprudence, many scholars felt the approach of the Court was justified. See Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (n 12) 33.

34 Gautam Bhatia, 'Freedom From Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution' (2016) 5(3) Global Constitutionalism 351.

further providing an empirical analysis of the claims made regarding the final impact of the ERP test.

ERP – A Case of Judicial Misreading

There is nothing in the Constitution that can be used to limit the scope of the right envisioned in Article 25.[35] Yet, the scope of Article 25 has consistently been narrowed down over the years due to judicial misreading. The misreading here is two-fold, one has already been pointed out by Gautam Bhatia where Courts refer to Ambedkar's speech in the Constituent Assembly to infer the meaning of ERP. [36] However, as Bhatia points out, the speech was made in a particular context where *Ambedkar used the word 'essentially religious' to qualify the nature (whether a practice is religious or secular) of a given practice and not its importance (whether it is essential or not). This is the only reference to ERP in the Constitution or the Constituent Assembly Debates.* Since that has been analyzed by Bhatia in detail elsewhere, this paper is more concerned with pointing out the second misreading i.e., of interpreting *Shirur Mutt*[37] which has been curiously ignored by scholars.[38]

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35 Article 25: 'Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.'

36 Constituent Assembly Debates, December 2, 1948, Speech by Dr. B.R. Ambedkar, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 20 August 2022.

37 *Commissioner, Hindu Religious Endowment Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt* 1954 SCR 1005 ('*Shirur Mutt*').

38 Gautam Bhatia, 'Essential Religious Practices" and the Rajasthan High Court's Santhara Judgment: Tracking the History of a Phrase' (*Indian Constitutional Law and Philosophy,*

The first major case on freedom of religion is that of Shirur Mutt[39] *where there was a challenge to the Madras* Hindu Religious and Charitable Endowment Act. During the arguments, the Attorney General ('AG') while defending the Act made the ERP argument as one of his submissions. He argued that all secular activities which may be associated with the religion, but do not constitute an 'essential' part of it, are amenable to State regulation. The Court responds to this by observing:

> "*The contention formulated in such broad terms cannot, we think, be supported. In the first place*, what constitutes the essential part of a religion is primarily to be *ascertained with reference to the doctrines of that religion itself*…"[40] (emphasis supplied)

A plain reading of this observation indicates that while the AG submitted that only essential religious practices are protected, the Court explicitly *rejected* that contention. Interestingly, the cases that were decided after *Shirur Mutt* interpret this case to mean that Article 25/26 only protects ERP.[41] The first few lines of the paragraph, where the Court expressly rejects the contention are simply, on purpose or otherwise, either ignored or left out in all future cases. Also, the use of the words 'in the first place' after the Court rejected the AG's contention indicates that the Court rejected employing the ERP test since what is essential would be determined by the religion itself and *not* by the Court.

August 2015) <https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/> accessed 28 August 2022.

39 ibid. Although *Mohammad Qureshi* was decided before *Shirur Mutt*, it did not elaborate on how the test evolved.

40 *Shirur Mutt* (n 38) [20].

41 For a comprehensive review of case law after *Shirur Mutt*, See M Mohsin Alam, 'Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution' (2009) 11 Asian Law 30, 31-34.

The next major case on this point is that of *Durgah Committee*[42] where the Khadims of the Moinuddin Chistia order challenged the Dargah Khawaja Saheb Act of 1955. Here the Court interpreted *Shirur Mutt* to mean that only essential practices of the religion shall be protected. It was also held that it was the Court that was to make the distinction between what is superstitious and what is religious.[43] In *Durgah*, the Court simply assumes that *Shirur Mutt* stands for the ERP proposition by ignoring the part where the Court explicitly rejects the said contention. M.C. Setalvad, former Attorney General, also notes in his extra-curial writings that the position of law as laid down by Justice Mukherjea in *Shirur Mutt* was "sought to be modified" in *Durgah Committee* and how doing so would be "contrary" to the principle of deference laid down in the former.[44]

There are, therefore, two issues with the cases of *Shirur Mutt* and *Durgah Committee*. One is pointed out by the SC in the Sabrimala Review Petition,[45] i.e., even if one reads *Shirur Mutt* to argue that the ERP test was laid down in the case, it was held that the Court would have to defer to the views of the religious institutions. *Durgah Committee* on the other hand carves out a role for the Court to exclude the practices that might be superstitious or secular. This precise issue has been referred to a nine-judge bench to consider. Both these cases were in the context of State intervention in religion - this becomes relevant in the decision of *Aishat Shifa v State of Karnataka* which is discussed in the last section of this paper.[46]

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42 *Durgah Committee Ajmer v Syed Hussain Ali* (1962) 1 SCR 383 ('*Durgah*').

43 Rajeev Dhawan and Fali S Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' (n 5) 260.

44 M.C. Setalvad, *My Life: Law and Other Things* (Universal Book Traders, 2019) 218.

45 *Kantaru Rajeevaru (Sabrimala Temple Review) v Indian Young Lawyers Association* (2020) 2 SCC 1 (Ranjan Gogoi, J.) [7] ('*Sabrimala Review*').

46 *Aishat Shifa v. State of Karnataka* (n 11).

However, this paper points out a more fundamental contradiction, i.e., contrary to popular perception, a closer reading of *Shirur Mutt* highlights that it did *not* lay down the ERP test but rejected its application. It is important to note that *Shirur Mutt* was a 7-judge bench and it is argued that *Dargah Committee* and all other ERP cases[47] may be considered *per-incuriam*. The birth of the ERP test, is thus, due to judicial misreading and therefore is liable to be done away with.

Standard Employed to Determine ERP

As pointed out, the ERP test is a result of judicial misreading. However, now that the ERP test is in existence, it is important to inquire as to what standards Courts employ to determine if a practice is to be declared as an ERP. Therefore, this section of the paper assumes that the ERP test was laid down in *Shirur Mutt*, for that is what Courts have done. There have been different tests devised to determine if a practice is an ERP and therefore to be granted protection under Article 25-26 which is discussed in this section.

In *Mohd. Hanif Quareshi v State of Bihar,*[48] the question of whether Muslims had a fundamental right to slaughter cows on the religious festival of Bakra Eid was before the Court. A five-judge bench of the SC introduced the *optionality test* within the ERP framework. It was held that since Muslims had an option of slaughtering either cows *or* goats, the same could not be protected as an ERP. Hence the takeaway from this case, which has been used in many other cases,[49] is that if a practice is an optional one, i.e., not mandated/obligatory then it cannot qualify to be an ERP.[50]

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47 *Sardar Swarup Singh v. State of Punjab* 1959 AIR 860; *Tilkayat Shri Govindlalji v. State of Rajasthan* 1963 AIR 1638

48 *Mohd. Hanif Quareshi v. State of Bihar* 1959 SCR 629 ('*Qureshi*').

49 *Hifzur Rahman Choudhury v. Union of India* MANU/GH/0575/2022 [8].

50 Post *Qureshi* High Courts often hold that cow slaughter laws are *per se* valid. See *Ramavath Hanuma v State of Telangana* MANU/AP/0276/2017 where it was also held that 'cow is a

The second major case on this point is *Durgah Committee*, which has been discussed above. Had the SC followed the *Shirur Mutt* reasoning, they should have given deference to the opinion of the religion for 'what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself'. Interestingly, the SC on the other hand observed that the practice in question in this case was superstitious and not essential to the religion, thereby going against the views of those practicing the religion. This essentially meant that the SC now acted as a clergy,[51] determining what was superstitious and what wasn't, even if that meant going against the views of the religious community. This has been argued to be antonymous to *Shirur Mutt* since it substitutes the view of the religious denomination with the view of the Court. This position was categorically affirmed in *Govindlalji Maharaj*[52] when the Court held that what constitutes essentiality is to be determined by the Court itself.

The next major case on this point was *Acharya*.[53] This test added another dimension to the ERP inquiry, i.e., the *recency test*. A case was filed before the SC to declare the *tandava* dance as an ERP but the Court refused to do so since it lacked a scriptural basis.[54] Interestingly, since the religion was new and the founder was alive, there was an explicit mention made in the scriptures to negate the basis of the verdict. Thus, the *tandava* dance was explicitly considered to be essential according to the religion's holy book. The case again reached the SC. Finally, in *Acharya-II*[55] the SC again held that the *tandava* dance

substitute to mother and god.'

51 Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (2017) 4 Brigham Young University Law Review 915.

52 *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* (1964) 1 SCR 561 [57].

53 *Acharya* (n 10).

54 *Acharya Jagdishwarananda Avadhuta v. Commissioner of Police, Calcutta* (1983) 4 SCC 522.

55 *Acharya* (n 10).

was not an ERP but due to different reasons. The Court employed the *recency test* to argue that if a practice is recent and not followed from the start of the religion then it cannot be categorized as an ERP. The SC also went on to hold that unless a practice is so important that there is a *fundamental change in the nature of the religion*[56] without that practice, only then can it be considered essential. The author refers to this as the '*but for test'* in this paper, i.e., but for a given practice, the character of the religion would change. It also ruled that once the Court declares a practice to be an ERP, that cannot be changed. This absurd logic implied that there can be no change in religious practices over time.[57]

Therefore, *Acharya* convoluted the field by introducing the recency test alongside holding that once a Court deems a practice not to be an ERP, it is set in stone. Hence the standard to determine ERP includes the optionality test, the recency test, the fact that once something is declared as not an ERP that is immutable, and whether the absence of a given practice would cause a fundamental change in the character of the religion. It is the Court that will determine all these questions.

It is now a mixture of all these tests that Courts employ to determine questions of ERP. For example, in the case of *Shayara Bano,*[58] Nariman J. adopted a two-step inquiry into determining what an ERP was. One was the 'but for test' in *Acharya*. He also adopted the test laid down in *Javed*[59] to hold that if a practice is merely permissible but not obligatory (similar to the optionality test) then it cannot be considered an ERP. Using these two tests it was held that the practice of triple talaq is not an ERP.

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56 *Acharya* (n 10) [9].

57 Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (n 52) 936.

58 *Shayara Bano v. Union of India* MANU/SC/1031/2017 (Nariman, J.) [252].

59 *Javed v. State of Haryana* (2003) 8 SCC 369.

Lastly, in the recent case of *Indian Young Lawyers Association*,[60] after holding that the practice which excluded women in the age group of 10-50 from entering the Ayappan temple at Sabarimala was not an ERP, the Court held that even if a religious group can perform the impossible task of proving that practice is an ERP that does not by itself imply constitutional protection. The ERP then has to satisfy the test for not violating Part III of the Constitution by arguing that morality implies constitutional morality in Articles 25 and 26.[61] This means that even if one somehow achieves the herculean task of showing that the practice in question is an ERP, it will then be tested on the anvil of constitutional morality, and other limitations laid down in Article 25/26.

Therefore, what emerges from these cases is as follows – *first*, to determine essentiality the Courts look at the optionality test to consider if the practice is obligatory; if it is not then it cannot be an ERP. *Second*, they look at the recency of the practice; if the practice started recently and not from the start of the religion it cannot be an ERP. *Thirdly* once the Court decides whether a practice is an ERP it is fixed in time and cannot be changed. *Fourthly*, even if a practice is obligatory and practiced from time immemorial, the 'but for test' is employed, i.e., if it does not change the 'fundamental character of the religion' it can still not be considered an ERP. Whether any one single practice can be so integral that without it the nature of the religion changes is open for debate.

Hence this paper argues that in practice there is a *very* high – almost impossible – burden on religious groups to prove that a practice is an ERP. This claim is empirically proved in the following section.

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60 *Indian Young Lawyers Association v. State of Kerala* MANU/SC/1094/2018 (Mishra, J.) [106] ('*Sabrimala*').

61 ibid.

Proving ERP – Mission Impossible?

The previous sections theoretically argue the standard to determine ERP is so high that it is nearly impossible to get protection under Articles 25-26. This section aims to empirically prove this claim. This paper analyses all Supreme Court judgments post-*Acharya* in 2004 and all High Court judgments post-2015 to see how Courts react to the ERP question. A summary of all these cases can be found in Annexure I.

First looking at the SC, there were eight relevant cases decided post-*Acharya* which involved the question of whether a practice is an ERP or not. In *none* of those eight cases did the Supreme Court declare that the practice in question was an ERP. In almost all cases, there seems to be a combination of the optionality and the 'but for test'.

In the case of *Mirzapur Moti,*[62] there was a 7-judge bench of the SC to decide whether the case of *Qureshi* was correct post the jurisprudential changes in how the Court views Directive Principles of State Policy vis-à-vis Fundamental Rights.[63] In deciding the case the Court categorically held that an optional religious practice is not covered by Article 25. Thus, this gives the optionality test an endorsement by a bench of no less than seven judges. While they rely on other cases[64] to hold the optionality test to be good law, being a 7-judge bench, the Court missed an opportunity to relook at whether previous cases like *Qureshi*, *Durgah*, and *Acharya* were actually correct in law. In the other cases too, the Court at times went against the view of the religious group to hold that a practice is not an ERP, a case in point being *Sabrimala*.

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62 *State of Gujrat v. Mirzapur Moti Kureshi Kassab Jamat* MANU/SC/1352/2005.

63 Vikramaditya S Khanna, 'Profession, Occupation, Trade or Business' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 875.

64 *State of West Bengal v. Ashutosh Lahiri* (1995) 1 SCC 189.

Coming to the decisions rendered by various High Courts, the same trend is seen, i.e., only three cases out of twenty-three held that the given practice is an ERP. In all three cases, protection was accorded to religious activities because the *Acharya* standard was *not* used. Apart from the three almost all HC judgments cite *Acharya* and employ the 'but for test'. At times *Shirur Mutt* is not even cited thus implying that the core case on the point of ERP as of today is *Acharya*.

Interestingly, one of the judgments that held that a given practice was an ERP was a single judge bench of the Kerala HC which held that wearing the Hijab is an ERP for Muslim women.[65] The Court here ignores the 'but for test'. This, of course, being a single-judge bench has little to zero binding value as was evident in the case of *Resham*[66] and *Zainab Abdul Qayyum Choudhary*[67] where the question was identical, i.e., the Court was to determine whether the practice of wearing a Hijab was an ERP. In *Resham* the Karnataka High Court simply held that since the facts were different, the *ratio* of the case does not apply, while in *Zainab*, the Bombay High Court chose to prioritize discipline and uniform over religious freedom.

In the second case of *Qualified Private Medical Practitioners Association v Union of India*[68] decided by a division bench of the Kerala HC, it was held that the practice of the Eucharist is an ERP. The Kerala High Court ignored *Acharya* and held the practice to be an ERP even though they specifically pointed out how it is *not* an obligatory practice.

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65 *Amnah Bint Basheer v. Central Board of Secondary Education* MANU/KE/0470/2016.

66 *Resham v. State of Karnataka* 2022 LiveLaw (Kar) 75.

67 *Zainab Abdul Qayyum Choudhary v. Chembur Trombay Education Society* (2024) SCC OnLine Bom 1925.

68 *Qualified Private Medical Practitioners Association v. Union of India* (2020) SCC OnLine Ker 295 [18].

In the third case decided by the Karnataka HC, it was held that the appointment of the chief pontiff of the Shirur Mutt is an ERP.[69] Even in this case the Court again *ignores Acharya* and does *not* employ the 'but for test'. Hence, the only way to declare a religious practice as an ERP is to either ignore the 'but for test' laid down in *Acharya* or distinguish it on facts.

Interestingly, another view seen in some of the cases is that of *reasonable accommodation*. The author believes that this is perhaps something the Courts have not looked at enough and other jurisdictions have shown the usefulness of the doctrine in the context of religious freedoms.[70] For example, in the case of *DSGMC v. Union of India*,[71] Ravindra Bhat J., speaking for the Delhi HC, held that wearing Kara/Kirpans in NEET would be permitted during examinations. However, in case there are concerns regarding cheating, the students may be called earlier for inspection. In cases where an individual challenges State action to argue for religious freedom (as opposed to with a religious denomination), the principle of reasonable accommodation may be an option worth exploring. By incorporating reasonable accommodation as a principle, the scope of the right shall not be limited as is the case with the ERP test.[72]

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69 *P. Lathavya Acharya v. State of Karnataka* MANU/KA/4599/2021 [64].

70 *MEC for Education, Kwazulu-Natal v. Pillay* (CCT 51/06) [2007] ZACC 21.

71 *DSGMC v. Union of India* MANU/DE/1651/2018 [9].

72 While mostly invoked in the context of disability rights, there is a growing consensus on the usefulness and validity of RA in other spheres as well. See Aart Hendriks and Lisa Waddington, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (2002) International Journal of Comparative Labour Law and Industrial Relations 404. Most recently, the Indian Supreme Court has shown its willingness to extend its application to religious freedom in *Aishat Shifa v. State of Karnataka* (2023) 2 SCC 1. Similar arguments are made in other jurisdictions as well. See Joshua Malidzo Nyawa, 'Reasonable Accommodation of Religious Beliefs at the Workplace – An Account from Kenya' (*Indian Constitutional Law and Philosophy*, 23 July 2023) <https://indconlawphil.wordpress.com/2023/07/23/guest-post-reasonable-accommodation-of-religious-beliefs-at-the-workplace-an-account-from-kenya/> accessed 26 April 2024.

As is seen in *DSGMC*, reasonable accommodation would allow Courts to be deferential to the views of the religion and at the same time incorporate the reformatory concerns of the State. Recall that in *Acharya*, the people following the Ananda Margi faith were willing to follow any reasonable conditions being imposed upon the conduct of the *tandava* dance. If this principle was followed, chances are the decision in *Acharya* would have been different.[73] Thus, reasonable accommodation seems to be a meeting point where claims by both parties may be satisfied.

Another surprising factor noted during the analysis was that many of these cases are PILs. This points towards an increasing trend of PILs being used to challenge the rights of religious groups. This takes us back to the question of the floodgate theory that Indu Malhotra J. raised in *Sabrimala*.[74] It is a debatable point as to whether her prediction is already a reality.

Therefore, to conclude, it is each Court to its own, for there is no single standard employed and it is, to put it bluntly, judicial interpretation gone nuts. However, in most cases, the *Acharya* standard was seen to be the prominent one. The author believes that practically, it is *impossible* to prove in unequivocal terms that the absence of any one religious practice can change the nature of a religion. Hence, simply put, it is close to impossible to prove that a given practice qualifies as an ERP.

Thus, the ERP test, as conceived of in *Shirur Mutt,* is not principally incoherent. However, the reasoning in nearly every case following *Shirur Mutt* has led to an anomalous situation that effectively renders Article 25-26 redundant. In that light, the Court may choose

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73 *Acharya* (n 10) (Lakshmanan, J.) [66].
74 *Sabrimala* (n 61) (Malhotra, J.) [303.7].

to discard the 'judicial misreading' in the Sabrimala Review, or alternatively, discard the ERP test *in toto* – which is discussed in the next section.

Aishat Shifa v. State of Karnataka – The Beginning of the End?

Is there any justifiable reason for the continuance of the ERP test given the blatant judicial misreading of *Shirur Mutt*? One possible reason is the internal politics of the Court and the role played by one particular judge, Gajendragadkar J., in the entrenchment of the ERP jurisprudence.[75] As the key architect of the doctrine, in his extra-curial writing, Gajendragadkar J. has expressed how he conceives religion to be based on logic and a spirit of scientific inquiry.[76] His approach in his book, titled *Secularism and Constitution of India*, is mirrored in his judgments and can be succinctly summarized as follows:

> "Religion, it is also argued, tends to be scholastic and deductive, and does not accept the validity of a rational and scientific approach…These points no doubt have a certain amount of validity; but they seem to overlook the fact that in its best and highest sense, *religion should and must recognize the validity of reason and the relevance of the spirit of inquiry, unhampered by the letter of scripture.*"[77] (emphasis mine)

Thus, the rationalization and homogenization of religion is not an unintended impact of the ERP test, but its primary cause and reason. In his other extra-curial writings, he has highlighted how the role of a judge is that of 'social engineering' and his judgments on religious freedom underscore a 'predominantly reformist role' to be

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75 Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (n 12) 175.

76 P.B. Gajendragadkar, *Secularism and the Constitution of India* (Bombay University Press 1971).

77 ibid 43.

played by the judge.[78] Matthew John concludes by highlighting that it was only after following Gajendragadkar's lead, that the Supreme Court, acting almost as theologians, entrenched the ERP test. Mohsin Alam Bhatt has also concluded that Gajendragadkar's personal beliefs were an important factor in the shaping of the ERP jurisprudence.[79]

In any event, the more pertinent question now is how the Court can move away from the ERP test. While writing this paper, the SC gave its much-awaited decision in *Aishat Shifa v State of Karnataka.*[80] This decision was the result of an appeal of *Resham v State of Karnataka* which had held that the wearing of the Hijab is not an ERP relying on the *Acharya* standard. While the division bench gave a split verdict and the case is now likely to be referred to a three-judge bench, the reasonings of both judges gain importance. Interestingly, this case deviates from the usual practice of Courts using the ERP test to deny the protection of religious rights.

In this regard, Dhulia J.'s reasoning is of particular importance and allows us to look at one possible way forward to get away from the ERP test by restricting the application of the test in certain specific circumstances. Dhulia J. points out how the ERP test was developed in a particular context, i.e. when there is a question of State intervention and both a question of A-25 and A-26. This proposition had been suggested by Farrah Ahmed and others even before the Karnataka HC started hearing the petitions but went unnoticed.[81] The context in which the ERP test was developed was when the State

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78 P.K Tripathi, 'Mr. Gajendragadkar and Constitutional Interpretation' (1966) 8 Journal of Indian Law Institute 479, 480.

79 M Mohsin Alam, 'Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution' (n 42).

80 *Aishat Shifa v. State of Karnataka* (n 11).

81 Farrah Ahmed, Aparna Chandra and Others, 'Prohibiting Hijab in Educational Institutions: A Constitutional Assessment' (*LiveLaw,* 17 March 2022) <https://www.livelaw.in/prohibiting-hijab-in-educational-institutions-a-constitutional-assessment> accessed 1 September 2022.

sought to defend its policies on the ground that the legislation was bringing either social reform or regulating secular or financial aspects of religious institutions. Justice Dhulia held that the ERP test was *never* meant for situations where individuals claim their Article 25 rights. Instead, the ERP test was meant for situations *only* when there is an element of social reform on the part of the State.

This finding is significant – for this leaves space for a deferential approach to be taken by the Court at least in cases where reformatory measures are not imposed by the State. While the normativity of the sincerely held belief test is outside the scope of its paper, *Aishta Shifa* points out one possible way forward wherein the scope of the ERP test is restricted and the sincerely held belief test might be adopted.

Conclusion

This paper has attempted to analyse how the genesis of the ERP test itself is flawed and is a result of judicial misreading. It then highlighted how the standard to determine ERP has gone from bad to worse over the years with the SC donning the role of a clergy, determining what practices are to be protected – even if it means going against the views religious group itself. From the last section, via an empirical analysis, it has been proved that it is almost impossible for a religious group or an individual to seek protection under Article 25 if the 'but for test' laid down in *Acharya* is followed.

The Supreme Court now has the perfect opportunity to reconsider the ERP test in the *Sarbimala Review Petition*. But if not ERP, then what? There can be two possible answers to this question based on two possible situations. The first is when the State intervenes in the matters of a religious group (*Durgah Committee*) and the other is when an individual claims his right against the religious denomination

(*Sabrimala*). The former can be easily dealt with by the proportionality analysis with the four-pronged test.[82] Doing so would not restrict the scope of the right but shall still allow for the State to intervene where necessary.[83] The latter is where the scenario gets complex. One possible answer to that could be the sincerely held belief test[84] which puts the individual at the center of the debate.[85] Other alternatives might involve either going to the initial idea of ERP where the Courts defer to the religious views or bringing in the idea of reasonable accommodation.

This paper does not argue that these alternatives are flawless but simply wishes to highlight that these are alternatives that could be considered by the Supreme Court in the *Sabrimala Review*. The 'essentiality test' strikes at the very foundation of religious freedom in India by restricting the *scope* of a right without any basis.[86] There might be a difference of opinion about what to replace the ERP test with, but one thing is certain, it is time to give the ERP test a well-deserved burial.

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82 Jaclyn L. Neo, 'Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication' (2018) 16(2) International Journal of Constitutional Law 574, 580.

83 Farrah Ahmed, Aparna Chandra and Others, 'Prohibiting Hijab in Educational Institutions: A Constitutional Assessment'(n 86).

84 Anup Surendranath, 'Essential Practices Doctrine: Toward an Inevitable Constitutional Burial' (2016) Journal of the National Human Rights Commission 173. This is similar to the sincerely held belief test employed in *Bijoe Emmanuel v. State of Kerala* (1986) 3 SCC 615.

85 This aligns with what the judges held in *Sabrimala* while recognising that 'all persons' are 'equally' entitled to their freedom of religion.

86 Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (n 52) 938.

Annexure I

RESEARCH METHODOLOGY

All SC Cases post-2004 and all HC cases post-2015 (13 and 51 cases respectively) were analyzed as of 2022. This was done by using the SCC Boolean Seach Operator. The search was done by using the 10-word cap with the following – '*Essential NEAR Religious NEAR Practice*'. The focus was on cases where a given practice was sought protection under A-25/26. The author after reading all cases during the given period picked only those where there was a serious reliance on Article 25 by either party which came down to 31 cases. In cases where there was a passing reference to ERP or cases simply affirming an old judgment have not been taken into account. Color coding has been used where *red* indicates that the Court has rejected the ERP claim being made, *grey* indicates that the Court did not respond to the ERP claim and *green* indicates that the Court declared the practice as ERP.

The Supreme Court (2004-2022) and High Courts (2015-2022)

Name	Facts	Standard Employed	ERP/Not ERP	Other Comments
State of Gujrat v Mirzapur Moti Kureshi Kassab Jammat (2005) 8 SCC 534 [7 J]	This case involved a challenge to a Prevention of Cow Slaughter Act. Earlier bulls and bullocks over the age of 16 could be slaughtered. By an amendment, i.e., the Bombay Animal Preservation (Gujarat Amendment) Act, the age restriction was taken away. This meant that no bull and bullock, irrespective of age could be slaughtered. But the Court also goes on to address the argument	Does not cite *Shirur Mutt* or *Acharya* – no detailed inquiry on the issue of ERP.	Not ERP - The Court held that it is settled law post-*Ashutosh Lahiri* that since it is an optional practice, it cannot be ERP. Interestingly, that *Ashutosh Lahiri* a 3J bench and this being a 7J bench could have reconsidered that question. Rather this was a lost opportunity to reconsider the	The case depended on whether *Qureshi* is good law. This challenge was due to a change in how the Court viewed the role of DPSPs. *Quareshi* saw Directive Principles of State Policy to be unenforceable and subservient to the Fundamental Rights and, therefore, refused to assign any weight to the Directive Principle contained in Article 48 of the Constitution. This logic stands discarded by a series of subsequent decisions of the SC. Also, Article 48A and Article 51A(g) were not noticed as they were introduced later.

	of cow slaughter being an ERP for Muslims.		ERP test as a whole.	
Advi Saiva Nalasangam v State of Tamil Nadu (2016) 2 SCC 725 [2 J]	In 1970, an amendment to the Tamil Nadu Hindu Religious and Charitable Endowments abolished the practice of appointing religious office holders on hereditary basis. The Court upheld the amendment's constitutionality in 1972, in the *Seshammal* Case. However, in 2006, a government order was issued directing that the Archakas of the temples were to be appointed without any discrimination stemming from customs on the basis of caste or creed. The question was whether the following of the Agamas was an ERP in the appointment of Archakas.	Cites *Shirur Mutt* and *Acharya*.	Upheld *Seeshmal* to say that while the State is exercising a secular power in making appointments, the Court (In *Seeshmal*) found that the criteria prescribed under the Agamas was essential to the practice of the religion, and was therefore inviolable. But the Agamas must be within the constitutional mandate (Similar to Chandrahud J. in Sabrimala)	In *Seeshmal,* the Court held that while the appointment of Archakas on the principle of "next in line" is a secular practice, the particular denomination from which Archakas are required to be appointed as per the Agamas embody a long-standing belief and such belief/practice constitutes an essential part of the religious practice. The Court is not an 'outside authority' to determine ERP. The Court reiterated that though the appointment was a secular function, the denomination of the Archakas must be in accordance with the Agamas. The Agamas restricted the appointment of Archakas to particular religious denominations. However, the Court held that the Agamas must conform to the constitutional mandate and not practice exclusion on the basis of constitutionally prohibited criterion like caste. Gogoi J. suggested checking appointments on a case-to-case basis for Article 14 violations. Hence, any selection made in the future would have to be in consonance with the Agamas. However, in cases of appointments on the basis of any constitutionally unacceptable parameter, it would be open to challenge under Article 14. There is no finding in the judgment on whether the criteria fixed in the Agamas constitutes "law" within the meaning of Article 13(3). If the Agamas fall within what are generally regarded as "personal laws", they would fall outside the scope of Article 13(3), and therefore not be amenable to an Article 14 challenge.[87]

[87] Suhrith Parthasarathy, 'Religious Freedom and Archaka Appointments in the Supreme Court's Recent Decision' (*Indian Constitutional Law and Philosophy*, December 2015) <https://indconlawphil.wordpress.com/?s=Adi+Saiva> accessed 12 August 2022.

Shayara Bano v Union of India. MANU/SC/1031/2017 [5 J]	A challenge to the practice of triple talaq. The contention is whether triple talaq is an ERP and is as such protected by A-25.	*Shirur Mutt* and *Acharya*	Triple talaq was not an ERP. The 'but for' test in *Acharya* alongside the optionality test (re-iterated in *Javed*) was employed.	Khehar and Nazeer JJ. (Dissent) held that none of the forms of 'talaqs' have their origin in the Quran. On the question of determining if triple talaq is approved by Hadiths, the Court explicitly states that it will not go into that question and held, "We truly do not find ourselves, upto the task. We have chosen this course, because we are satisfied, that the controversy can be finally adjudicated, even in the absence of an answer to the proposition posed in the instant part of the consideration…The practice originated 1400 years ago and was widespread. It was therefore clear that practice of 'talaq-e-biddat' was very much prevalent, since time immemorial." It is considered integral to the religious denomination in question, i.e., Sunnis belonging to the Hanafi school and forms part of their personal law. They hold that the Act neither lays down nor declares the Muslim personal law- 'Shariat'. Therefore it cannot be tested for Part III violations. Thus, the two-judges did not decide on the practice being an ERP, but instead stated that the practice is 'integral' to the faith. The Court used use A-142 to direct the legislature to make a law on this subject and till then Muslim husbands are 'injuncted' from practicing triple talaq for 6 months. Joseph J (Concurring) –Agrees with Khehar J. to say the Act does not regulate talaq and, hence cannot be tested on Part III grounds. Disagrees with him to say that triple talaq is not an integral part of Islam. Also disagrees with injuncting a fundamental right on A-142. Relies heavily on the case of *Shamim Ara* to say that what is bad in the Holy Quran cannot be good in law and upholds *Shamim Ara* to say the practice of triple talaq lacks the approval of Shariat and is opposed to the Quran.

				Nariman J and U.U Lalit JJ (Concurring) – All forms of talaq are recognized and enforced by the Shariat Act therefore it is necessary to check for Part III violations. Holds it **not** to be an ERP. *Acharya* test (alongside the optionality test) was employed. The Court held, "Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it" and "the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice" (i.e., te *Acharya test*). Also held that since triple talaq is instant and irrevocable it shall be hit by manifest arbitrariness under Article 14.
Indian Young Lawyers Association v State of Kerala (2017) 10 SCC 689 [5 J]	Whether the practice of excluding women in the age group of 10-50 from entering the Ayyappa temple in Sabarimala constitutes an ERP.	Both *Shirur Mutt* and *Acharya.*	Not ERP	Mishra J and Khanwilkar J held that Ayyappan's do not constitute a religious denomination under A-26. There is no identifiable group called Ayyappan's and they are categorised as Hindus. Under Article 25, the right is not just for inter-faith parity but also intra-faith parity. It cannot be restricted under religious sects' morality, since morality means constitutional morality. The test is the *Acharya* test -- "if nature of Hindu religion is altered". The Court held the practice to not be an ERP in the absence of scriptural evidence. Also relies on *Acharya* to say practices that come about recently cannot be ERP since women were earlier allowed (recency test). Also, "all persons" in A-25 means women and men have equal rights under A-25. Nariman J (Concurring) –Held that the Ayappans were not a religious denomination, and consequently A-26 does not get attracted. Does not discuss the ERP test but points out how A-25 says everyone is "equally entitled" which includes women. Chandrachud J. (Concurring) held that morality is not social morality but constitutional morality - which is based on justice, equality, fraternity,

				etc. There is a multiplicity of constitutional values that should be used to determine the essentiality of a practice. Held that the practice was not an ERP. Documents show the celibate nature of the deity but no connection is shown as to how women should not be allowed to maintain celibacy. Relies on *Acharya* to say it is not obligatory since women used to go earlier so it will not result in a fundamental change in the character of the religion. Also relies on the A-17. Indu Malhotra J (Dissent) –Held the practice is an ERP simply because the community says so (i.e., the original *Shirur Mutt* deference standard). Also holds that Ayappans are a religious denomination under A-26. Holds that one cannot apply rationality to religious practices. Also points out the role of PILs in such cases.
M Siddiq v Mahant Suresh Das (2019) 18 SCC 631 [3 J]	As a response to *Ismail Faruqui* which held that the "mosque is not an essential part of Islam and Namaz can be offered, even in the open."	No ERP inquiry was conducted. But *Shirur Mutt* cited.	Did not disagree with the observation made by the Court in *Ismail*. Two out of the three judges said it was to be read contextually and Nazeer J. dissented to say that Courts have relied on it so it requires reconsideration.	Not a case of ERP *per se* but the Court could have gone into the question of mosques being essential to the Muslim religion. In effect, it upheld the observation of mosques not being an ERP.
Arjun Gopal v Union of India (2019) 13 SCC 523 [2 J]	Can the Court ban/restrict the use of firecrackers during Diwali? A contention was raised that it is a religious practice that continues from time immemorial and therefore cannot be banned.	Neither cited.	Do not comment on ERP. Goes directly to the restrictions to say there is a serious health hazard.	The Court holds that Article 25 is subject to Article 21. If a particular practice, even if religious, threatens the health of the people, it cannot be permitted. Using the principle of 'balancing of rights', A-21 was given primacy.

Chief Secretary to the government Chennai v Animal Welfare Board (2017) 2 SCC 144 [2 J]	Whether Jalikattu is an ERP.	Cites *Shirur Mutt* but not *Acharya*.	Not ERP	The petitioner argued that every festival has religious roots and since this one is followed after harvest, one cannot ignore 'religious ethos'. The Court held that Jalikattu is not an ERP so not liable to be protected under A-25(1). It rejected the ERP contention as no proof was adduced for the same since Jalikattu was considered to be more of a cultural activity as opposed to a religious one.
Kantaru Rajeevaru (SabrimalaTemple Review) v Indian Young Lawyers Association (2020) 2 SCC 1 [5 J] 3-2 Split	The Court agrees to examine the ERP doctrine as a whole alongside the seeming contradiction in *Shirur Mutt* and *Durgah Committee*.	None cited, not required.	Not mentioned - sent it to nine-judge bench for review.	This could be a great opportunity for the Court to examine all relevant issues and as this paper argues, do away with the ERP test in its present form. Interestingly Khanwilkar J. changed his stance i.e., while he was in the majority in *Sabrimala,* he also agreed to the review of the same judgment.
Aishat Shifa v State of Karnataka. (2022) SCC OnLine SC 1394	The Court examined the correctness of the decision of the Karnataka High Court in *Resham v State of Karnataka*.	Cited *Shirur Mutt* and *Acharya*	Split Decision – The ERP test was not employed.	This decision comes against the backdrop of growing criticism of the ERP test. This allows Courts to differentiate *Shirur Mutt* and *Acharya* based on facts and hold the ERP test inapplicable in instances where there is no element of social reform and only individual rights are being claimed. It allows the nine-judge bench an opportunity to look at this as an alternative to wither down the ERP test.

The High Courts (2015-2022)

Cases	Facts	Standard of Reasoning	ERP or Not Protected	Other Comments/Evidence examined
Allahabad HC				
Afsal Ansari v Union of India MANU/UP/0995/2020 [2 J] (PIL)	Whether the recital of the Azan over loudspeakers is protected as an essential/integral practice under A-25.	Some cases are cited to put forward the point of loudspeakers and noise pollution. *Shirur Mutt* or *Acharya* is not cited. The recency test is employed to argue that the usage of loudspeakers during Azan is a recent practice and hence cannot be essential.	Not ERP. The Court held that the recital of the Azan is a fundamental right but recital on loudspeakers is not.	The Court constantly talks about a "rights versus rights" framework since loudspeakers will impact the rights of minors and elderly persons. The entire focus remains on noise pollution. Interestingly, if the concern is noise pollution and the adverse impact it has, ideally the Court could restrict the right under 'health'. Instead, we see the scope of the right itself being diminished.
Gauhati HC				
Hifzur Rahman Choudhury v Union of India MANU/GH/0575/2022. [2 J] (PIL)	The Animal Welfare Board is asking the State to prevent cow slaughter. The State passes a communication under the Assam Cattle Prevention Act to disallow slaughter on Bakra Eid. Petitioners contend that the Act under S.12 allows for exemptions based on religious grounds. Hence the order restraining cow-slaughter on Bakra-Eid is invalid.	Relied heavily on *Qureshi* and *Mirzapur Moti* to say it is well-settled that cow slaughter is not ERP. Approves of the optionality test. Either sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. Hence to claim an exemption under section 12, the religious practice must be an ERP.	Not ERP - Agrees with the view of *Qureshi* that the slaughtering of healthy cows on Bakra Eid is not essential or obligatory.	The Court held that for lifting the ban it should be shown that it is essential for a Muslim to sacrifice a healthy cow on Bakra Eid and only then can an exemption under Section 12 be claimed. Additionally, they hold that it is a settled legal position that there is no fundamental right to insist on the slaughter of a healthy cow on Bakra Eid.

Rajasthan HC				
Nikhil Soni v Union of India MANU/RH/1345/2015. [2 J] (PIL)	Whether the practice of Santhara/Sallekhana is an essential religious practice in Jainism and therefore entitled to protection under Article 25. This decision was stayed by SC.[88]	Relies on *Acharya* and *Hamid Qureshi*. The standard utilised is that of *Acharya*.	Held not to be an ERP using the optionality test.	The Court itself highlights how religious books and scriptures approve of the practice of Santhara. Multiple scriptures cited by petitioners. Yet the Court held that while there is a scriptural basis to prove the religious aspect of the practice, the obligatory aspect has not been proved. The Court came down heavily on PILs and how petitioners had no locus (similar to the criticism of Malhotra J. in *Sabrimala*).
Andhra Pradesh HC				
Yellanti Renuka v State of Andhra Pradesh (2022) SCC OnLine AP 688 [1 J]	Whether relocation of the deity in Mahakali Ammavari Temple at the time of the reconstruction of the temple violates ERP.	Relies on *Shirur Mutt* and *Durgah Committee*	Not ERP.	The deity was installed by the Petitioner in 1976 keeping the procedure of Agamashastras in mind. Reconstruction of the temple is due to highway expansion. The temple is in a dilapidated state. Petitioners argued that the State cannot remove the deity. It was held not to be ERP. The Court held that the petitioners have failed to prove ERP using the authoritative text of Agama Shastra which prohibits the relocation of idols or other material. It was also an admitted fact that the

[88] Dhananjay Mahapatra, 'Supreme Court permits Jain community to practice Santhara' (*The Times of India*, 1 September 2015) <https://timesofindia.indiatimes.com/india/supreme-court-permits-jain-community-to-practice-santhara/articleshow/48751751.cms> accessed 2 September 2022.

				deity was taken out of the temple and traveled through various parts of India.
Delhi HC				
DSGMC v. Union of India MANU/DE/1651/2018. [2 J]	Whether the wearing of Kara/Kirpan by students practicing the Sikh religion in the NEET examination conducted by CBSE can be prohibited.	Relies on *Shirur Mutt* and *Acharya*.	Does not comment on ERP at all. It impliedly uses the principle of reasonable accommodation.	The Court highlights how there is a special mention for Kirpans in A-25. CBSE says that the rule is to maintain uniformity and prevent malpractices. Petitioners argued that these articles are allowed elsewhere in public spaces (flights etc). It was held that it is incumbent on CBSE to make special arrangements for the petitioners if they want to prevent malpractice. They further held that every practicing Sikh is enjoined to wear the Kara/Kirpan without commenting on ERP. (Reasoning is similar to *Amnah Bint Basheer*).
Manisha Sharma v Commissioner of Delhi 2015 SCC OnLine Del 13254. [1 J]	The police rejected the petitioner's request to assign him a temporary firework license for the occasion of Diwali, which is being challenged. One of the grounds is that firecrackers are related to Diwali and the use of firecrackers during a religious festival should be protected under A-25.	Relies of *Ismail Faruqui and Javed* but not *Acharya* or *Shirur Mutt*.	The bursting of crackers during Diwali is not an ERP. The Court rejects the argument by holding that the bursting of firecrackers have no sanctity in religious texts and there is nothing to suggest that the bursting of firecrackers is even a religious practice.	The Court hints towards the fact that even if it were to recognise the practice as ERP, it would be willing to restrict the practice on the ground of health. It was held that Diwali is historically a festival of lights and is mainly associated with the pooja that is done, and not with the bursting of firecrackers.

Tripura HC				
Subhas Bhattacharjee v State of Tripura (2019) SCC OnLine Tri 441 [2 J] (PIL)	The Court frames the following question, "Whether the age-long practice of 500 years of sacrificing animals, after the stoppage of the practice of human sacrifice, in Tripureswari Devi Temple, Udaipur, Gomati District, Tripura can be construed as an essential and integral part of religion, as protected under Article 25(1) of the Constitution of India?"	Relies on *Shirur Mutt* and *Acharya*. Uses the 'but for' test in *Acharya* and optionality in *Qureshi*.	Animal sacrifice in temples is not an ERP. While the religious text mentions the practice, it is not obligatory. Moreover, it does not change the essential character of the religion. Hence the *Acharya* standard is used.	At the outset, the locus of the petitioner was challenged since he did not make a representation to the government and directly came to the Court. However, the Court approved it by saying that the social practice would have continued if not for this PIL (contrast with Malhotra J in Sabrimala). Apart from ERP, the Court holds that animals have the right to life after *Animal Welfare Board* Also, even if this is an ERP, post *Sabarimala,* the Court recognises that this would violate constitutional morality. The Court also attempted to restrict the practice on the grounds of health, and observed that, "one cannot deny the fact that sacrifice of animal in temple does affect mental and physical health of an individual" and "the blood of the animals is allowed to flow in the open drains, as a result, causing foul smells".
Madhya Pradesh HC				
Aarsh Marg Seva Trust v State of Madhya Pradesh MANU/MP/1626/ 2019 [2 J]	The petitioners were women who claimed they had a right to perform Abhishek for God Bawangajaji in Jainism and the Trust is restricting them from doing	Cites *Shirur Mutt* and *Sabrimala* but not *Acharya*.	The Court held that celibacy of the idol is an ERP and, therefore, the restriction on women to perform Jal Abhishek is an ERP. But the very practice of Jalabhishek is not ERP (so women	The Court distinguishes this from *Sabrimala* by arguing that *Sabrimala* was regarding the entry of women into the temples. Here, women are allowed entry and only those practices which go against the

	so. They claim that women performing the Jal Abhishek is an ERP. They also challenge it on A-14 and A-15 grounds (this is post-*Sabrimala*). Interestingly, the Trust also claimed the restriction of Abhishek for women on the grounds of ERP. They argued that the restriction on women was to maintain the celibacy of the naked idol.		cannot claim an ERP for Jal Abhishek).	celibacy of deity/idol are restricted, so *Sabrimala* was distinguished on facts.
Kerala HC				
Muraledharan T v State of Kerala (2020) SCC OnLine Ker 2313 [2 J] (PIL)	There was a challenge to the Kerala Animals and Bird Sacrifices Prohibition Act, 1968. Similar to *Subhas Bhattacharjee* in Tripura HC.	Cites *Shirur Mutt* and *Acharya*	Not ERP. The Court explicitly holds this based on the *Acharya* standard basis the fact that the evidence is lacking (But for test).	There was no material to establish that sacrificing animals and birds was essential to the religion. It was shown that the scriptures permitted sacrifice, but it could not be proved that it was obligatory.
Kannan KG v State of Kerala (2019) SCC OnLine Ker 6208) [1 J].	A decision was taken in an all-party meeting that persons who are accused in criminal cases shall not be engaged as volunteers for temple festivals. Petitioner has challenged this on grounds of Article 25.	No inquiry on ERP. *Bijoe Emmanuel* cited.	Not ERP - Participation in a temple festival cannot be an ERP.	It is also said that this decision was taken so public order is maintained (which is one of the limitations under A-25). But no connection is shown on how an accused volunteering in temple festivals might lead to the deterioration of public order.
Riza Nahan v State of Kerala (2021) SCC OnLine Ker 9861 [1 J]	The petitioner is an 8th-standard student who was selected for the Student Police Cadet (SPC). SPC	None cited.	Does not say anything on ERP. Held that there is no compulsion on the student to join SPC and if you are not ready to	There is no inquiry on the ERP doctrine. Moreover, the reasoning is simply absurd. If taken to its logical conclusion, any

	had a uniform that prohibited the wearing of a Hijab and full-sleeved dress. It was contended that this violated A-25 and the wearing of the Hijab was an ERP.		follow the dress code you need not join.	group can restrict the religious rights as long as membership of that group is voluntary – a slippery slope argument.
Qualified Private Medical Practitioners Association v Union of India (2020) SCC OnLine Ker 295)]2 JJ (PIL)	This case was a result of a PIL by a few doctors against a practice in the Church. Priests used to serve wine from a single spoon to the mouth of every communicant. This practice is referred to as the 'Eucharist'. It was argued that there was no cleaning of the spoon which gave rise to a very high possibility of saliva contamination. The Church says the practice of the Eucharist is protected under A-25.	None. *Acharya* Standard not followed. If the 'but for test' was to be applied, the Court could not hold this as an ERP.	It is an ERP. It was held that receiving the holy sacrament is a matter of expressing your faith, no authority can interfere except according to the restrictions laid down in A-25 and A-26. It was further held that if at all any changes are required then they must come from within the Church itself.	The Court held that the Food Safety Act has no role to play here and the government using the FSA cannot interfere in matters of the Church. The doctors have no instances of how the practice has impacted health adversely. Additionally, even though not obligatory the practice was still held to be an ERP.
Amnah Bint Basheer v CBSE MANU/KE/0470/ 2016 [1 J]	Challenge to the prescription of dress code in All India Premedical Entrance Test in 2016 conducted by CBSE. It argued that people hide electronic devices so long sleeves are not permitted. Petitioners cannot wear a headscarf and full-sleeved dress as mandated by Islam. Hence the question is of	Cites *Shirur Mutt* and *Acharya*.	The Court held that wearing the headscarf is an ERP. The Quran indicates that the Islamic dress code for women not only consists of a scarf that covers the head, the neck, and the bosom but also includes the overall dress that should be long and loose. The Court does not use the 'but for test'.	The Court does not (rightly so) limit the scope of the right. The Court holds that the restrictions under A-25 are not satisfied. To answer the question of transparency and credibility of the examination, the approach of the Court is always to 'harmoniously accommodate'. Held that the invigilator can be asked to frisk such candidates including by removing the scarf.

	whether Hijab is an ERP.			However, this must be done by honouring the religious sentiments of the candidates. Finally, the board claims practical difficulties in implementing this. However, the Court held that practical difficulty cannot be an excuse to honour fundamental rights.
Karnataka HC				
South Central India Union of SDA v Government of Karnataka (2016) SCC OnLine Kar 8342 [1 J].	The 'Seventh Day Adventist' group is a denomination of Christians. They are arguing on behalf of a student whose exams are scheduled on Saturday. The faith is that members of the group do not take part in any activity on all Saturdays (Sabbath Day) from 6 AM to 6 PM for doing so would be an act of sin. The question is whether following the Sabbath day is an ERP.	Cites *Shirur Mutt* and *Acharya*.	Not ERP. The Court recognised that as per the religion, the god created the universe in six days and rested on the seventh day, which is celebrated as the Sabbath Day. But the Bible does not say the week commences from Sunday and ends on Saturday - Sabbath Day can be Saturday or Sunday or any other day for that matter.	The judgment begs the question as to whether *any* scriptural documents can provide all the answers. There was also disagreement within the denomination itself on the question of when the Sabbath Day was to be celebrated.
Resham v State of Karnataka (2022) LiveLaw (Kar) 75 [3 J]	If wearing of Hijab by Muslim women constitutes an ERP and if the prescription of a school uniform is a violation of A-25.	Cites *Shirur Mutt* and *Acharya*.	Not ERP. The Court uses the 'but for' test in *Acharya* to hold that wearing the hijab was only recommendatory. Held that, "it is not that if the alleged practice of wearing hijab is not adhered to, those not wearing hijab become the sinners, Islam loses its glory and it ceases to be a religion".	They distinguish this case from *Basheer* by saying the exam was a one-time affair and this case concerns a regular everyday practice. However, logically, even if the facts are different, the practice being essential to Islam cannot change. It can't be that wearing the Hijab in an examination is an ERP but not in a school.

P. Lathavya Acharya v State of Karnataka MANU/KA/4599/2021 [2 J] (PIL)	The question is whether the appointment of the pontiff of *Shirur Mutt* is an ERP. There was a 16-year-old minor as the Matadhipathi (chief pontiff) of the Udupi Shiroor Mutt. The Court held that *Shirur Mutt* is a religious denomination and has A-26 rights. The contention was that a 16-year-old cannot become the chief pontiff. The Court held that the ERP of appointing heads was being practiced for 800 years in consonance with the teachings of Shriman Madhwacharya.	Cites *Shirur Mutt* but not *Acharya*.	Held that the appointment of the pontiff was an ERP. The practice has been performed for 800 years. Also, Hindu religion allows one to be a sanyasi before eighteen years of age.	The system of Dwandwa Mutts (eight mutts are paired with each other. If one mutts head dies without nominating the successor the head of the paired mutt appoints the successor) is an ERP. One of the key challenges were due to the fact that he was a minor. The 'but for' test was not employed here. It was held that, "Courts are certainly not meant to write religious text, however, they are under an obligation to follow religious text in the matter of cases dealing with religious dispute and to follow old practices which are prevalent in the religion so long as they do not violate constitutional rights of an individual".
Bombay HC				
Campaign against Manual Scavenging v State of Maharashtra (2015) SCC OnLine Bom 3834 [2 J] (PIL)	By previous interim directions, the Court held that the river bed of Chandrabhagha River shall not be used for any activity like temporary pandals, booths, shelters, or any prohibited activity. The Warkari Sahitya Parishad contends that there is a long custom/tradition which exists for 700 years of holding Bhajans, Kirtans, and Gajar on the river bed.	Cites *Acharya*.	The practice of having bhajans/kirtan on the river bed specifically cannot be an ERP. The standard used is of *Acharya* - "by no stretch of imagination, it can be said that act of imposing ban on erecting temporary structures on the river bed will amount to the change in the character of the religion or its beliefs".	The Court recognises that even if the practice were to be an ERP, it would nevertheless be restricted on the ground of health.

Zahid Mukhtar v State of Maharashtra MANU/MH/0670 /2016 [2 J] (PIL)	The Maharashtra Animal Preservation (Amendment) Act, 1995 which got presidential assent in 2015 is challenged. By the Amendment Act, in addition to the existing prohibition on the slaughter of cows, a complete prohibition was imposed on the slaughter of bulls and bullocks in the State. A ban was imposed on possessing the flesh of cow, bull, or bullock slaughtered within and outside the State.	*Acharya* was not cited. The Court relies on *Shirur Mutt*	Not ERP – Held that for lifting the ban it should be shown that it is essential for a person practicing Islam to sacrifice a healthy cow on Bakra Eid.	Heavy reliance was placed on Articles 48 and 48A. The Court relied on the case of *Ashutosh Lahiri* to hold that it is, not obligatory for a person practicing Islam to sacrifice a cow or progeny of a cow.
Noorjehan Safia Niaz and Another v State of Maharashtra (2016) SCC OnLine Bom 5394 [2 J] (PIL) (Reaffirmed by SC in *Haji Ali Dargah Trust* case)	Earlier the petitioners could visit the sanctum sanctorum where the saint was buried although through a different entry for men. In 2012, a barricade was put and women were not allowed to enter the sanctum sanctorum. The Trust claimed that stopping women from entering the sanctum sanctorum was an essential part of Islam and therefore protected by A-25.	Both *Shirur Mutt* and *Acharya*	The prohibition of women from entering the sanctum sanctorum was not an ERP. The standard used is whether the nature of Islam would change if women were allowed i.e., the 'but for test' in *Acharya* was employed.	The Court also held that Part III had to be satisfied in any case and even if it was an ERP, the Court would not permit such practice. Since people from all over visited the place there was no right to discriminate under the guise of religion. What weighed heavily with the Court was the fact that women were permitted to enter the sanctum sanctorum before 2012 (thereby employing the recency test).

Mahesh Vijay Badekar v State of Maharashtra (2016) SCC OnLine Bom 9422 [2 J] (PIL)	Two issues were raised. First regarding the construction of pandals or temporary booths for religious festivals and second, regarding noise pollution caused due to the use of loudspeakers at religious festivals. The question was whether either of these two was an ERP.	*Ismail Faruqui* (not *Shirur Mutt* of *Acharya*).	Neither of the two was held to be an ERP. The Court held that the State must ensure roads are not blocked and remain accessible to the public. Further, it was held that the right to worship does not extend to the right of worship at every place.	It was held that "no one has fundamental right of offering prayers or worshiping on a street or footway by obstructing free flow of traffic as it is not an essential part of any religion".
Elmas Fernandes v State of Goa MANU/MH/2912 /2019 [2 J]	The challenge is to Article 19 of Decree Number 35461. This related to the annulment of marriage, the bishop appointed a judge in the patriarchal tribunal to hear the case. The contention is that the judge was biased. The judge decided to annul the marriage.	None cited.	Not ERP. The ourt held that the power of the Ecclesiastical Courts may have civil consequences. Hence it cannot be considered as an ERP.	Under Article 19 of the Decree, the procedure is that Catholics who want to annul their marriage appeal to the Bishop in Panaji. Once the appeal is decided by the Tribunal, the same order is sent to the HC for enforcement. The same was challenged by the woman and the church claimed it is an ERP and hence protected under A-25. Thus, Catholics will now have to file separate petitions in civil Courts for annulment of marriage.[89]

[89] Lisa Monteiro, 'Church tribunal decisions will not have any civil effect henceforth' (The Times of India, October 2019) <https://timesofindia.indiatimes.com/city/goa/church-tribunal-decisions-will-not-have-any-civil-effect-henceforth/articleshow/71640129.cms> accessed 1 September 2022.

Madras HC				
T Wilson v DC Kanyakumari (2021) SCC OnLine Mad 1739 [1J]	The petitioner is a devout Christian who used to conduct prayer meetings in his residential house. Prayers were conducted on loudspeakers. This was restricted by the District Collector since people complained of a possible law and order situation. The Petitioner claimed that this violated Article 25.	Only *Acharya* but not *Shirur Mutt*.	The Court held that congregational prayers are indeed an ERP. But no protection was given to the petitioner.	The Court held that, "Bible does not profess a prayer to be done or conducted in a manner that would warrant gathering of people and usage of amplifiers of any sort in the process".
Ramaswamy Udayar v District Collector (2021) SCC OnLine Mad 1779 [2 J]	Religious procession of Hindus was to be carried through the streets/roads of a Muslim-majority area. The claim is that such permission must be granted.	*Acharya* but not *Shirur Mutt*	No mention of ERP - but allowed procession on A-25 grounds. They do not go into any inquiry about ERP.	With no inquiry into ERP, the Court instead chooses to observe how a secular country necessarily has to be a tolerant one. This seems like a judgment given on gut and intuition and not the law.

KARNATAKA HIGH COURT RULING ON CONTENT BLOCKING: A SETBACK FOR USER RIGHTS

*Sachin Dhawan**

ABSTRACT

On June 30, 2023 the Karnataka High Court dismissed X's [hereinafter Twitter] writ petition challenging several blocking orders issued by the government in 2021 and 2022. It even imposed costs on Twitter. The blocking orders - pertaining to both tweets and user accounts - were issued under Section 69A of the Information Technology Act, 2000, which empowers the government to block content on several grounds. The government must follow a specific process when it seeks to block content, laid down in the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. One of the major contentions raised by Twitter in this case was that the government did not follow the required process. Twitter argued in part that the government was required to involve users/originators in the blocking process, which it did not. As per Twitter the government should have notified users about the possible blocking of their content, given them a hearing, and after blocking their content supplied them with a copy of the blocking order along with reasons for the same.

The High Court however disagreed. It stated that there was no precedent to suggest that the government had to make reasonable efforts to notify users, give them a hearing and supply them with a copy of the blocking order along with reasons. Moreover, it said that

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aggrieved users had not approached the court despite being more than capable of doing so. So the Court concluded that the fact that the government did not involve users in the blocking process did not invalidate the blocking orders. With respect, the High Court should not have undermined the rights of users in this way. Binding law and sound public policy dictate that users should be involved in the blocking process. Thus, this article will focus on the decision's lacuna concerning users. It will make three points: (i) Notice should have been given to users (ii) A hearing should have been given to users and (iii) Blocking orders along with reasons for blocking of content should have been conveyed to users.

PART 1: INTRODUCTION

On June 30, 2023 a Single Judge Bench of the Karnataka High Court (Court) dismissed the online platform[1] X's writ petition challenging ten blocking orders issued by the respondent Union of India (Ministry of Electronics and Information Technology - MeitY) in 2021 and 2022. It also imposed costs on X (Twitter). The blocking orders - pertaining to both tweets and user accounts - were issued under Section 69A of the *Information Technology Act, 2000* (IT Act), which empowers MeitY to block content on several grounds.[2] MeitY must follow a specific process when it seeks to block content, laid down in the *Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules)*.[3]

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1 The terms 'platform' and 'intermediary' are used interchangeably in this article.

2 The grounds are as follows: "sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States, or public order or for preventing incitement to the commission of any cognizable offence relating to above."; See: Section 69A, The Information Technology Act, 2000.

3 The process is as follows: Complaints requesting blocking of content are sent to Nodal Officers of various ministries who forward them to the Designated Officer, Ministry of Electronics and Information Technology (MeitY). A Committee for Examination of Requests comprising the Designated Officer and other members of the Executive Branch gives recommendations regarding the validity of such complaints, after hearing

One of the major contentions raised by Twitter in this case - *X Corp v. Union of India*[4] - is that MeitY did not follow the required process. Twitter argued in part that MeitY was required to involve content creators/uploaders (users/originators) in the blocking process, which it did not. As per Twitter, MeitY should have notified users about the possible blocking of their content, given them a hearing, and after blocking content, supplied affected users with a copy of the blocking order along with reasons for the same.

The Court however disagreed. It stated that there was no precedent to suggest that MeitY has to make reasonable efforts to notify users and give them a hearing. Moreover, it said that aggrieved users had not approached the Court despite being more than capable of doing so. As a result, the Court concluded that the fact that MeitY did not involve users in the blocking process did not invalidate the blocking orders.

With respect, the Court should not have undermined the rights of users in this way. Binding law and sound public policy dictate that users should be involved in the blocking process. Thus, in this article I will focus on the decision's lacuna concerning users/originators. I argue that the decision should have upheld and followed *Shreya Singhal*

objections from intermediaries or originators of content, who receive a notice to participate in the deliberations of the Committee (which deliberations must be held no sooner than 48 hours after provision of notice to intermediaries/originators). These recommendations are conveyed by the Designated Officer to the Secretary of MeitY, who gives her/his approval/disapproval to them. If s/he approves, then the Designated Officer directs the intermediary to block content. If s/he disapproves, then the Designated Officer informs the Nodal Officer of the same; See: The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

4 X Corp. v. Union of India and Ors., MANU/KA/2230/2023 [refer to Manupatra version].

v. Union of India[5] (Shreya Singhal) and other rulings which clearly articulate the need for extending robust due process protections[6] to individuals before depriving them of fundamental rights. I engage with critiques that assert that Shreya Singhal is (i) not binding law and/or (ii) impractical to implement. I also discuss what future courts can do to more fully realize the promise of Shreya Singhal.

This article makes a contribution to existing literature by highlighting the role of Shreya Singhal in evolving the law on content blocking. Since the ruling was rendered in 2015, several critics have sought to diminish its significance regarding user due process rights. This article counters such a narrative in order to restore Shreya Singhal's status as a landmark decision bolstering user due process rights that is binding on the Court.

The article proceeds as follows - Part 2 will discuss the main contours of the Court's decision. Part 3 will critique the decision's shortcomings regarding user rights. Part 4 concludes by emphasizing the importance of integrating user due process rights into the content blocking process.

PART 2: THE KARNATAKA HIGH COURT DECISION

A] Context and Background:

The passage of three 'farm laws'[7] in September 2020 led to extensive protests in India. A significant degree of discontent was expressed online, through platforms such as Twitter. During this time

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5 Shreya Singal v. Union of India, [2015] 5 SCC 1.

6 The terms 'due process' and 'procedural safeguards' are used interchangeably in this article.

7 The farm laws were: The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020; The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services Act, 2020; The Essential Commodities (Amendment) Act, 2020; See: *Three farm laws to be rolled back. What were they all about?,* India Today (20/11/2020), available at https://www.indiatoday.in/india/story/three-farm-laws-to-be-rolled-back-what-were-they-all-about-1878746-2021-11-19, last seen on 12/11/2023.

public frustration with the government's response to the COVID pandemic was also articulated on Twitter among other platforms.

MeitY concluded that some of these expressions of discontent violated the law. Over the period of a year, from February 2021 to February 2022, it issued 10 content blocking orders to Twitter under Section 69A of the IT Act (Section 69A) read with the Blocking Rules. These orders called for the blocking of 1474 accounts and 175 tweets.[8] Twitter complied with these directions, under protest.

B] Court's Ruling:

Eventually, Twitter challenged the legality of a few account and tweet blockings from these 10 blocking orders (39 URLs were challenged, but the exact number of accounts and tweets that comprise these 39 URLs is undisclosed). It filed a writ petition in July 2022 before the Court arguing inter alia that i] Blocking of accounts in addition to tweets is disproportionate and hence unconstitutional ii] Blocking of accounts in addition to tweets is against a plain reading of Section 69A and hence in violation of statutory law iii] MeitY failed to provide reasoned blocking orders to Twitter, in violation of Section 69A iv] MeitY failed to provide notice to users in violation of procedural safeguards contained in the Blocking Rules.

The Court dismissed the writ petition for the following reasons -

One, it stated that blocking of accounts in addition to tweets is not disproportionate. The Court stressed that the blocking orders were issued after due deliberation; they were not the product of hasty action. Given the evenhandedness on display by MeitY, it is evident that the blocking of accounts which contained legal and illegal tweets does not

8 Supra 4, at 4.

violate the proportionality principle. Moreover, restricting MeitY to blocking tweets would have delayed efforts to stem the spread of illegal content as sifting illegal tweets from legal ones is an onerous and time-consuming task. In any event, the Court noted, the principle of proportionality cannot be invoked by a "juristic person and a foreign entity"[9] such as Twitter.

Two, the Court said that blocking of accounts is permitted by the language of Section 69A. It acknowledged that account blockings will prevent legitimate content from being uploaded in the future. But it stated that Twitter was incorrect to argue that Section 69A only permitted blocking of already posted content. Twitter's interpretation of Section 69A, which focused on the past tense of the words used therein, was in the eyes of the Court too rooted in a "linguistic interpretation of statutes."[10] Such a reading failed to reflect the actual intent of the statutory provision.

The Court elaborated that the intent of Section 69A is to prevent harm caused by incendiary content that falls within the proscribed grounds enumerated in the Section. The goal of prevention is not served by an interpretation which waits for incendiary content to be posted, for it to spread far and wide and only then for MeitY to step in after a cumbersome procedure and block it. Only for the malcontents involved to again post incendiary content while adopting a "better luck next time"[11] approach. It's more effective to deter such conduct by empowering MeitY to block accounts in addition to tweets.

Three the Court said that MeitY did provide reasoned blocking orders to Twitter - in effect if not formally. This is because Twitter was part of the process which culminated in the issuance of blocking

9 Ibid, at 30.
10 Ibid, at 19.
11 Ibid, at 20.

orders. This was a deliberative process involving "high functionaries of the government."[12] During this process, in fact, Twitter successfully urged a Review Committee to unblock 10 user accounts.[13] Thus, overall, the blocking process was marked by "processual fairness"[14] during which Twitter was made aware of the problematic nature of the content at issue. So it is incorrect to assert that Twitter was not provided with the reasons behind the blocking orders.

Four, the Court said that MeitY did not have to provide notice to users. This is because the text of Rule 8(1) of the Blocking Rules requires the Designated Officer of MeitY to provide notice to either the user or the intermediary, not the user and the intermediary. MeitY followed this rule by providing notice to the intermediary, Twitter.

The Court denies that the following words of Shreya Singhal change this interpretation: "It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the 'person' i.e. the originator is identified he is also to be heard before a blocking order is passed…"[15] While dismissing Twitter's reliance on this portion of Shreya Singhal, the Court said "the observations in a judgment cannot be construed as the provisions of a statute."[16] The Court also noted that the details of affected users were with Twitter but it never shared those details with MeitY or urged MeitY to contact users. Finally the Court states that even if there was a failure to notify users, this is an issue for users to raise, not intermediaries like Twitter.

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12 Ibid, at 26.
13 Ibid.
14 Ibid.
15 Ibid, at 27.
16 Ibid.

PART 3: ASSESSMENT OF THE DECISION: A SETBACK FOR USER RIGHTS

The Court's analysis of the law on content blocking deserves critical scrutiny. In this part I focus on how the Court erred on the issue of user due process rights. I also discuss some potential critiques of my position and suggest ways in which courts in the future can better uphold user due process rights.

This decision is of considerable significance. If the law on content blocking evolves in the direction laid down by the Court then the free speech rights of users will suffer disproportionately. Whereas platforms will still have access to basic due process safeguards [such as notice, a hearing and some semblance however attenuated of reasons behind a blocking order][17] users will have their content blocked without recourse to even these safeguards.[18]

A] The Court Did Not Follow Shreya Singhal on User Due Process Rights

Primarily, the Court errs in its interpretation of Shreya Singhal. Shreya Singhal is binding law regarding user rights under Section 69A and the Blocking Rules. It stresses the importance of robust due process rights for users.

While interpreting the Blocking Rules, Shreya Singhal clearly specifies that notice should be given to the intermediary and the

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17 Twitter Inc. v. Union of India & Anr., W.P. No. 13710/2022, Intervention Application (Aakar Patel), at 20. This application specifies that notice and a hearing is given to platforms but not to users during the content blocking process.

18 This is not to assert that the outlook is rosy for platforms. But they emerge out of this decision with slightly more rights and vastly more resources to push for these rights. Twitter is a multi-billion dollar corporation that possesses the wherewithal to push back against overbroad government action; ordinary users lack access to such resources. Such a power differential signifies that a premium should have been placed by the Court on doing more to secure the rights of ordinary users, to enable them to push back in the future.

user/originator where "the originator is identified."[19] Moreover, it clearly lays out that after notice is given, a pre-decisional hearing i.e. a hearing before a blocking order is passed should be provided to both the intermediary and the user.[20] Finally, it emphasizes that blocking orders along with reasons must be conveyed to the user as well - not just the intermediary. Doing so enables users to exercise their rights and challenge the validity of blocking orders via writ petitions before High Courts.[21]

Unfortunately, as explained above, the Court deprived users of these due process rights. It ignored Shreya Singhal. As will be seen later, the Court also ignored other precedent emphasizing the need to extend due process protections to individuals before depriving them of fundamental rights.[22]

B] Criticism of Shreya Singhal and User Due Process Rights

Several commentators have criticized Shreya Singhal's directions on user due process rights. They contend that the judgment is not binding precedent[23] and also that it is impractical to implement.[24] As per this view, the Court may have been correct to dismiss Twitter's arguments. Specifically, critics contend that:

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19 Supra 5, at ¶ 110.

20 Ibid: "It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e., the originator is identified he is also to be heard before a blocking order is passed."

21 Supra 5, at ¶ 109.

22 Vasudev Devadasan, *The Karnataka High Court on Twitter's complaint: Carte blanche to the government,* Indian Constitutional Law and Philosophy (Jul. 2, 2023), available at https://indconlawphil.wordpress.com/2023/07/02/the-karnataka-high-court-on-twitters-complaint-carte-blanche-to-the-government/, last seen on 09/08/2024.

23 Divyansha Sehgal and Gurshabad Grover, *Online Censorship: Perspectives From Content Creators and Comparative Law on Section 69A of the Information Technology Act* (Apr. 13, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404965, last seen on 09/08/2024.

24 Tanul Thakur v. Union of India, W.P. (C) No. 788 of 2023, Written Submission on Behalf of Respondent, MeitY, p. 7.

i] Shreya Singhal is Not Binding Precedent: The Supreme Court did not declare Section 69A and the Blocking Rules unconstitutional[25] nor did it read down the Section and the Rules.[26] The Court echoes this sentiment when it states that notifying users about the possibility of their content being blocked is "not mandatory."[27]

ii] Shreya Singhal is Impractical to Implement: Even if there is some validity - on paper - to the Supreme Court's comments on user due process rights, the argument goes, it is difficult to implement them.[28] They are in effect nugatory. Specifically, critics contend that it is difficult to implement Shreya Singhal regarding a] notice to users and b] reasoned order to users.

What if MeitY mechanically asserts that it is not able to contact users? What has been seen since Shreya Singhal in cases like *Tanul Thakur v. Union of India*[29] (Tanul Thakur) is that when questioned MeitY officials simply assert that efforts were made to contact users but they were unsuccessful.[30] In this way, there is no way to hold MeitY accountable if it has not made reasonable efforts to contact users. So far, courts have not pushed MeitY to substantiate its claims that efforts were made with evidence of such efforts in the form of emails sent etc.

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25 Supra 4, at 18: "In SHREYA SINGHAL, supra the challenge in a social action litigation (u/a 32 of the Constitution), to the validity inter alia of section 69A of the Act & the Website Blocking Rules came to be repelled by the Apex Court on the ground that Rule 8 provides for sufficient substantive & procedural safeguards." *See also,* Merrin Muhammed Ashraf, *Reimagining Regulation of Speech on Social Media Platforms in India,* 7(4) NUJS JOURNAL OF REGULATORY STUDIES 21, p. 39 (2022).

26 Supra 23, at 8.

27 Supra 4, at 29.

28 Supra 24.

29 Tanul Thakur v. Union of India & Ors., W.P. (C) 13037/2019, Delhi High Court Order (May 11, 2022).

30 Supra 24. *See also* Tanul Thakur v. Union of India & Ors., W.P. (C.) No. 13037 of 2019, Counter Affidavit, at 17-18.

It has also been contended that some users, if given notice, will be stirred to post more unlawful content[31] "through…[anonymous] accounts"[32] and accounts on other platforms. They will become aware of the fact that MeitY knows about their online activities and so more easily escape capture.[33] As a result, MeitY should not give them notice.

Critics also contend that the Supreme Court in Shreya Singhal failed to fully articulate user due process rights.[34] While it stated that reasoned orders have to be given to the user and intermediary, it left untouched Rule 16 of the Blocking Rules[35] (Confidentiality Rule) which MeitY has since cited to deny giving copies of blocking orders to users even when they request it.

Therefore, the argument goes that courts will not be able to enforce the due process safeguards of Shreya Singhal even if they want to because they will be told that a] reasonable efforts were made but the user couldn't be contacted b] reasonable efforts should not be made in some cases because that will further encourage wrongdoers and c] The Confidentiality Rule bars giving users a copy of reasoned blocking orders. Courts will therefore have to conclude that Shreya

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31 Supra 4, at 85-86.

32 Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part II (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/24/the-phantom-constitutionality-of-section-69a-part-ii-twitter-v-the-union/, last seen on 09/11/2023; *See also,* Supra 4, at 85-86: "Informing the user by notice will only cause more harm. The user will get alert of the same and get more aggressive, change his identity and will try to do more harm by either getting himself anonymous and spread more severe content through multiple accounts from the same platform or from other online platforms."

33 Ibid.

34 Devdutta Mukhopadhyay, *MeitY defends blocking of satirical Dowry Calculator website #FreeToMeme,* Internet Freedom Foundation (Mar. 16, 2020), https://internetfreedom.in/meity-defends-blocking-of-satirical-dowry-calculator-website/, last seen on 09/08/2024.

35 Rule 16, The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009: *"**Requests and complaints to be confidential. —** Strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof."*

Singhal cannot be enforced in practice. So, the Court in this case did not err by overlooking Shreya Singhal.

C] Countering the Critics of Shreya Singhal and User Due Process Rights

(i) Shreya Singhal is Binding Precedent: It is true that the Supreme Court did not strike down Section 69A and the Blocking Rules as unconstitutional. But it clearly went beyond merely upholding the validity of Section 69A and the Blocking Rules. It read them in a way that enhanced the procedural safeguards contained therein. The Supreme Court took pains to offer an interpretation of Section 69A and the Blocking Rules that would make them comport with constitutional strictures. That reading/interpretation is binding precedent.[36]

Moreover, multiple commentators and even the Delhi High Court have upheld the legitimacy of Shreya Singhal, its reading of Section 69A and the Blocking Rules and followed its vision.[37] For

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[36] Jyoti Panday, *The Supreme Court Judgment in Shreya Singhal and What It Does for Intermediary Liability in India?*, The centre for Internet & Society (11/04/2015), available at https://cis-india.org/internet-governance/blog/sc-judgment-in-shreya-singhal-what-it-means-for-intermediary-liability, last seen on 09/08/2024. *See also,* Gautam Bhatia, *The Supreme Court's IT Act Judgment, and Secret Blocking*, Constitutional Law and Philosophy Blog (25/03/2015), available at https://indconlawphil.wordpress.com/2015/03/25/the-supreme-courts-it-act-judgment-and-secret-blocking/, last seen on 09/08/2024; Vasudev Devadasan, *The Karnataka High Court on Twitter's complaint: Carte blanche to the government*, Constitutional Law and Philosophy Blog (02/07/2023), available at https://indconlawphil.wordpress.com/2023/07/02/the-karnataka-high-court-on-twitters-complaint-carte-blanche-to-the-government/, last seen on 09/08/2024; Kartik Kalra, *The Karnataka High Court's Twitter Judgment – II: On nationalist rhetoric as legal reasoning*, Constitutional Law and Philosophy Blog (03/07/2023), available at https://indconlawphil.wordpress.com/2023/07/03/guest-post-the-karnataka-high-courts-twitter-judgment-ii-on-nationalist-rhetoric-as-legal-reasoning/, last seen on 09/08/2024.

[37] Vrinda Bhandari et. al., *Revising the Information Technology Act, 2000,* p. 14-15, xKDR (30/03/2024), available at https://papers.xkdr.org/papers/20230330Baileyetal_itAct.pdf, last seen on 09/08/2024. *See also,* Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part I (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/22/the-phantom-constitutionality-of-

instance, in round one of the Tanul Thakur litigation, Thakur's writ petition relied on Shreya Singhal to argue that his due process rights to notice, a hearing and access to the Section 69A order blocking his website had been denied. Subsequently the Delhi High Court directed MeitY to grant him a post decisional hearing and access to the order blocking his website dowrycalculator.com.[38]

(ii) Shreya Singhal's Vision Can be Implemented: There are ways to overcome the alleged practical difficulties in implementation. For instance, Rule 15 of the Blocking Rules requires the Designated Officer of MeitY to "maintain (a) complete record of the request received (to block content) and action taken thereof."[39] If efforts have been made to contact users, they will be reflected in this record. A future court can thus call for and examine this record if it is in doubt

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section-69a-part-i/, last seen on 09/11/2023; Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part II (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/24/the-phantom-constitutionality-of-section-69a-part-ii-twitter-v-the-union/, last seen on 09/11/2023; Sachin Dhawan & Ronika Tater, *Tanul Thakur Case: Delhi High Court Should Quash Blocking Order, Vindicate Legacy of Shreya Singhal,* Medianama (09/06/2022), available at https://www.medianama.com/2022/06/223-website-block-shreya-singhal-high-court/, last seen on 10/08/2024.

38 Supra 29. *See also*, Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part II (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/24/the-phantom-constitutionality-of-section-69a-part-ii-twitter-v-the-union/, last seen on 09/11/2023: "In *Tanul Thakur's* challenge, the Delhi High Court directed the Government to provide the content originator with a copy of the blocking order and a *post-facto* hearing as to why his content should not continue to be blocked…the order is an acknowledgement of: (i) the need to offer originators an opportunity to contest restrictions on their free expression…(ii) the importance of supplying the originator with a copy of the blocking order…Thus, *Tanul Thakur's* case… should serve as valuable precedent mandating the disclosure of the blocking order to the originator and the grant of a hearing, ultimately facilitating a challenge under Article 226 before a High Court."

39 Rule 15, The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009: *"**Maintenance of records by Designated Officer. —** The designated officer to maintain the database of the records of the cases of blocking of information by public access and the action taken by him in each case respectively. He shall maintain both in electronic format and in the register."*

about whether reasonable efforts were genuinely made to contact users.[40]

Moreover, if a user still cannot be contacted after reasonable efforts have been made, then MeitY can direct the platform to contact the user. In fact, platforms have been tasked with notifying users in the recently enacted *Digital Services Act* (DSA) in the European Union and in several other jurisdictions.[41] Platforms in India usually do not take the initiative to notify users because of the concern that doing so will violate the Confidentiality Rule.[42] MeitY has not provided clarity on this point; further it has so far refused to seek the assistance of platforms to contact users.

However, giving users notice in this way will not violate the confidentiality of the complainant,[43] which is the justification given by MeitY for having the Confidentiality Rule.[44] Specifically, MeitY has argued that the Confidentiality Rule exists to protect the identity of the individuals who make the complaints that trigger the blocking process. But clearly, a complainant's identity is not compromised if a user is simply informed by a platform that their content may be blocked by the government. A user doesn't have to be informed of the identity of the complainant to be given notice of the possibility of blocking (along with a hearing regarding the same and a copy of the eventual blocking order).

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40 Sachin Dhawan & Ronika Tater, *Tanul Thakur Case: Delhi High Court Should Quash Blocking Order, Vindicate Legacy of Shreya Singhal,* Medianama (09/06/2022), available at https://www.medianama.com/2022/06/223-website-block-shreya-singhal-high-court/, last seen on 13/11/2023.

41 Article 9(5), Digital Services Act, Regulation (EU) 2022/2065 (19/10/2022).

42 Supra 32.

43 The complainant is the person who initiates the blocking process by sending a complaint to the concerned Nodal Officer; Supra 3.

44 Tanul Thakur v. Union of India & Ors., W.P. (C.) No. 13037 of 2019, Counter Affidavit, at 22. *See also, supra* n. 37, p. 17-18.

If MeitY wishes to maintain confidentiality for other reasons - to the extent that users should not be notified by platforms - then its "...rationale…should be testable by courts."[45] In other words MeitY should have to make a viable case in favor of confidentiality and against user notification. If it fails to do so, then the lack of notice (as a result of MeitY refraining from directing a platform to notify users or preventing a platform from notifying users on confidentiality grounds) should render any subsequent blocking order void.

Wrongdoing users will become aware of the fact that MeitY is aware of them even when their content is blocked; blocking will thus have the same effect as a notice. It's not MeitY's responsibility to capture wrongdoers; if the government wants to apprehend wrongdoers without alerting them, it can rely on other powers in other laws to do so.[46] The relevant government agencies can request MeitY to desist from sending notices to the concerned individuals while it pursues its investigations into them.[47]

One concern remains. It is true that it is virtually impossible for users to obtain copies of blocking orders even when they file Right to Information (RTI) requests. Unfortunately, the Confidentiality Rule is cited to deny many such requests.[48] The hope is that recent rulings like Tanul Thakur will clearly signal to authorities that the weaponization of the Confidentiality Rule in this way is impermissible. More needs to be done perhaps at the level of the Supreme Court to restrict the pernicious deployment of this Rule to keep users in the dark about how and why their content has been blocked. At the very

45 Supra 32.
46 Ibid.
47 Ibid.
48 Supra 17, at 10-11.

least, the Confidentiality Rule should be read down to assert that it will not apply to users whose content has been blocked.[49]

D] Additional Precedent in Favor of User Due Process Rights

Even if the critics of Shreya Singhal are correct when they assert that it lacks precedential value regarding user rights, there are other precedents which call for the kind of safeguards it espouses. Unfortunately, the Court did not consider these precedents. They are-

(i) Precedent on the Right of Judicial Redress and Right to Transparency: The Court overlooks important precedent on judicial redress and transparency. Two cases in particular bear mentioning - *Ram Jethmalani and Ors v. Union of India*[50] and *Anuradha Bhasin v. Union of India*.[51] Jethmalani, focusing on the importance of judicial redress, specifies that "it is imperative that…petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State."[52] Denial of blocking orders to users "impedes the(ir) ability to contest them."[53] A user cannot exercise her right to judicial redress and challenge a blocking order if she doesn't have access to it or even knowledge of it.

Bhasin condemns a similar lacuna in transparency – in the context of internet shutdowns - as violative of the mandate of Article 19 of the Constitution. That is why this landmark ruling called for the publication of internet shutdown orders. And it has rightly been argued that such logic compels the publication of content blocking orders or at least the provision of such orders to users.[54]

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49 Supra 32.
50 Ram Jethmalani and Ors. v. Union of India, (2011) 8 SCC 1.
51 Anuradha Bhasin v. Union of India, AIR 2020 SC 1308.
52 Supra 50, at ¶ 66; See: Supra 4, at 10.
53 Supra 17, at 10.
54 Ibid.

(ii) Precedent on Article 21 and Due Process Rights: The Court also fails to recognize that users have due process rights/natural justice rights under Article 21 of the Constitution. These rights entail that they be given notice, a hearing and a reasoned order[55] - because the government cannot deprive persons of their fundamental rights without furnishing them with these basic due process safeguards.[56]

(iii) Precedent on the Principle of Proportionality: It is clearly laid down in a number of judgments that the government cannot violate fundamental rights including the fundamental right to speech without adhering to the principle of proportionality.[57] This requires the government to use the least restrictive means to achieve the ends of a given law. The Court did not engage in a discussion of whether denial of user rights satisfies the principle of proportionality i.e. whether it constitutes the least restrictive means to achieve the ends of Section 69A.[58]

E] Public Policy Arguments in Favor of User Due Process Rights

Finally, the Court is wrong from a policy perspective about user due process rights. There are several important policy reasons why

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55 Supra 17, at 13; Tanul Thakur v. Union of India & Ors., W.P. (C.) No. 13037 of 2019, at 6. *See also* Vasudev Devadasan, *The Karnataka High Court on Twitter's complaint: Carte blanche to the government,* Indian Constitutional Law and Philosophy (02/07/2023), available at https://indconlawphil.wordpress.com/2023/07/02/the-karnataka-high-court-on-twitters-complaint-carte-blanche-to-the-government/, last seen on 14/11/2023.

56 Maneka Gandhi v. Union of India, 1978 AIR 597; PUCL v. Union of India & Anr., AIR 1997 SC 568. Olga Tellis & Ors v. Bombay Municipal Corporation & Ors., 1986 AIR 180; Allauddin Mian & Ors. v. State of Bihar, 1989 AIR 1456.

57 Justice K S Puttaswamy (Retd.) & Anr. v. Union of India & Ors., W.P. (Civil) No. 494 of 2012; Madhyamam Broadcasting Limited v. Union of India & Ors., Civil Appeal No. 8130 of 2022.

58 Kartik Kalra, *The Karnataka High Court's Twitter Judgment – II: On nationalist rhetoric as legal reasoning*, Constitutional Law and Philosophy Blog (03/07/2023), available at https://indconlawphil.wordpress.com/2023/07/03/guest-post-the-karnataka-high-courts-twitter-judgment-ii-on-nationalist-rhetoric-as-legal-reasoning/, last seen on 09/08/2024.

the Court should have strengthened rather than weakened due process protection of users. They are -

(i) Users Can Better Clarify the Context of their Content Than Intermediaries: If a hearing is given to users, they will be able to provide more context about the circumstances surrounding their content and perhaps the legality of their content. In this way, MeitY might, at the pre-decisional stage itself, be able to satisfactorily resolve many cases.

Often intermediaries will not be able to provide such context and clarification. They do not know the details surrounding why their users posted content; indeed, it's virtually impossible for them to gain such insights given that they host millions of users and given that they receive hundreds of blocking requests every year.[59]

(ii) Platforms Have Little Incentive to Defend Their Users Before the Government: Given their size, platforms hardly suffer if a few thousand users get censored. In fact, if anything, platforms will be more likely to over comply with government blocking requests and engage in "collateral censorship."[60] It is true that Twitter attempted to defend a few of its users before MeitY in this case. But it must be kept in mind that Twitter challenged a minuscule percentage of the tweets and accounts that MeitY ordered it to block. It is likely that users would have responded more robustly in a hearing with MeitY and challenged more tweet and account blockings in court, given that they had a lot more to lose than Twitter.

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59 Supra 17 at 10.

60 Jack M. Balkin, *Free Speech is a Triangle,* 118 Columbia Law Review 2011, at 2017 (2018), available at https://columbialawreview.org/wp-content/uploads/2018/11/Balkin-FREE_SPEECH_IS_A_TRIANGLE.pdf, last seen on 12/11/2023.

PART 4: CONCLUSION

The Court had an opportunity to make an important contribution to the law on content blocking. It did not do so. This article has detailed the reasons why, especially with regard to overlooking Shreya Singhal and other Supreme Court precedent on procedural safeguards that must be satisfied before fundamental rights can be restricted. It has also discussed critiques of Shreya Singhal as well as how such critiques can be resolved. It acknowledges that a concern remains regarding Shreya Singhal, which hopefully can be addressed soon in pending matters.

Several positive developments have taken place since the Court's ruling. Twitter has reportedly filed an appeal against the order of the Single Judge Bench.[61] The Division Bench should take this opportunity to reverse course and uphold robust due process protections for users.

Moreover, a similar matter - the Tanul Thakur case - is pending before the Delhi High Court. In fact, this is the second round of litigation in the Tanul Thakur case. In the first round, Thakur won recognition of some due process rights like a post decisional hearing and access to the Section 69A order that blocked public access to his website dowrycalculator.com.[62] After the post decisional hearing was held, another blocking order was issued. However, Thakur was denied access to this blocking order as well. Consequently, in the second

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61 Aihik Sur, *X, formerly Twitter appeals Karnataka court ruling on blocking orders: Sources,* Money Control (02/08/2023), available at https://www.moneycontrol.com/news/business/x-formerly-twitter-appeals-karnataka-court-ruling-on-blocking-orders-sources-11078421.html, last seen on 14/11/2023.

62 As discussed above, at p. 9: "For instance, in round one of the Tanul Thakur litigation, Thakur's writ petition relied on Shreya Singhal to argue that his due process rights to notice, a hearing and access to the Section 69A order blocking his website had been denied. Subsequently the Delhi High Court directed MeitY to grant him a post decisional hearing and access to the order blocking his website dowrycalculator.com."

round he's fighting for his due process right to the latest blocking order issued for his website, along with reasons for the same. If the Delhi High Court rules in his favor again, it will further strengthen the legacy of Shreya Singhal.

A future Supreme Court Bench can do even more to protect user rights. Unlike High Courts, it can go beyond Shreya Singhal to protect user rights. Specifically, it can strike down the Confidentiality Rule to remove any doubt that MeitY cannot deny copies of blocking orders (with reasons) to users. A future Supreme Court Bench can thereby ensure that members of the general public also get access to blocking orders so that they may challenge them. This is because when content is blocked their right to receive speech (which is an integral part of the right to free speech) is affected.[63] And longstanding principles of judicial redress dictate that they must be given some recourse for the same.

[63] The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr, 1995 SCC (2) 161.

TOWARDS *CUL-DE-SAC*: REFLECTIONS ON THE DESIRABILITY OF HOMOGENEOUS CONSTITUTIONAL IDENTITY IN INDIA

Aditya Rawat[*]

Abstract

Supreme Court's split verdict on Karnataka State Government's Hijab ban on educational institutes brings out the dichotomous understanding of Constitutionalism and its relationship with plurality. Similarly, the Court in earlier case of Mohd. Zubair Corporal No. 781467 Vs. Union of India & Ors. held that the parameter for freedom to manifest one's religion are not the same in disciplined forces and secondly, maintenance of a beard is not an essential tenet of religion. Both judgments emphasized the need for homogeneity and uniformity as an aspirational path leading to 'national unity'. Romanticization with homogeneous 'national' identity informed recent mainstream political discourses as well. Indian Home Minister, Amit Shah's aggressive and continuous push for Hindi as the national language of India has generated an acutely polarized understanding of what is our constitutional identity. His commitment to 'national' assimilation despite the history of violent linguistic sub-nationalism in the subcontinent countries (leading to the breakdown of Pakistan and prolonged civil war in Sri Lanka) is buttressed by aspirations for creating a homogenized national identity and dissolution of cultural differences.

Consequently, aspirational 'national' identity is breeding intolerance towards other ways of being. The intolerance is now resurging violently in the form of a radical Hindutva ideologue. The provocative hate

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speech, call for arms, and "safai ayvam Myanmar jaisa" was asserted as a need of the hour by powerful religious leaders in Dharam Sansad which was held last year.

The contemporary milieu around identity discourses warrants pressing questions about constitutionalism and its relationship with pluralism in post-colonial societies of South Asian countries. The contemporary politico-legal discourses surrounding the need for the decolonization of 'Eurocentric liberal constitutionalism' and its manifest failures to confront the civilizational issues in the sub-continent require us to reformulate, reimagine, and if possible, recalibrate the contours of constitutional consciousness in South Asia.

The primary objective of this essay is to inquire (i) whether 'imagined' constitutional identity by institutional functionaries is premised on the normative paradox in modern constitutionalism and secondly, (ii) whether there are avenues for providing equal playing ground to decolonial ontological, epistemological and theological systems?

I intend to do so by unpackaging how judicial understanding of "constitutional" identity with aspirational western modernity accentuated the chasm in India- civilization with plural ontological, epistemological, and theological value systems.

Introduction

What is our aspiration for the future? Our aspiration is this. Unfortunately, the country has been divided into so many classes and communities. We should proceed in such a way that all the different communities may vanish and we may have one nation, the Indian nation. If we proceed as the British did, with this class and that class, with this. area and that, we shall fail in the future.[1]

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1 Babu Ramnarayan Singh speech, *Constituent Assembly of India Debates* (CAD) (Delhi: Government of India Press, 1949), pp. 984.

- Babu Ramnarayan Singh, Constituent Assembly (5th September 1949)

The abstract idea of fraternity, …, has to be applied to the ground realities wherein some students wearing headscarf in a secular school run by the State Government would stand out and overtly appear differently. The concept of fraternity will stand fragmented as the apparent distinction of some students wearing headscarf would not form a homogenous group of students in a school where education is to be imparted homogenously and equally, irrespective of any religious identification mark.[2]

- Justice Hemant Gupta in *Aishat Shifa Vs. State of Karnataka & Ors.* (2022 case)

Indian Constitutionalism's relationship with plurality is chequered since its inception (the first quoted excerpt is a part of Babu Ram Narayan Singh's speech in Constituent Assembly wherein he strenuously attacked the tribal autonomy provisions in the Constitution)[3] to the recent split verdict of Supreme Court concerning Karnataka State Government's *Hijab* ban on educational institutes (The second quoted excerpt is part of Justice Gupta's verdict; he upheld the validity of Government's order).[4] Justice Dhulia's pronouncement in *Hijab* Ban case brings out this befuddled judicial understanding acutely. His observations concerning intersectionality between uniformity and dignity stands at a sharp contrast with Justice

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2 *Aishat Shifa Vs. State of Karnataka & Ors.* [2022] SCC OnLine SC 1394 < https :// www.livelaw.in / pdf_upload / 842-aishat-shifa-v-state-of-karnataka-13-oct-2022-439216.pdf > accessed 2 March 2023 (*Hijab* Ban case).

3 For further reading on tribal autonomy premised conversations in Constituent Assembly, see – Selma K. Sonntag, 'Autonomous Councils in India: Contesting the Liberal Nation' (1999) 24 Alternatives, 415-434; Valerian Rodrigues, 'Citizenship and the Indian Constitution' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

4 *Hijab* ban case (n 1).

Gupta's articulations regarding uniformity enabling fraternity. He stated –

> School is a public place, yet drawing a parallel between a school and a jail or a military camp, is not correct. Again, if the point which was being made by the High Court was regarding discipline in a school, then that must be accepted. It is necessary to have discipline in schools. But discipline not at the cost of freedom, not at the cost of dignity. Asking a pre university schoolgirl to take off her hijab at her school gate, is an invasion on her privacy and dignity…This right to her dignity and her privacy she carries in her person, even inside her school gate or when she is in her classroom.[5]

Justice Dhulia's pronouncement is widely celebrated but even it has normative paradox concerning plurality especially his comparative analogy with jail or military camp is illustrative of the limits of pluralism.[6]

Romanticization with homogeneous 'national' identity informed recent mainstream political discourses as well. Indian Home Minister, Amit Shah's aggressive and continuous push for Hindi as the national language of India has generated an acutely polarized understanding of what is our constitutional identity.[7] His commitment

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5 Ibid, Dhulia's judgment (para 52). For analysis of Dhulia's pronouncement, see, Vineet Bhalla, 'Decoding the Supreme Court's split verdict on hijab ban' (*The Leaflet* 13 October 2022) < https://theleaflet.in/decoding-the-supreme-courts-split-verdict-on-hijab-ban/ > accessed 3 March 2023;

6 Apex Courts have consistently set the limitations of plurality in terms of disciplined forces – see *Mohd. Zubair Corporal No. 781467 Vs. Union of India & Ors.* [2017] 2 SCC 115; *Mohd. Farman Vs. State of UP through Principal Secretary* [2021] SERVICE SINGLE No. - 17225 of 2021.

7 Express News Desk, 'People from different states should speak in Hindi, not English: Amit Shah' (*The Indian Express* 9 April 2022) < https://indianexpress.com/article/india/people-different-states-should-speak-hindi-not-english-shah-7858861/ > accessed 3 March 2023; For disquisition over it, see Editorial, 'Undesirable and divisive: on Amit Shah's push for Hindi' (*The Hindu* 17

to 'national' assimilation despite the history of violent linguistic sub-nationalism in the subcontinent countries (leading to the breakdown of Pakistan and prolonged civil war in Sri Lanka) is buttressed by aspirations for creating a homogenized national identity and dissolution of cultural differences. These disquisitions are also reminiscent of the last decade's Supreme Court's jurisprudence wherein the judicial test of 'constitutional morality' found itself at the crossroads with cultural and religious pluralism (protest against criminalization of instantaneous *talaaq*[8] or the *Sabarimala* verdict[9] or *Khap Panchayat's* open dismissal of the Court's verdict[10] concerning honor killings[11]).

The contemporary milieu around identity discourses warrants pressing questions about constitutionalism and its relationship with pluralism in India especially when (i) constitutional values are used as a rhetoric to justify religious persecutions or cow vigilantism[12]; and (ii) Apex court becomes the contesting sites for such civilisational issues. The contemporary politico-legal discourses surrounding the need for the decolonization of 'Eurocentric liberal constitutionalism' and its manifest failures to confront the civilizational issues in the sub-

September 2019) < https://www.thehindu.com/opinion/editorial/undesirable-and-divisive/article59779520.ece > accessed 3 March 2023.

8 *Shayaro Bano Vs. Union of India & Ors.* [2017] 9 SCC 1.

9 *Indian Young Lawyers' Association & Ors Vs. State of Kerala & Ors.* [2018] SCC online SC 1690 (*Sabarimala* case).

10 *Shakti Vahini Vs. Union of India* [2018] 7 SCC 192.

11 Ashutosh Sharma, 'Love In The Crosshairs: Honour Killings Still Continue In India' (*Outlook* 15 January 2022) < https: // www . outlookindia . com / magazine / story / india - news-love-in-the-crosshairs-honour-killings-still-continue-in-india/305349 > accessed 3 March 2023.

12 Constitution of India 1949, Art. 48 (Directive Principles); Prevention of Cruelty to Animals (Regulation of Livestock Market) Rules (No. 3961 of 2017), < http://www.egazette.nic.in/WriteReadData/2017/176216.pdf > accessed 5 April 2023; See appendix of the report, Human Rights Watch (HRW), *Vigilant Cow Protection in India* (19 February 2019), < https://www.hrw.org/report/2019/02/19/violent-cow-protection-india/vigilante-groups-attack-minorities#_ftn21 > accessed 05 April 2023.

continent require us to reformulate, reimagine, and if possible, recalibrate the contours of constitutional consciousness in South Asia.

Through this essay, I intend to inquire (i) whether 'imagined' constitutional identity by judiciary is premised on the normative deficit in modern constitutionalism and secondly, (ii) whether there is a possibility of providing equal playing ground to plural ontological, epistemological and theological framework within constitutionalism?

The essay is structured in three parts. Through the first part, I will engage with the thematic underpinnings of plurality, pluralism, and national identity in the context of Indic civic society. In the second part, I will locate competing understanding of pluralistic Indian identity in the constitutional philosophy through prominent icons and respective school of thoughts. In the last part, I intend to unpackage judicial understanding of "constitutional" identity and how with its aspirational western modernity accentuated the chasm in India. This will be followed by my departing note concerning inevitability of cul-de-sac in constitutional relationship with plurality.

PART I – UNDERSTANDING PLURALITY AND NATIONAL IDENTITY

Plurality is not a simple question to answer especially in the context of a civilization or modern nation. The dictionary meaning of pluralism is – "a theory that there are more than one or more than two kinds of ultimate reality".[13] In terms of the civilization, below stated dictionary definition seems appropriate for our purpose –

> A state of society in which members of diverse ethnic, racial, religious or social groups maintain and develop their

[13] Merriam Webster Dictionary, < https://www.merriam-webster.com/dictionary/pluralism > accessed 05 April 2023.

> traditional culture or special interest within the confines of a common civilization.[14]

On a related note, defining national identity is a herculean task and it becomes more daunting in the post-globalization era.[15] Benedict Anderson in his seminal work, *Imagined Communities* conceptualized that nation is "an imagined political community and imagined as both inherently limited and sovereign".[16] He calls it 'imagined political community' by asserting that members even of smallest countries does not meet or even know each other but imaginatively share the image of communion.[17]

Locating these questions in the context of Indian sub-continent posits unprecedented complexities considering the historicity of the region and pervasive effects of modernity inspired colonial narrative of understanding plurality in colonized civilizations in global south. The same has been rightly challenged in the recent decolonial literature.[18] Prof. Sudipta Kaviraj criticized the Colonial construction of Indian religious plurality. He argued –

> European authors were influenced by religious strife in their own history in reading those of others. As the actual

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14 Ibid.

15 Gal Ariely, 'Globalisation and the decline of national identity? An exploration across sixty-three countries' 18(3) Nations and Nationalism (2012) 461, 482.

16 Benedict Anderson, *Imagined Communities* (first published 1983, Verso 2006) 06.

17 Ibid, Anderson argues that this imagination is (i) finite because there will always be other or foreign, and (ii) sovereign because the construct of nation-state traces its origin to the enlightenment inspired modernity; For similar arguments in the context of Britain, see, Hugh Seton-Watson, *Nations And States: An Enquiry Into The Origins Of Nations And The Politics Of Nationalism* (Westview Press 1977).

18 Walter D. Mignolo & Catherine E. Welsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press, 2018); Ashis Nandy, *The Intimate Enemy: Loss And Recovery Of Self Under Colonialism* (Oxford University Press, 2009); Sudipta Kaviraj, *The Imaginary Institution Of India* (Columbia University Press, 2010); Sudipta Kaviraj & Sunil Khilnani, *Civil Society: History And Possibilities* (Columbia University Press, 2001); Aditya Nigam, *Decolonizing Theory – Thinking Across Traditions* (Bloomsbury, 2020). For a brief discussion on this, see Anibal Quijano, 'Coloniality of power, Eurocentrism, and Latina America', 1 NEPANTLA:VIEWS FROM SOUTH (2000) 533, 580.

> history of relations between the two major religious communities were understandably checkered, it was always possible for historical interpreters to select elements and construct a "history" and an accompanying social memory according to the historians' ideological preference…In this kind of historical writing, the empirics of Indian history was mediated through a history of secularism that the modern West had given itself – in which tolerance in the face of religious diversity was an exclusive achievement of European modernity. In the face of this meta-history underlying all history, empirical evidence was powerless. Such colonial histories, starting from James Mill, declared religious plurality an unresolved curse that premodern Indian institutions were incapable of overcoming.[19]

How do we proceed amidst overwhelming colonial knowledge traditions and its pervasive effects on our 'self' construction? In the same work, Kaviraj argues that to understand the complexities associated with unpackaging plurality in Indian context, we should be cognizant that "Indian society is marked by a plurality of distinct faiths; and second, these faiths are unequally distributed in numbers".[20]

Rudolf and Rudolf argued in their work that historically plurality existed and was successfully accommodated in Indic civic society because of indigeneous principle that society consisting of different social groups is "prior to the state and independent of it" even when the inter-religious relationship was not characteristically

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19 Sudipta Kaviraj, 'Plurality and Pluralism – Democracy, Religious Difference, and Political Imagination' in Karen Barkey, Sudipta Kaviraj & Vatsal Naresh (eds), *Negotiating Democracy and Religious Pluralism – India, Pakistan, and Turkey* (Oxford University Press 2021).

20 Ibid. He brings this out acutely through diverse sociological peculiarities within Hinduism – Vaisnavas, Saivas, and Saktas and similar strand can be taken with regard to extension of Indian origin religions such as Buddhism, Jainism, and Sikhism.

mutual and reinforced inequality.[21] Rochana Bajpai calls it hierarchical pluralism.[22] She stated –

> In many respects, hierarchical pluralism was pluralist, accommodating of religious and sociocultural plurality. The precedence of the moral order of society implied that the state would not seek to impose its preferred vision throughout society, but respect the internal rules and practices of social groups so long as taxes and revenues were paid.[23]

However, Sudipta Kaviraj argued that such pluralism in India is asymmetrical in comparison to western civilization wherein symmetrical hierarchy existed (For him, caste system is a manifest expression of such asymmetrical hierarchy).[24] Bajpai argues that modern state in India continued the hierarchal pluralism through its legal structure (for family laws, religious authorities were given legal recognitions).[25]

National identity conversations gained prominence and traction during the anti-colonial struggle and influence of western modernity with its liberal individualist ideas. Through next part, I will scrutinize disquisitions pertaining to identity and plurality in terms of Indian constitutional philosophy using the icons and their respective entry points of understanding constitutionalism in India.

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21 Rudolf, S.H. and Rudolf, L.I. *Explaining Indian Democracy: A fifty year perspective, 1956-2006* (New Delhi Oxford University Press 2008).

22 Rochana Bajpai, 'Religious Pluralism and the State in India' in Karen Barkey, Sudipta Kaviraj & Vatsal Naresh (eds), *Negotiating Democracy and Religious Pluralism – India, Pakistan, and Turkey* (Oxford University Press 2021).

23 Ibid, 141.

24 Sudipta Kaviraj, *The Trajectories of the Indian State* (Permanent Black 2010) 15.

25 *Bajpai* (n 22).

PART II - LOCATING PLURALISTIC NATIONAL IDENTITY IN INDIAN CONSTITUTIONAL PHILOSOPHY

There are multiple ways of conceptualizing the relationship between constitutional philosophy and plurality. Rajiv Bhargava, Indian political scientist located the five competing visions of national identity by historicizing making of Indian constitution.[26] They are: (i) Socio-democratic vision of Nehru; (ii) Gandhian Vision (non-democratic, quasi communitarian); (iii) Liberal-democratic Ambedkarite vision; (iv) KT Shah's radical egalitarianism; and (v) Hindutva ideology.[27] For the purpose of this essay, I will frame competing understanding of constitutional identity within his segregation.

Nehruvian thought of national identity was deeply critical of Coloniality and its pervasive effect on the civilizational values of India. In his *The Discovery of India,* Nehru stated that greatest of all injuries done by England to India was creation of "the slave mentality".[28] Similarly while addressing the constituent assembly, he lamented that there *"has been no imagination in the understanding of the Indian problem".*[29] Bhiku Parekh argued that Nehruvian vision was "*inclusive, secular, culturally sensitive, based on the ethnic and cultural plurality of India, could be owned by all Indians".*[30] At the same time, Nehru's Indian was one who

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26 Rajeev Bhargava (edited), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008) 7; For other models of conceptual understanding of this relationship, Rochana Bajpai's six models - (i) Hierarchical Pluralism; (ii) Integrationist Exclusionary; (iii) Integrationist inclusionary; (iv) Weak Multiculturalism; (v) Strong Multiculturalism; and (vi) Majoritarian Assimilationist. For her, restricted (weak) multiculturalism best describes the overall approach of our constitution towards religious pluralism and attitudinal inclination towards majoritarian assimilation post 2014.

27 Ibid.

28 Jawaharlal Nehru, *The Discovery of India* (first published 1946, Penguin 2004) 52.

29 Speech by Jawaharlal Nehru, Constituent Assembly of India, December 13, 1946, in *Constituent Assembly Debates,* 12 Vols. (first published 1950, 2009) 64.

30 Bhiku Parekh, 'The Constitution as a Statement of Indian Identity' in Rajeev Bhargava

would put India above and beyond belongings of religious, linguistic, caste, or tribal groups.

However, at the same time, Parekh critiqued Nehruvian vision for being statist and elitist. He stated –

> Its limitations were just as great. It was statist, elitist, did little to speed up India's economic development and tackle poverty, paid only limited attention to primary education, healthcare, and other basic needs of the masses, and was insufficiently insensitive to rural India and the religious aspirations of its people.[31]

Prof. Baxi ironically calls out Nehruvian vision for elevating constitutional immiseration especially with regard to right of children to education.[32] The second civilizational reimagination of 'Indian' identity lies with Gandhian communitarian identity. I am deliberating on two prominent themes of his approach. Firstly, it did not talk in the language of rights. He gave primacy to duties and for him, rights were emancipated from duty. He stated in his prayer meeting in the backdrop of Constituent Assembly debates on Rights, "*Rights cannot be divorced from duties. This is how satyagraha was born, for I was always striving to decide what my duty was*".[33] Secondly, his understanding of *Swaraj.* In an interview with journalists on March 6, 1931, while responding to the question of what is *Swaraj,* he stated –

> The root meaning of swaraj is self rule.'Swaraj' may, therefore, be rendered as disciplined rule from within and

(ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008)

31 *Bhiku Parekh* (n 30);

32 Upendra Baxi, 'Outline of a Theory of Practice' of Indian Constitutionalism in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

33 MK Gandhi, *Collected Works* (Volume 95) 354, *also available at:* < http: // www . gandhiashramsevagram . org/gandhi-literature/mahatma-gandhi-collected-works-volume-95.pdf > accessed 26 February 2023.

> purna means 'complete'. 'Independence' has no such limitation. Independence may mean licence to do as you like. Swaraj is positive. Independence is negative. Purna swaraj does not exclude association with any nation, much less with England. But it can only mean association for mutual benefit and at will.[34]

Gandhi's concept of *Swaraj* and his dismissal of western parliamentary sovereignty comes out very acutely in his celebrated work, *Hind Swaraj.*[35] He called Parliaments *as "really emblem of slavery"* and asserted that –

> Parliament is without a real master. Under the Prime Minister, its movement is not steady, but it is buffeted about like a prostitute. The Prime Minister is more concerned about his power than about the welfare of Parliament. His energy is concentrated upon securing the success of his party. His care is not always that Parliament shall do right.[36]

He strongly argued against western democratic model and its application in India. He stated –

In effect it means this: that we want English rule without the Englishman. You want the tiger's nature, but not the tiger; that is to say, you would make India English. And when it becomes English, it

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34 MK Gandhi, *Collected Works* (Volume 95) 354, *also available at:* < http: // www . gandhiashramsevagram . org/gandhi-literature/mahatma-gandhi-collected-works-volume-95.pdf> accessed 26 February 2023.

35 MK Gandhi, *Hind Swaraj or Indian Home Rule* (Navjivan Publishing House, 1910), *also available at:* <https://www.mkgandhi.org/ebks/hind_swaraj.pdf > accessed 26 February 2023.

36 Ibid.

will be called not Hindustan but Englistan. This is not the Swaraj that I want.[37]

Gandhian constitutionalism is often categorized as antithetical to parliamentary democracy with its strong premise around grassroot village based democratic republic.[38] Granville Austin in his seminal work stated that Gandhian thought of village swaraj was tersely dismissed in the Constitution of India. He goes further to argue that provisions and principles of the Indian Constitution are 'almost entirely of non-indian orgin, coming as they had largely from the *former* colonial power'.[39] Contemporary Gandhian scholars like Thomas Pantham disagrees with Austin stating that Gandhi was an *original emancipatory thinkers* of post-colonial liberal democratic Constitutionalism.[40] He argues that Indian Constitutional philosophy is misunderstood to be "dichotomous with, or exclusionary towards the Gandhian Constitutional philosophy" .[41] He argues –

> They have a considerable range of overlapping and complementary or compatible democratic values and freedoms…I feel that we need to recognize and emphasize those democratic overlappings and complementarities or compatibilities if we are to appreciate the normative originality and resourcefulness and the institutional vitality

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37 Ibid, P. 27.

38 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (first published 1966, Oxford University Press 1999) 31; for paradox of Gandhian Constitutionalism, see, Peter Ronald deSouza, 'Institutional Visions and Sociological Imaginations: The Debate on Panchayati Raj' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

39 Ibid, p.308.

40 Thomas Pantham, 'Gandhi and the Constitution' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

41 Ibid, p.75.

> and suppleness of the Indian post-colonial constitutional democracy...[42]

Third civilization imagination of national identity is of Dr. BR Ambedkar. Ambedkar's lived experiences and corpus of work in a deeply casteist civic society informed his vision of national identity. He was discomfortable with the term as well as understanding of what 'Swarajya' entails. He believed that Gandhian *swaraj* was a paradox i.e. it endorsed freedom from colonial political order but at the same time reinforced the civic order with its graded inequalities and domination on a hereditary basis. He was often cited to state that when Dalits hear the upper caste speak on Swaraj, it seems to them (Dalits) like they are hearing the Devil cite the scriptures.[43] In *Annihilation of Caste*, he wrote, *"swaraj for Hindus may turn out to be only a step towards slavery".*[44] His criticism of Congress and Gandhian vision of swaraj comes out strongly in his writings and speeches. He stated–

> If the foreigner bears in mind these points he will realize why the servile classes of India are not attracted by the Congress brand of Swaraj. What good can the Congress brand of Swaraj bring to them ? They know that under the Congress brand of Swaraj the prospect for them is really very bleak. The Congress brand of Swaraj will either be materialization of what is called Gandhism or it will be what the governing class would want to make of it. If it is the former it will mean the spread of charkha, village industries, the observance of caste, Bramhcharya (continence), reverence for the cow and things of that sort.

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42 Ibid, p. 75; Also see Ashutosh Varshney, *Ethnic Conflict and Civic Life* (New Delhi; Oxford University Press, 2002).

43 Aakash Singh Rathore, *Ambedkar's Preamble: A Secret History of the Constitution of India* (Vintage Books, 2020) 53.

44 BR Ambedkar, *Annihilation of Caste* (first edition in 1936).

> If it is left to governing classes to make what it likes of Swaraj the principal item in it will be the suppression of the servile classes by withdrawing the facilities given by the British Government in the matter of education and entry in public services.[45]

Ambedkar's reservation to Congress'/ Gandhian *'swarajya'* nationalism foregrounds the importance of inclusivity in the imagination of national identity by promoting 'dignity' and 'fraternity'. Recent works on Ambedkar argue that the term 'liberty' instead of 'freedom' and 'dignity' in the Indian preamble owes its authorship to Ambedkar.[46]

In other words, Ambedkarite swaraj had an umbilical cord to agency of the untouchables. The chronicles of his life story suggest that his understanding of identity and 'dalit swaraj' led him to convert to Buddhism, and pioneered Dalit Buddhist movement.

The fourth conception of national identity in the context of constitutional philosophy is of Economics Professor KT Shah. His conceptual framework of constitutional identity was heavily dipped in the ink of socialism. Professor Shah throughout the Constituent Assembly Debates urged for a progressive liberal constitution.[47] Firstly, he argued for strict separation of power between organs of the Government – Legislative, Executive, and Judiciary emphasizing that these are basic tenets of liberal constitution.[48] On a similar note, he

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45 Dr. BR Ambedkar, *Dr. Babasaheb Ambedkar Writings and Speeches Vol. 9* (first published in 1979, Dr. Ambedkar Foundation 2019), *also available at* < http: // drambedkarwritings . gov . in / upload / uploadfiles / files/Volume_09.pdf> accessed 26 February 2023.

46 *Aakash Singh Rathore* (n 43).

47 Sudhir Krishnaswamy, 'Is the Indian Constitution liberal?' (Friedrich Naumann Foundation 2019), *available at* < https://www.sudhirkrishnaswamy.net/wp-content/uploads/2019/04/Is-the-Indian-Constitution-Liberal.pdf > accessed 26 February 2023.

48 Ibid.

invoked that freedom of press and publication should be an express fundamental right alongside freedom of speech and expression.[49] However, often his amendments were rejected by Constituent Assembly. For instance, he suggested proviso to right to property in fundamental rights which goes as below:

> *"Provided that-no rights of individual private property shall be recognized in forms of natural wealth, like rivers or flowing waters, coastal waters, mines and minerals, or forests."*[50]

However, he did not move the amendment considering the complexities associated. Dr. Suresh Chandra Banerjee lamented on impossibility of incorporating KT Shah's amendment. He stated in his speech –

> Mr. President, Sir, I had naturally hoped that we would make some progress towards socialisation at least when we gained our independence within a few months, but in these fundamental rights nothing has been put in regard to socialisation. I would have been really happy, had the amendment of Prof. K. T. Shah been accepted, because there is an element of socialisation there.[51]

Coming to the last competing vision of *Hindu* nation. *Rashtriya Seva Sangh* (RSS) has been aggressively asserting the need of *"Gana Rajya System"* and is deeply critical of modern constitutionalism which it argues is dipped in the ink of colonization. It becomes pertinent to unpackage this understanding of decolonization and consequently its rhetoric of national identity. One of the prominent assertions of Hindu

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49 Ibid.

50 Constituent Assembly Debates (CAD), *Volume III* (2nd May 1947), *available at* < https: // www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-05-02 > accessed 26 February 2023.

51 Ibid.

nationality was made by MS Golwalkar. In *We or Our Nationhood Defined,* he stated:

> The data rendered available to us through the history going over thousands of years and the careful and dispassionate observation of the present day conditions of the Hindus enable us to maintain without any fear of contradiction that the Hindus are a nation or nationality by themselves. They have a distinctive characteristic culture. They have a common cultural language and a common cultural literature which regulate and govern their life even in minute details. They have developed a common out-look on life which is decidedly different from that of any other people…No sane man can question the proposition that Hindus are a nation. There will also be no difficulty to concede that the Hindus constitute the vast majority of the population. India is therefore pre-eminently a Hindu nation, Hindusthan.[52]

On a similar note, another political figure who is coming at the forefront of mainstream political discourse in India post 2014 is Veer Savarkar, celebrated widely as an articulator of the term, *Hindutva*.[53] He defined *Hindutva* in *Hindu Rashtra Darshan* as –

> Everyone who regards and claims this Bharatbhoomi from, the Indus to the Seas as his Fatherland and Holyland is a Hindu. Here I must point out that it is rather loose to say that any person professing any religion of Indian origin is a Hindu. Because that is only one aspect of Hindutva.

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52 M.S. Gowalkar, *We Or Our Nationhood Defined* (Bharat Publications, 1939) 24.

53 Shashi Tharoor, 'Veer Savarkar: The man credited with creating Hindutva didn't want it restricted to Hindus' *(The Print* 26 February 2018) < https://theprint.in/pageturner/excerpt/veer-savarkar-hindutva-india/38073/ > accessed 26 February 2023.

> The second and equally essential constituent of the concept of Hindutva cannot be ignored if we want to save the definition from getting overlapping and unreal. It is not enough that a person should profess any religion of Indian origin, i.e., Hindusthan as his Holyland, but he must also recognise it as his Fatherland as well.[54]

For Savarkar, other faiths owing their origin to India, like Sikhism, Buddhism, and Jainism also qualified to be Hindu and hence part of Hindutva. This strand of thought believes in the Indic civilisational virtues since antiquity and laments the colonial consciousness embedded in our constitutional framework. J. Sai Deepak's recent work on decolonisation is premised around reclaiming the position of Indic civilisational consciousness and presenting it to act as counter-hegemonic to the western normative framework.[55] In this celebrated work, Sai Deepak acutely brings out the Christian 'civilising' intent and the way it culminated into legislative endeavours, and ways in which Christian OET inspired our legal consciousness.[56]

Despite competing visions, all of them shared passionate consensus and conviction that India is unique with its distinct world view and values. In the next part, I will look at judicial attitude towards plurality and ways through which it curtailed the plurality discourses.

PART III – JUDICIAL TRYST WITH PLURALISM

Hobbesian idea of commonwealth state posits that the sovereign or state is the final authority to make judgments when society is at the crossroads with regard to being harmed or injured. Judiciary as one of the State authorities is a marker of Hobbesian State with its

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54 Veer Savarkar, *Hindu Rashtra Darshan* (Prabhat Prakashan, 2015) 5.
55 J.Sai Deepak, *India That Is Bharat – Coloniality, Civilisation, Constitution* (Bloomsbury, 2021).
56 Ibid.

powers to provide finality to civilizational issues using the legal/constitutional langua-culture. Judiciary's tryst with plurality is marred with doctrinal inconsistencies as well as parental reformist gaze with assimilationist aspirations of approaching plurality.[57] Professor PK Tripathi concurs that even constitutional text was apprehensive of religious autonomy. He wrote –

> Even the freedom of religion was guaranteed in this secular state not out of concern for religions, generally, much less, for any particular religion, but solely and unmistakably out of concern for the individual, as an aspect of the general scheme of his liberty, and as incidental to his well-being.[58]

One of the first post-independence case dealing with religious autonomy, *Commissioner of Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Tirtha Swaminar* (popularly known as the *Shirur Math* case), acknowledged the constitutional protection to practice of religion.[59] However, the court categorically rejected the assertion test and laid down its own judicial test of Essential Religious Practices (ERP Test). Justice Mukherjea compared opinions in foreign judgments to support his stand (especially concurred with Australian judge Latham's opinion)[60] and stated that on questions of where to draw the line for courts to inquire on validity of religious practices, it becomes important to note that *"essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself".*[61] Justice Mukherjea's dicta is widely used as an entry point to understand Essential practices test.

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57 *Bajpai* (n 22).

58 P.K. Tripathi, "Secularism: Constitutional Provision and Judicial Review" (1956) 8 Journal of The Indian Law Institute 1,29.

59 *Commissioner of Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Tirtha Swaminar* [1954] SCR 1005 (*Shirur Math* case).

60 *Adelaide Company v. The Commonwealth* 67 C.L.R. 116, 127.

61 *Shirur Math* (n 59).

This test acquired critical importance and was used in catena of cases concerning freedom of religion or of religious authorityies.[62] Justice Gajendragadhkar further formulated the test in *Durgah Committee, Ajmer Vs. Syed Hussain Ali* stating –

> Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and Observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices.[63]

Gajendragadhkar's note of caution was skeptical towards plurality. It also gave impetus to judges to inquire the legitimacy of plural theological claims. He himself stated in later judgment that in instances of a competing claim regarding essential feature of a religion, courts should not go always go by what community states to be an essential feature of a religion. It should have liberty to inquire and decide whether conflicting feature is an actual integral characteristic based on evidences produced before it.[64] This logic or test give wide amplitude to judges to define, interpret or regulate the meaning of religion. J. Duncan Derrett succinctly puts forward the net result of such test, he writes –

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62 *Venkataraman Devaru v. State of Mysore* [1958] AIR SC 255; *Saifuddin Saheb v State of Bombay* [1962] AIR SC 853; *Bijoe Emmanuel & Ors. v. State of Kerala & Ors.* [1986] SCR (3) 518; and *Ratilal Panachand Gandhi v. The State of Bombay & Ors.* [1954] AIR SC 388; *Acharya J. Avadhuta & Ors. v. Commissioner of Police, Calcutta & Anr* [1983] 4 SCC 522; and *Commissioner of Police & Ors. v. Acharya J. Avadduta* [2004] 12 SCC 770.

63 *Durgah Committee, Ajmer Vs. Syed Hussain Ali* [1962] SCR (1) 383.

64 *Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan & Ors* [1963] AIR SC 1638

> The Courts can discard as non-essentials anything which is not proved to their satisfaction – and they are not religious leaders or in any relevant fashion qualified in such matters… The Constitution does not say freely to profess and propagate the essentials of religion, but this is how it is constructed.[65]

This test continues as I write despite multiple criticism from different sections.[66] Current CJI, DY Chandrachud expressed his discomfort with ERP in *Sabarimala* stating that judges "lack both the competence and legitimacy to pronounce on the importance of specific doctrines or beliefs internal to religion" and any attempts at interpreting religious texts by judges lead to imposition of an external viewpoint. [67] Ironically, his formulation of 'Constitutional Morality' is also criticized as a 'top-down model of reformation with a whip' and imposition of judicial morality on retricting plurality. As recent as in *Hijab* case, one of the issues before the High Court was whether wearing hijab/headscarf is a part of Essential Religious practice in Islamic Faith protected under Article 25 of the Constitution? While dismissing the relevance of this question in Supreme Court, Justice Dhulia also laments the frequent usage of ERP test.[68] He states –

> In my humble opinion Courts are not the forums to solve theological questions. Courts are not well equipped to do that for various reasons, but most importantly because there

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65 J. Duncan Derrett, *Religion, Law and the State in Modern India* (New Delhi, Oxford University Press 1996) 447.

66 Mathew John, 'The limits of pluralism: A Perspective on Religious Freedom in Indian Constitutional Law' in in Karen Barkey, Sudipta Kaviraj & Vatsal Naresh (eds), *Negotiating Democracy and Religious Pluralism – India, Pakistan, and Turkey* (Oxford University Press 2021); Anup Surendranath, 'Essential Practice Doctrine: Towards an Inevitable Constitutional Burial' (2016) 15 Journal of the National Human Rights Commission, India 159.

67 *Sabarimala* case (n. 8).

68 *Hijab* Ban case (n.1).

> will always be more than one viewpoint on a particular religious matter, and therefore nothing gives the authority to the Court to pick one over the other.[69]

Pratap Bhanu Mehta argues that 'courts seem committed to some Ciceronian idea of *relgio* cleansed of *supersititio,* to the search for a pure religion whose theology turns out to be compatible with the civil theology of the Commonwealth'.[70] Such pursuit often left bitter taste in court's relationship with plurality, to an extent, that it proved detrimental to Courts' legitimacy as a vanguard of rights. This got sharply in forefront of mainstream discourse during *Sabarimala* case. Empirical reality of judgment puts direct questions on such impositions and consequently, led to a review petition which is now referred to a nine-judge constitutional bench.[71]

To conclude this part, it can be stated that judicial understanding (including innovative judicial jurisprudence such as transformative constitutionalism and constitutional morality) of plurality looks at plural 'ways of being' as a negative dimension to liberal constitutionalism and is inevitably destined for what Professor Anup Surendranath calls in a related context, 'Constitutional burial'.

CONCLUDING REMARKS

Webb Keane, American anthropologist, posits a provocative question as to why religious freedom should be given "either a privileged or a peculiarly worrisome character different in kind from artistic, political, or sexual freedom?"[72] He concludes that the answer

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69 Ibid, Para 36 (Dhulia's judgment).

70 Pratap Bhanu Mehta, 'Passion and Constraint – Courts and the Regulation of Religious Meaning' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

71 *Kantaru Rajeevaru v Indian Young Lawyers' Association* [2020] SCC OnLine SC 158

72 Webb Keane, 'What is Religious Freedom Supposed to be Free?', in Winnifred Fallers Sullivan et al. eds *Politics Of Religious Freedom* (University of Chicago Press 2015) 324.

to it depends on understanding of "religion" as presupposed by the laws that regulate and protect it.[73] Myriam Henin-Hunter in her recent work tries to follow this strand of inquiry and asserts that the court adjudications concerning religious freedom in the UK and France have often looked (especially in the twenty-first) at its negative dimension i.e., negative liberty, to protect believers from State intrusions and interferences.[74] I have reviewed the work elsewhere.[75]

On a similar note, judiciary in India have historically accommodated plurality and sets limits to it through its jurisprudence of Essential Religious Practice (ERP), transformative constitutionalism or even the more recent one, Constitutional morality. Mathew John while examining the epistemic framework of ERP test concluded –

> …the essential practice test that has structured the operation of religious freedom in Indian law to constrain rather than expand India's plural traditions of religious practice.[76]

Much aggressive criticism vis-à-vis of transformative constitutionalism and constitutional morality came from J. Sai Deepak's recent work wherein he attacked these tests to be pervasive effect of colonial Onto-Epistemology and Theology.[77] He wrote –

> …modern day constitutional institutions serve colonial constitutionalism and advance the cause of reformation of native society in the image of the European Civilisation, perhaps under the belief that the native society's salvation lies in Westernisation…If the premise is rooted in

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73 Ibid.

74 Myriam Hunter-Henin, *Why Religious Freedom Matters For Democracy: Comparative Reflections From Britain And France For A Democratic "Vivre Ensemble*" (Oxford University Press 2020).

75 Aditya Rawat, 'Book Review: Why Religious Freedom Matters For Democracy: Comparative Reflections From Britain And France For A Democratic 'Vivre Ensemble' By Myriam Hunter-Henin (Non-West Reading Of Hunter-Henin's Democratic Approach)' (2021) 6(1) CALJ 149.

76 *Mathew John* (n. 66).

77 *J. Sai Deepak* (n 55).

> colonialized versions of indigenous history, it is but natural that transformative constitutionalism constantly sees the need to reform the native out of his/her identity.[78]

It leaves us in a suspended limbo wherein we are conscious of immanent incapacitation of modern constitutionalism's toolkit to engage with plurality and our decolonial epistemology is on a bridge to nowhere. Aditya Nigam pointed out this inherent lacuna in his work stating –

> However, one must underline that this 'democratic dialogue' is virtually impossible given that our language has no vocabulary to understand the puranic, a necessary consequence of modernity's cognitive arrogance. This democratic dialogue can be made possible by acknowledging a certain equality between different ways of thinking and being.[79]

This brings me back to title of the essay i.e. towards *cul-de-sac*. Professor MP Singh & Dr. Niraj Kumar argued in their recent work that non-state legal orders such as religion based, caste-based, village-based, tribe-based are not operative in peripheries, but there is a strong probability that the state legal system might be the one which is actually at the peripheries.[80] If we are serious about plurality, we should strive towards epistemic reconstitution of our constitutionalism that sheds the clothes of desirability of homogeneous constitutional identity.

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78 Ibid, 114; It is tough to align with his conceptual challenges, but at the same time, he is asking pressing questions which makes it imperative to engage with him without brushing him aside because of his political idealogue. For my critique of his work, see, Aditya Rawat, 'Book Review: India that is Bharat-Engaging but Incongruent Decolonial Epistemology to Understanding Indian Constitutionalism' (2022) 7(1) COMP. CONST. L. & ADMIN. L. J. 146.

79 *Aditya Nigam* (n 17).

80 M P Singh & Niraj Kumar, *The Indian Legal System - An Enquiry* (Oxford University Press 2019).

CONVERSATIONS ON ARTICLE 370 OF THE CONSTITUTION OF INDIA: A CRITICAL RESPONSE

*Aurif Muzafar**

Abstract:

This article brings forth transformative ways of thinking on Article 370 of the Constitution of India beyond the contours of the predominant liberal and rightwing narratives. The narrative formed around Article 370 as a site for India's traditional, broadly accepted liberal discourse on Kashmir, restricted in terms of interpretation and devoid of any solution to the larger Kashmir problem, is unmasked. The article thus criticises dominant narratives that have come to define Article 370.

Introduction:

In a "unilateral" move, the Government of India, on August 5, 2019, revoked Article 370 of the Constitution of India(hereinafter Article 370), a controversial provision steering the relationship between the Union of India and the State of Jammu and Kashmir.[1] Article 370 was framed as an interim arrangement that existed between the newly formed Indian state and the princely state of Jammu and Kashmir and would cease to exist "only when the Kashmir problem [was] satisfactorily settled"[2] and when the people of Jammu and

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1 'India revokes disputed Kashmir's special status with rush decree' (*Aljazeera*, 5 August 2019) <https://www.aljazeera.com/news/2019/8/5/india-revokes-disputed-kashmirs-special-status-with-rush-decree > accessed 20 November 2023

2 Constituent Assembly Debates, vol 10, 17 October 1949 (10.154.293) <https://www.constitutionofindia.net/debates/17-oct-1949/#135272> accessed 20 November 2023

Kashmir would be given the opportunity "to decide for themselves whether they will remain with the Republic or wish to go out of it."[3] With Kashmir unresolved for decades, this interim arrangement crystallised into a widely accepted "constitutional arrangement" in India's federal political polity and tied Kashmir's future to India permanently. Legally and constitutionally speaking thus, Article 370 was the only link connecting the Indian Union with the erstwhile state. In the liberal Indian imagination, however, Article 370 was understood to be an instance of a "special status" or "autonomy" accorded to a Muslim-majority state in a Hindu-majority country, and it was in opposition to this idea that the Hindu nationalist parties have always wanted to assert full control over Kashmir which would come in the elimination of Article 370. When the Parliament of India was in the process of abrogating Articles 370 and 35A, the whole of the population in Jammu and Kashmir was put under siege, and there was a complete communication blockade, including an internet shutdown lasting many months.[4] Taking note of the situation in Kashmir, the United Nations called the internet shutdown a "collective punishment of the people of Jammu and Kashmir."[5] The siege, however, was not new to the people of Kashmir. In its modern history, Kashmir has had a tumultuous past, with mass movements being suppressed by the might of the state right from the year 1989 when the first armed insurgency started to continuous peaceful demonstrations in the first two decades of the 21st century.[6]

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3 ibid (10.154.294)

4 '145 days of internet shutdown in Kashmir, no word on service restoration' (*The Economic Times*, 27 December 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/145-days-of-internet-shutdown-in-kashmir-no-word-on-service-restoration/articleshow/72996839.cms> accessed 20 November 2023

5 'Kashmir communications shutdown a 'collective punishment' that must be reversed, say UN experts' (*UN News*, 22 August 2019) <https://news.un.org/en/story/2019/08/1044741> accessed 20 November 2023

6 Sanjay Kak (ed), *Until My Freedom Has Come* (Haymarket Books 2013), see generally; See also, Javid Iqbal, *Kashmir: A State of Impunity* (Gulshan Books 2015)

The situation in 2019 was unprecedented for numerous reasons. One, it put Kashmir directly into the hands of the Hindu nationalists, who have consistently opposed autonomy for Kashmir and have demanded a "complete integration" of the State into the Union of India.[7] Two, it exposed the region to irreversible (and now normalised) changes impacting the possibilities of long-term peace and justice in the region. Aggrieved by the unilateral constitutional changes, people from different walks of life, including lawyers and politicians, approached the Supreme Court, praying to reverse all such changes, including the revival of the "autonomy" and the invalidation of the Presidential Orders passed in 2019 to reorganise the erstwhile state into the territories of the Union. As a result, many conversations have taken place on Article 370 and the BJP's move to abrogate the provision. While this article is being written, the hearings in the Supreme Court are underway, and as this article argues, are representative of the liberal democratic rhetoric on the one hand and the right-wing discourse on the other. Keeping the hearings in the Supreme Court at the centre of the discussion, I explore various ideas defining Article 370. The premise of this article is that the "liberal-secular" defence and right-wing opposition to Article 370 have practically not had much of a difference as they have sustained the propaganda of the state in one form or another and have denied to the Kashmiri people the agency to decide their political future.

Even the Article 370 hearings in the Supreme Court were representative of two entities: the liberal elite (inheritors of the Congress party) and the right-wing Hindu nationalist Bharatiya Janata

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7 Dibyesh Anand, 'Kashmir Is a Dress Rehearsal for Hindu Nationalist Fantasies' Foreign Policy (Washington, 8 August 2019) <https://foreignpolicy.com/2019/08/08/kashmir-is-a-dress-rehearsal-for-hindu-nationalist-fantasies/> accessed 20 November 2023

Party (BJP), leaving a void for the representations of the Indigenous Kashmiri demands.

I thus open the discussion with the question of sovereignty in Kashmir and seek to understand the indigenous meanings of sovereignty, whether they come from the "mainstream" or the "resistance" camp of politics.[8] Keeping the hearings in the Supreme Court at the centre of the discussion, I cite various documents, scholarly works, and political speeches to understand the idea of sovereignty and how Kashmiris grapple with it.

Similarly, the "development" narrative advocated by the BJP has come as a justification for the revocation of Article 370. The government has also vowed to bring "democracy" to Kashmir. I draw parallels of the development narrative in colonial conquest and make a case for its falsity and hollowness. I attempt to understand the role development plays in colonial situations.

I then refer to the liberal Indian attitudes to understand their approach towards Article 370. Citing one such lawyer, I go on to understand the approach of the petitioners' lawyers and their position with respect to Kashmir. In my estimation, therefore, things become more apparent, and I do not see much of a difference between the lawyers representing the petitioners and the state, except the former trying to preserve a liberal order of which they are the inheritors and from which the promises made to the people of Kashmir flow.

Finally, I explain the interpretation of the basic structure doctrine with respect to Article 370 from the liberal Indian perspective,

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8 'Pro-India' political parties or parties who take participation in the elections are generally presented as 'mainstream' in the Indian media. See also, Samreen Mushtaq and Mudasir Amin, 'In Kashmir, Resistance is Mainstream' (*Himal SouthAsian*, 16 April 2020) <https://www.himalmag.com/comment/in-kashmir-resistance-is-mainstream-2020> accessed 20 November 2023

which basically converges with the Hindu nationalist idea of denial of "autonomy" to Kashmir. Attempting a 'different' analysis, I cite the Jammu and Kashmir High Court to make a case for "referendum" through the basic structure doctrine itself. I then refer to the statement of a lawyer, which I refer to as the "liberal outrage" over justifying and normalising the situation in Kashmir, even if it is illegal and unconstitutional, to provide a different understanding of the basic structure. The application of the basic structure doctrine, without context, is a poor understanding of law and politics.

The Question of Sovereignty in Kashmir:

The question of sovereignty came to be discussed at length in the Supreme Court during the Article 370 hearings. Sovereignty came to be defined as anything short of sovereignty and was mostly representative of the dominant Indian liberal conception of sovereignty where, through different terminologies and arrangements, the ultimate control of the territory lies with the Indian state and not the people of Jammu and Kashmir. Dr Rajeev Dhavan, for example, representing one of the petitioners in the case, used the term "internal sovereignty" to define Kashmi's status as an entity.[9] "External sovereignty", he said, was lost by the Dogra monarch upon signing the Instrument of Accession. Nitya Ramakrishnan, another lawyer representing the petitioners, used the term "shared sovereignty" to describe the relationship between the Union of India and the State of Jammu and Kashmir.[10] She claimed that this system of 'political sovereignty' acted as a system of checks and balances reflecting the

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9 'Supreme Court hearing on Article 370 abrogation | Day 6' (*The Hindu*, 16 August 2023) <https://www.thehindu.com/news/national/supreme-court-hearing-on-article-370-abrogation-day-6/article67200270.ece> accessed 20 November 2023

10 Gauri Kashyap and R. Sai Spandana, 'Abrogation of Article 370 | Day 9: What makes the relationship between India and J&K binding, asks CJI' (*SC Observer*, 23 August 2023) <https://www.scobserver.in/reports/abrogation-of-article-370-day-9-what-makes-the-relationship-between-india-and-jk-binding-asks-cji/> accessed 20 November 2023

power of the centre with respect to the state of J&K. Similarly, Sanjay Parikh argued that sovereignty in Kashmir was interchangeable with autonomy, and it translated into the form of the Constitution of Jammu and Kashmir.[11] While the Chief Justice of India rejected all such propositions, we need to address the question of sovereignty in scenarios such as Kashmir through a decolonial praxis. "Shared sovereignty" and other such terms give an incomplete conception of sovereignty and provide a strategic recognition of the less powerful that will always be exploited to the advantage of the more powerful.

It is in this context that a critical appraisal of sovereignty requires an appreciation of how the 'dominated' articulates the aspects of sovereignty and not just how the 'dominant' envisions it.[12] In contrast to Indian liberal understandings, sovereignty in Kashmir is a part of everyday life and language and defines the architecture of the society as well. Sovereignty thus does not only become an idea that is challenged(of the dominant or the coloniser) but also one that is asserted(by the subject or the colonised).[13] It is reflected in the food

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11 R. Sai Spandana and Gauri Kashyap, 'Abrogation of Article 370 | Day 8: On reorganisation of J&K, misuse of President's Rule and protection of minorities' (*SC Observer*, 22 August 2023) <https://www.scobserver.in/reports/abrogation-of-article-370-day-8/> accessed 20 November 2023

12 See generally Philip Constable, 'Kashmir Dispute since 1947' [2018] The Encyclopaedia of Diplomacy 1; see also Karen Heymann, 'Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust' (2003) 19 American University International Law Review 153. (India and Pakistan both claim sovereignty over the whole of Jammu and Kashmir, while China also lays claims to certain parts. The present study does not discuss the claims of these sovereign states but how sovereignty is imagined by the indigenous political groups.)

13 Scholars have pointed out the lack of sovereignty in post-colonial states where sovereignty could not be transferred directly to the people. See, for example, Adom Getachew, *Worldmaking After Empire*: *The Rise and Fall of Self-Determination* (Princeton University Press 2019). Getachew disscets the Carribean development narrative as basically colonial expansion allowing direct control to outside entities in opposition to the aspirations of the people. See also, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans*: *Race and Self-Determination in International Law*, vol 3 (University of Minnesota Press 1996); Gerry Simpson, *Great Powers and Outlaw States*: *Unequal Sovereigns in the International Legal Order* (CUP 2004)

patterns of the people,[14] in the streets when people claim their political will,[15] how people trade,[16] in everyday conversations and aspirations of the people, and in the life and death of the political subject.[17] The choices people make in their lives are deeply influenced by the broader political happenings around them. In Kashmir, sovereignty has also been asserted in the language of what is generally referred to as "mainstream politics" and not just resistance politics. In this part, I will demonstrate how sovereignty in Kashmir is historically informed and how Kashmir's political discourse has always centred around claims of sovereignty over the land.

After the abrogation of Article 370, significant changes were made to the land laws, and big corporations opened Kashmir for investment, fearing claims of demographic change in the region.[18] It also meant amending land laws and making the transfer of land easy for the corporates and the settlers. In October 2020, when the land laws were being amended to suit the interests of the ruling party, Omar Abdullah, the former Chief Minister of Jammu and Kashmir and one of its foremost leaders, tweeted that the laws were unacceptable to the people.[19] He made another interesting remark, signifying not just a fear

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14 Samina Raja and others, 'Planning and Food Sovereignty in Conflict Cities' [2022] Journal of the American Planning Association 183. See also Omer Aijazi, 'Textures of Violence: Foraging, Cooking, and Eating in Kashmir' [2023] PARISS, 106

15 Mohd Tahir Ganaie, 'Claiming the Streets: Political Resistance Among Kashmiri Youth' in Mona Bhan, Haley Duschinksi and Deepti Misri (eds), *Routledge Handbook of Critical Kashmir Studies* (Routledge 2023)

16 Aditi Saraf 'Trade, Boundaries, and Self-Determination' Bhan (n 15) 127

17 Farrukh Faheem, 'Interrogating the Ordinary: Everyday Politics and the Struggle for Azadi in Kashmir' in Haley Duschinski and others(eds), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018)

18 The changes made to the land laws have opened discussions on settler-colonialism and how the revocation of the autonomy of Kashmir establishes India as a settler state. That, however, is a debate for a different time. For a discussion, see 'From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir', [2021] 134 Harvard Law Review 2530

19 "Jammu and Kashmir put on sale': Omar Abdullah slams Centre for amendment in land laws', *The Indian Express* (27 October 2020) <https://indianexpress.com/article/india/jammu-kashmir-land-laws-amendment-

but a lament of a loss that was too costly. He said, "J&K is now up for sale…" Abdullah was lamenting the loss of sovereignty in his tweet. It was a departure from how Kashmiris used to see themselves with respect to the land that they considered themselves the only owners of. The control over the land by the indigenous in Kashmir signified their claims to sovereignty over the land. Once the liberalisation of such land laws took place in a colonial fashion and the name of neoliberal development,[20] such a loss was huge. In fact, sovereignty as a phenomenon had a huge role to play in the dispute over the legal status of Jammu and Kashmir.[21]

In an extensive study titled *Anatomy of the Autonomy: A Comparative Study of some Documents related to the State of J&K*, Arif Ayaz Parrey details how different documents formed in the erstwhile State viewed the idea of sovereignty.[22] Parrey examines major 'mainstream' documents such as Naya Kashmir produced by Sheikh Abdullah's National Conference(NC) in 1944, Self-Rule Framework for Resolution formed by the J&K People's Democratic Party(JKPDP) in 2008, Sajad Lone's, representing J&K People's Conference(JKPC), Achievable Nationhood formed in 2006, J&K Regional Autonomy Report of 1999, and report of the Regional Autonomy Committee in 2000.

The Naya Kashmir document, the leftist manifesto of the National Conference, which was formed some years before the independence of India, views Kashmir as a sovereign state. Parrey

omar-abdullah-6902386/> accessed 20 November 2023

20 Nitasha Kaul, 'Coloniality and/as Development in Kashmir: Econonationalism' [2021] *Feminist Review* 114

21 Priyasha Saksena, *Sovereignty, International Law, and the Princely States of Colonial South Asia* (OUP 2023)

22 Arif Ayaz Parrey, 'Anatomy of the Autonomy: A comparative study of some documents related to the autonomy of J&K', Centre for Dialogue and Reconciliation <https://cdr-india.org.in/pdf's/Anatomy_of_the_Autonomy_2.pdf> accessed 20 November 2023

argues that even the drastic changes brought to this 1944 document in 1977 have failed to erase the strong Kashmiri nationalist tone prevalent throughout the text.[23] It remains one of the most important legal documents in Kashmir's modern history and is inspired by the Soviet Constitution.[24] It spoke the language of a territorially defined new nation whose self-determination was necessary to perfect the union.[25] The fact that there is scant or no mention of India and Pakistan in the manifesto gives the idea that the framers envisioned a sovereign state for themselves. PDP's self-rule framework and PC's Achievable Nationhood both envision a system of "shared sovereignty" with India and Pakistan. This means giving Jammu and Kashmir the power to determine its political arrangements, with both countries currently controlling its land and resources- perhaps a method to work out the idea of a 'shared sovereignty'. While the Self-Rule Framework gives India control over defence, security, foreign affairs and communications, Achievable Nationhood restricts it to defence and foreign affairs.[26] The State Autonomy Report does not mention the parts of Jammu and Kashmir under the administration of Pakistan but sees the solution of the part under Indian control in the pre-1953 position of autonomy.[27] The Report shares the political vision in the Naya Kashmir document, but the prevalent political circumstances of the time make it subscribe to notions of autonomy or a federal scheme that can translate to "shared sovereignty" between the two units.

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23 ibid

24 Andrew Whitehead, 'The Making of the *New Kashmir* Manifesto' in Ruth Maxey and Paul McGarr (eds), *India at 70: multidisciplinary approaches* (Routledge 2020)

25 "Union" here refers to the State of Jammu and Kashmir. Kashmir is referred to as a "country" in *Naya Kashmir* and most of the major texts formed during that period. For a discussion, see Suvir Kaul, 'On Naya Kashmir' Bhan (n15) 37

26 Parrey (n 22) 25.

27 Pre-1953 position refers to the position before the passage of the Basic Order of 1954. The Constitution (Application to Jammu and Kashmir) Order 1954 made substantial portions of the Constitution of India applicable to Jammu and Kashmir. The year 1953 was also marked by Sheikh Abdullah's dismissal and arrest under the Public Safety Act, and much of what followed emptied Article 370 of its content.

National Conference used the plank of autonomy to contest the assembly elections of 1996 and got a huge victory, leading to the formation of the State Autonomy Committee.[28] The Indira-Sheikh Accord of 1975, understood as the final blow to Sheikh's aspirations of an autonomous state, was also marked by demands to restore the pre-1953 position. This was not the only instance that the National Conference was citing history to articulate its demands. In 1955, NC's plebiscite movement went to the extent of asking for a referendum and the final settlement of the Kashmir dispute.[29]

When the report of the State Autonomy Committee (commonly referred to as the Autonomy Report) was tabled before the Jammu and Kashmir Legislative Assembly in the year 2000, the discussions lasted a few days. While a few recalled Sheikh Abdullah's speeches, Choudhary Mohammad Ramzan, a member of the National Conference, made an impassionate speech. He opened his speech with an Urdu couplet, marking a complaint and dejection. He said: *hum wafa karte rahe, wo jafa karte rahe/ apna apna farz tha donon ada karte rahe*.[30] A rough translation would mean the following: We (Kashmiri unionists) kept remaining loyal to them (India), they kept betraying us/ Both of us kept performing our duties.

Appalled at the injustices committed to the people of Kashmir "in the name of legislation", he urged everyone to leave party politics and restore the constitutional rights of the people, which would restore the "integrity and sovereignty of the State."[31] He warned the members about the State becoming a ground of "international conspiracies" and

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28 Rekha Chowdhary, 'Autonomy Demand: Kashmir at Crossroads' (2000) 35 EPW 2599

29 Farooq Ahmad Waza, 'Special Position within Indian Union: Articles 370 and 35A of the Indian Constitution' in Aijaz Ashraf Wani and Farooq Ahmad Waza (eds), *Government and Politics of Jammu and Kashmir: From Princely State to Union Territory* (SAGE India 2022)

30 Jammu and Kashmir Legislative Assembly Secretariat, *Assembly Debates on Autonomy Report*, (Session 9, 2000) 161

31 ibid

reminded the members of the terms of the Instrument of Accession. He said that apart from subjects such as defence, foreign affairs, and currency, it was in terms of Article 370 that "residual sovereignty" was retained. The special treatment of Kashmir, he said, was borne out of the fact that Kashmir merely acceded to India and did not merge. His party was elected on the agenda of restoring autonomy, and this hope of restoration of autonomy sustained the people's trust.

The Development Narrative:

'We must develop them with or without their consent.'[32]

To effect the complete annihilation of Article 370 and bring other major changes, India's Home Minister, Amit Shah, introduced the Constitution (Application to Jammu & Kashmir) Order, 2019 and Jammu & Kashmir (Reorganisation) Bill, 2019, along with the Resolution for Repeal of Article 370 of the Constitution of India, he made it clear that his government was only going to talk to those "committed to peace and *development* in J&K."[33] It was the youth of the State, he said, who needed development. Article 370, he said, prevented development and strangulated democracy in Kashmir. He appealed to the Members of the Lok Sabha to "join hands with the Government to bring the people of J&K in the mainstream of development." He mentioned a number of central laws that could not be applied to Jammu and Kashmir that hampered development in Kashmir, prominent being the Prevention of Child Marriage Act, Right to Education, and Land Accusation Act. This development was to come in the form of liberalisation of land laws to "bring in investments

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32 Quoted in Kaul (n 20)

33 'Government brings Resolution to Repeal Article 370 of the Constitution', PIB, MHA, GoI (5 August 2019, New Delhi) https://www.mha.gov.in/sites/default/files/PressReleaseJ%26KDecisions_06082019.pdf accessed 20 November 2023

from private individuals and multinational companies."[34] He also talked about low land prices in Kashmir because of the restrictions on land transfer to outsiders. This "development" paradigm must be critiqued and put into context, given the unique nature of Kashmir. I will use the following frameworks to put into perspective the narrative of development that reeks of colonial pride and wants to assimilate the "other", even if the other feels robbed at every instance of such practices and modes.

In an excellent article titled *Deconstructing Development*, Ruth E. Gordon and Jon H. Sylvester question the idea of development as a hegemonic construct of the West to destroy the societies, cultures, communities and institutions of the "other" needing transformation.[35] Development "presumes a universal and superior way of ordering society, and that all societies are to advance toward the same goal."[36] This practice does not value cultures and ways of living as it wants to "develop" the political subject into "something else".[37] It is a product of a specific order that wants to assimilate or homogenise the other.[38] Primary among these attempts towards assimilation is the colonisation of legal systems.[39] Adopting the coloniser's systems would thus facilitate development and lead to the creation of better institutions. There would be "increased equality, freedom and participation…" benefitting "the poorest of the poor."[40]

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34 ibid

35 Ruth E. Gordon and Jon H. Sylvester, 'Deconstructing Development' (2004) 22 Wisconsin International Law Journal 1; See also, Luis Eslava, 'The Developmental State: Independence, Dependency and the History of the South' in Jochen von Bernstroff and Philipp Dann (eds), *The Battle for International Law* (OUP 2019)

36 ibid

37 ibid 5

38 ibid 8

39 ibid 18 (The authors in the cited material have used the word "Westernization").

40 ibid 19

It may be helpful to situate the idea of development in an era of decolonisation the world over, as even today, these very justifications are employed to perpetuate colonialism. In her much-needed article *Decolonization, Development, and Denial*, Natsu Taylor Saito explains how the development narrative sustains colonisation and emerges as a colonial construct.[41] Taylor describes how even the decolonisation process established by the United Nations produced "an order privileging territorial integrity over the rights of non-self-governing peoples."[42] Colonialism is presented as beneficial to the colonised and for their "good." Even as Spain was colonising the Americas, legal justifications were provided for their colonisation as they were found unfit to rule themselves, and it was to their advantage that they were getting the benefits of "civilisation."[43] This order that prefers territorial integrity over broad-based rights uses "guardianship" to justify appropriation.[44] The other narrative that is replicated is that the colonised need to embrace a certain idea (perhaps a myth?) – "the idea of India", in our case, selling democracy and dreams, the idea of "integrity", the idea of constitutionalism, expansion of the "good" to margins to civilise them- which all become the building blocks of colonial rule and make the development narrative hollow.[45]

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41 Natsu Taylor Saito, 'Decolonization, Development, and Denial' (2010) 6 Fla. A&M U. L. Rev. 1; Critics argue that the claims of democratization are a historical continuity of the Western standards of "humanizing" and "civilizing" non-European societies and reproduce the notions of superiority of one race over the other. See, for example, Antony Anghie, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 Vill. L. Rev. 887; See also, Uma Kothari (ed), *A Radical History of Development Studies*: *Individuals, institutions and ideologies* (Zed Books 2005)

42 ibid 21

43 Justus M. van der Kroef, 'Francisco de Vitoria and the Nature of Colonial Policy' (1949) 35 The Catholic Historical Review 129

44 Taylor (n 41) 22

45 Developmentalism in India has also had a devastating impact on indigenous and lower caste communities. Tribal communities in Manipur, for example, have faced exploitation of their resources and have been subjected to dispossession. However, what makes the development narrative differ from the narrative on Kashmir is the discrimination that it comes with as the "fruits of development" hardly reach the poorer, lower castes and tribals while as in the case of Kashmir, the refusal of the people to be developed and seen

Viewed through the above prism, we see references being made in the speech of the Home Minster to development and democracy. A close scrutiny of the address would inform us of the "development horror" associated with colonialism being reproduced and replicated today. When he says that J&K would become a "true part"[46] of India by removing Article 370, it means a denial of every hint of sovereignty to the people. The practice of sovereignty that was so far being exercised in the form of state violence (touted as "governance")[47] takes a different turn, as, without the appropriation of lands, the coloniser seems incomplete. The coloniser cannot exist without the colonised (reference is made to the claim of "integral part" by the Indian state over the whole of Jammu and Kashmir) as the erasure of pre-existing peoples is necessary, in the name of development, of course, to further their annexation. The sovereign interests of an occupying state, therefore, depend on the creation of "social, political, legal, and economic institutions that would function solely for their own benefit; and to determine who could or could not—or would be forced to—live within their claimed borders and exactly how they were to live."[48]

The development aspect thus attains a unique framework in the Kashmiri context. In Indian writings supporting the move of the BJP government, "Kashmir was denied the fruits of Indian

as "developed" in the imagination of mainland Indians is seldom accepted. While the policies of extraction of the resources are the same, the case of Kashmir also makes it a point of pride for any government in power in New Delhi to sell their ways of controlling Kashmir. However, the systemised dispossession of all the people existing in the geographical margins of India continues to follow the same modus operandi of 'development' and 'democracy'. Raile Rocky Ziipao, *Infrastructure of Injustice*: *State and Politics in Manipur and Northeast India* (Routledge 2020). Despite India's rapid economic growth, lower castes and tribes in India continue to be marginalised. Shah and Lerche et al., Ground Down by Growth (Pluto Press 2018). See also, Mukul Sharma, *Caste and Nature*: *Dalits and Indian Environmental Politics* (OUP 2017)

46 MHA (n 33)

47 Suchitra Vijayan, *Midnight's Borders: A People's History of Modern India* (Westland 2021) 185

48 Natsu Taylor Saito, 'Different Paths' (2020) 1 JLPE 46

democracy."[49] With the removal of the "special status", "all the benefits of democracy will flow to Kashmir now."[50] This development will include the *development of narratives* as the hearts and minds of the people have to be won.[51] This is a false depiction as the major portion of the Indian Constitution was already applicable to Jammu and Kashmir by what A.G. Noorani calls the "systematic hollowing out of Art. 370."[52] Much of this propaganda falls flat, as we now see a demotion instead in terms of the exercise of rights by the people. Shrimoyee Nandini Ghosh notes that the rights framework, including the right to gender equality, to work, to education, are now part of the unenforceable scheme of the Directive Principles of State Policy,[53] giving a blow to the historic Naya Kashmir manifesto, which gave the right to education to all citizens free of charge covered under "a wide system of State scholarships"… "in the higher schools and universities."[54] It is interesting to note that the Naya Kashmir manifesto has the right to work for women "in all fields of national life, economic, cultural, political, and in the state services"… to "be realised by affording women the right to work in every employment upon equal terms and for equal wages with men."[55] There is also a provision for leave during pregnancy.[56] Even the development indicators show that Jammu and Kashmir was doing better or at par

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49 Syed Firdaus Ashraf, 'Kashmir was denied the fruits of Indian democracy- Tilak Devasher Interview' (*Rediff.com* 6 August 2019) <https://www.rediff.com/news/interview/kashmir-was-denied-the-fruits-of-indian-democracy/20190806.htm> accessed 20 November 2023

50 ibid

51 Aditya Gowdara Shivamurthy, 'Building Indian narratives and battling new militancy in Kashmir' *Hindustan Times* (New Delhi, 8 August 2021)

52 A.G. Noorani, 'Deception on Article 370' *Greater Kashmir* (Srinagar, 4 July 2016) 9

53 Shrimoyee Nandini Ghosh, 'One Nation, One Flag, One Constitution' (*Lok Samvad* 7 November 2019) <https://popularedu cation.in/loksamvad/article/one-nation-one-flag-one-constitution/> accessed 20 November 2023

54 New Kashmir, 1944, Article 11

55 ibid Article 12

56 ibid

with the rest of India in all the primary development indicators, mainly because of the land reform policies initiated in the 1950s.[57] It could, therefore, easily qualify as a democratic backsliding- if democracy even existed in any form- rather than democratic reform. Development in Kashmir is basically "an end that justifies using any means,"[58] including moral blindness.

The mention of non-implementation of laws like the Prevention of Child Marriage Act and Right to Education signals the assumption that Kashmir is a backward society, primarily because it is Muslim-majority, and needs intervention. In fact, the Jammu and Kashmir RTI Act of 2009 was more robust than the Central Act of 2005 and was implemented a year before the Central Act.[59] Child marriage, for example, becomes another marker of identity for the larger Muslim population, where the colonial construction of rescuing the "other" from their self-imposed oppression comes in handy, and the coloniser finds justification in imposing his systems of law.

Similarly, the changes in land laws pose unique questions about property and rights and how they interact. In October 2020, sweeping changes were made to land rules in J&K, paving the way for "the Indian capitalists to invest and accumulate resources in the region."[60] These corporations will not be regulated and could possibly replace

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57 Womic Baba and Anam Zakaria, 'The false promise of normalcy and development in Kashmir' (*ALJAZEERA* 5 August 2020) <https://www.aljazeera.com/opinions/2020/8/5/the-false-promise-of-normalcy-and-development-in-kashmir> accessed 20 November 2023**;** see also Jean Dreze, 'Article 370 helped reducing poverty in Jammu and Kashmir' (*National Herald* 9 August 2019) <https://www.nationalheraldindia.com/india/economist-jean-dreze-jandk-more-developed-than-gujarat-special-status-helped-reducing-poverty> accessed 20 November 2023

58 Kaul (n 20)

59 Raja Muzaffar Bhat, 'Replacing J&K RTI Act With Centre's Law Has Weakened People's Right to Know' (*The Wire*, 13 May 2021) <https://thewire.in/rights/jammu-and-kashmir-rti-act> accessed 20 November 2023

60 Muhammad Mutahhar Amin, 'Land Laws of Jammu and Kashmir: Material Consequences and Political Ramifications' (2021) 56 EPW 20

governance in a place like Kashmir, benefitting the already powerful BJP government. Their partnership has already been a feature of Indian politics. Enriching the companies at the cost of the resources in Kashmir is also not recent.[61] However, after the appropriation of the lands, it will be made accessible, and any resistance will also be conveniently crushed. By decrying low land prices, the land is rendered "profitable", similar to the colonial attitudes of European settlers towards American Indians and Africans.[62]

The Crisis of a Liberal Democracy:

"*India would bind Kashmir in golden chains.*" ~ Jawaharlal Nehru

The relationship between Jammu and Kashmir and the Union of India was based on liberal democratic principles endorsed by Sheikh Abdullah, who was "enamoured of the high principles for which [India] stood."[63] An artificial bond, it came to be sold to many generations of Kashmiris. The comparison was mostly made with Pakistan, which was presented as poor, undeveloped, and not so liberal or democratic. The Jammu and Kashmir Constituent Assembly echoed such comparisons and how the aspirations of Sheikh Abdullah converged with those of the newly formed Indian state. In fact, he brought about a list of differences, laying down the advantages of joining any of the dominions between India and Pakistan or remaining independent. It was the "kinship of ideals," Abdullah said that

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61 Haley Duschinski and Mona Bhan, 'Third World Imperialism and Kashmir's Sovereignty Trap' Bhan (n15) 332 This passage is reproduced from the above-cited chapter: "A 2016 Right to Information application revealed that India's National Hydroelectric Power Corporation (NHPC) has earned 3 million USD in the last 14 years from electricity sales, while Jammu and Kashmir alone bought 115,636 million units of power from the NHPC between 2001 and 2016 in order to fulfil its domestic energy requirements."

62 Taylor, *Different Paths* (n 48)

63 Prem Shankar Jha, 'Sheikh Abdullah in 1968: 'Accession Is of Minds, Hearts; Love & Justice Are the Only Weapons You Need'' (*The Wire*, 10 August 2023) <https://thewire.in/politics/sheikh-abdullah-in-1968-accession-is-of-minds-hearts-love-justice-are-the-only-weapons-you-need> accessed 20 November 2023

determined the strength of the ties between the two states. The accession to India, he proclaimed, meant the death of feudalism and autocracy. Speaking before the J&K Constituent Assembly on November 5, 1951, Abdullah was confident that the Government of India would not interfere in the internal autonomy of J&K as the last four years had proven.[64] Abdullah was equally impressed by "the goal of secular democracy" that India had set to achieve for itself through its constitution, and the "national movement" in Jammu and Kashmir "naturally gravitate[d] towards these principles of secular democracy."[65] A comparison was also made between "highly industrialised" India, which could help the state with equipment, technical services and materials, and Pakistan, where these economic advantages could not be explored.

It was this mutual interest with the newly formed secular India that tied Sheikh Abdullah to the "idea of India", represented mainly by the Indian National Congress.[66] Critics have pointed out that the Indian brand of secularism reinforces notions of exclusion of Hinduness, Muslim exclusiveness and India being the homeland only of Hindus. The opposition to Hindutva has not been able to counter these problems, and the identity of India's secular politics has rather exacerbated Hindu nationalism and created a Brahminical, socialist, secular order of the society.[67] Now, for India also to exist as a secular 'nation' and heed the Nehruvian or Gandhian brand of 'Hindu inclusiveness', Kashmir had to be part of it, giving it the reasons to assume what Gowhar Fazili calls a "moral high ground relative to the supposedly totalitarian regimes like China or feebler democracies like

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64 Jammu and Kashmir Constituent Assembly, *Assembly Debate*, (JKCAD Part I, Vol 1) 1951-1955

65 ibid 106

66 Altaf Hussain Para, 'Demystifying Sheikh Abdullah' (2013) 48 EPW 23

67 Gail Omvedt, *Understanding Caste*: *From Buddha to Ambedkar and Beyond* (2nd edn, Orient Blackswan 2012)

Pakistan?".[68] However, the liberal order he was subscribing to did not prove to live long, as the Sheikh was soon arrested in the Kashmir conspiracy case by his closest ally, Nehru, leading to the killings of hundreds of civilians by the Indian troops.[69] Sheikh's dismissal and arrest also marked a new beginning in which local client politicians were installed to help Nehru consolidate his rule in Kashmir.[70]

The Indian liberal elite, represented mainly by the Indian National Congress, was complicit in this process, resulting in the decay of democracy in Kashmir. The importance of Article 370 was also known to them as nothing apart from this provision tied Kashmir to India. It has often been described as a "tunnel" responsible for the passage of Indian laws to Kashmir. The Indian liberal elite understood the treachery that had been done to rid Kashmir of its rights, including the right to self-determination. However, Article 370(after it had been emptied of all its content) was a cover hiding all such stealth. This cover served dual purposes for the Indian liberal elite. One, it helped India maintain its control over Kashmir, citing the 'special privileges' the State was allowed. Two, it prevented any meaningful engagement on the larger political issue of Kashmir, thereby presenting Kashmir as an 'internal matter' tied to its constitution. What made the 2019 changes different then? The 2019 changes the right-wing central government made took the lid off of this arrangement, and it became apparent that the constitutional commitments carried no meaning. In that sense, Kashmir was really "special".

I argue that the battle on Article 370 in the Supreme Court was the one between the Indian liberal class and the right-wing section of

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68 Gowhar Fazili, 'Liberal Silence on Kashmir and the Malleability of Ethics in India' Bhan (n15) 278; see also Tariq Ali and others, *Kashmir. The Case for Freedom* (Verso 2011)

69 Hafsa Kanjwal, *Colonizing Kashmir* (Stanford University Press, 2023)

70 ibid 2

Indian society, thereby carrying little or no meaning for the subject population of Kashmir. For the liberal side, it was not just about keeping their promises made to the "mainstream" political dispensation in Kashmir but also about preserving democracy and constitutional values back home in the Indian mainland. This is reflected in the line of arguments extended in the Supreme Court, which I will explain in the following paragraphs. For the right-wing side, representing the central government, the battle was about removing every possible hint of Muslim representation, often dubbed as "separatism."

It goes without saying that the success of the petitioners relied on subscribing to the dictates of the liberal order that exists vis-à-vis Kashmir, thereby working under the framework of phraseology such as "integral part." However, such a framework lacks depth and meaning and serves as a dialogue with the status quo or the state itself that produces such depravity in the first instance. It negates the political as the Schmidtian approach would inform us.[71] On the opening day of the arguments, Senior Advocate Kapil Sibal, representing the petitioners, cleared the air, setting a caveat for the rest of the arguments to follow. He said Kashmir was an "integral part" of India, and the integration of Kashmir into the Union of India was unquestionable, keeping himself in accord with the Indian liberal view on Kashmir.[72] Sibal invoked the Jammu and Kashmir Constitution to say this.[73] Similarly, Dushyant Dave submitted that Kashmir was an "integral part" of India, arguing that the repeal of the provision does

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71 Wanling Xiong, 'Protecting Democracy from Liberalism: Defending Carl Schmitt's Critiques of Liberal Democracy' (MA Thesis, Leiden University 2018-2019)

72 Aurif Muzafar, 'Summary of 'In Re: Article 370 Petitions'- Day 1' (*LAOT Blog*, 3 August 2023) <https://lawandotherthings.com/summary-of-in-re-article-370-petitions-day-1/> accessed 25 November 2023

73 The motive here is not to discredit Kapil Sibal for his approach or the line of arguments but to point out the prevalence of the largely liberal rhetoric in such arguments.

not serve any purpose when the integration is already a fact.[74] Other petitioner representatives also put limitations on their observations (in the form of arguments) and clarified their positionalities concerning the matter. Why is this important for our discussion? This is important because it prevents the court from critically reflecting on the issue beyond the contours that it holds dear in the name of integrity, sovereignty, and other such limiting phrases. An example of this is when one of the main petitioners, Mohammad Akbar Lone, was asked to submit an affidavit "stating that he would preserve and uphold the provisions of the Constitution of India and protect the territorial integrity of the nation."[75] This was after Tushar Mehta, Solicitor General of India, asked the Court to demand such an affidavit from Lone. For a constitutional court to permit such an illegality was not surprising, given that it had already put limitations on the discourse.

At the same time, it is essential to understand the implications of legitimising the J&K Constituent Assembly, with some even calling it "Rousseau's model of representative democracy."[76] Such arguments have been met with objections by scholars with allegations of rigging, lack of electoral representation, and a disregard for UN Resolutions.[77] All these political developments need to be questioned to arrive at a logical conclusion, but the exaggeration of the liberal side seems like an attempt to deny a deeper understanding of history.

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74 Transcript of hearing, 'Writ Petition (Civil) No.1099/2019 *In re: Article 370 of the Constitution*' (Record of Proceedings, Supreme Court of India) 17 August 2023

75 Padmakshi Sharma, 'Article 370 Case Petitioner Files Affidavit In Supreme Court Affirming Oath To Uphold Indian Constitution & Protect Territorial Integrity' (*Live Law*, 5 September 2023) <https://www.livelaw.in/top-stories/article-370-case-petitioner-files-affidavit-in-supreme-court-affirming-oath-to-uphold-constitution-protect-indian-territorial-integrity-237066> accessed 20 November 2023

76 Aurif Muzafar, 'Summary of 'In Re: Article 370 Petitions'- Day 4' (*LAOT Blog*, 10 August 2023) <https://lawandotherthings.com/summary-of-in-re-article-370-petitions-day-4-9th-august-2023/> accessed 20 November 2023

77 ibid, see author's notes

Your Basic Structure is Not My Basic Structure:

"*What is true about [the]Constitution of India as regards, (sic) [the]"Basic Framework of the Constitution" is true about [the] Constitution of Jammu and Kashmir.*" ~Justice Hasnain Masoodi

On August 5, 2022, three years after the writing down of Articles 370 and 35A, Senior Advocate Arvind P. Datar was speaking at the book release function of '*Hamīñ Ast? A Biography of Article 370*'.[78] He claimed that nothing was wrong- even legally and constitutionally- with what the central government did to Kashmir, as "there could be different means of achieving an end."[79] He made another pertinent point: "*How far would Article 35A survive after the Basic Structure came?*"[80] He was referring to the Basic Structure doctrine laid down in the *Kesavananda Bharati* case.[81] The scheme of 'special status' was unjustified, and the presence of Article 35A was "anachronistic or paradoxical" in Part III(referring to the Fundamental Rights chapter in the Constitution of India).[82] The revolt in his statements no doubt points to the majoritarian views on Kashmir and these constitutional provisions, with a bit of technical phraseology, but how far are his views justified? A more straightforward way of explaining this is that if you submit your sovereignty to a larger sovereign, how is your claim of sovereignty justified? It puts your integrity in question as a claimant of something you demand of the larger sovereign. This question, of

78 Vidhi Centre for Legal Policy, 'Launch of 'Hamin Ast? A Biography of Article 370' by Navi Books' (*Vidhi*, 13 August 2022) <https://vidhilegalpolicy.in/videos/launch-of-hamin-ast-a-biography-of-article-370-by-navi-books/> accessed 20 November 2023

79 ibid (1:10:00 onwards)

80 ibid. If what Datar says is correct, it also means that the action of the BJP government implied the furthering of the Basic Structure doctrine.

81 AIR 1973 SC 1461. The 'basic structure doctrine' was expounded by the Supreme Court of India in the above-mentioned case and permits the parliament to amend any part of the constitution without without destroying its basic features such as secularism, democracy, constitutional supremacy, separation of powers, federalism, among other features.

82 ibid

course, has its own merit, but when we problematise it in a situation such as Kashmir, we arrive at what I call the "assimilation argument". Datar asks: if Kashmiris are citizens of India, how is Article 35A even justified? In his argument, the upsurge points to the resolution of a longstanding issue from the coloniser's perspective, which comes in different forms, including the "absolute and total destruction or assimilation of original inhabitants."[83] It is a direct attack on the language of the colonised, on how they want to assert themselves and protect their identity and history, whose only wish is to be identified differently from the broader sovereign to which they have submitted by circumstance. But if the resolution culminated in the abrogation of the "special status", why does the state not stop there? It imposes hegemonic nationalism, changes the curriculum, alters the education system, the boundaries of the territory, and the belief systems of the indigenous, and makes coloniality visible to the naked eye. The fact is, the state does not stop, and there is no endpoint in extending its presence in every facet of the life of the colonised. In the following part, I explain how the central government's argument on the "basic structure doctrine" before the Supreme Court was similarly situated and needs further explication.

Terming the abrogation a "step in the historical evolution to achieve fraternity and unity of the nation", Tushar Mehta, Solicitor General of India, contended that the abrogation was in furtherance of the basic structure doctrine.[84] Fraternity and equality being the facets of basic structure means that a "transitory provision" is "removed at an appropriate stage".[85] Its removal thus "*furthers the basic structure* and it enhances the equality and fraternity, which is the bedrock of the

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83 Eve Tuck and K. Wayne Yang, 'Decolonization is not a metaphor' (2012) 1 Decolonization: Indigeneity, Education & Society 1

84 Record of Proceedings (n 74) 29 August 2023

85 ibid

Constitution."[86] The problem comes again as ideas like fraternity and brotherhood(an extension of the "assimilation argument"?) are employed to confer legitimacy to blatantly illegal actions. Some even argued that the arrangement made as a result of Article 370 was in "oddity" with the federal structure.[87] The resurrection of Article 370, V. Giri proclaimed, would "be violative of the basic structure of the Constitution."[88] Similarly, the petitioners' arguments, with the exception of Dr Rajeev Dhavan, on the grounds of basic structure, illustrate the implications of the illegality concerning the whole of the country, with little attention to the purpose and effect of the move for the people of Kashmir.[89] Dhavan carefully located the basic structure in the design of Article 370 itself.[90] According to Dhavan, an analysis that deserves careful reading, Article 370, a substitute for a "merger agreement" not signed between the Union of India and the State of Jammu and Kashmir, itself formed a part of the basic structure.[91] In the absence of a merger agreement, sovereignty would continue with Article 370 as a repository of both the standstill and merger agreements. I conclude this paragraph with a question: does a referendum attain the stature of basic structure in the absence of

86 ibid (emphasis mine)

87 Gursimran Kaur Bakshi, 'On Day 15, quoting Ambedkar, V. Giri calls abrogation rightful centralisation to prevent another loss of India's independence' (*The Leaflet*, 4 September 2023)<https://theleaflet.in/on-day-15-quoting-ambedkar-v-giri-calls-abrogation-rightful-centralisation-to-prevent-another-loss-of-indias-independence/> last accessed 20 November 2023

88 Record of Proceedings (n 74) 4 September 2023

89 See, for example, Muzafar (n 76) (The lawyers argue that this action by the Government is a threat to India's larger federal structure or poses a challenge to Indian democracy in general. However, this is far from true, and this lens for comparison is not justified and hardly serves the case at hand.)

90 Aurif Muzafar, 'Summary of 'In Re: Article 370 Petitions'- Day 6' (*LAOT Blog*, 19 August 2023) <https://lawandotherthings.com/summary-of-in-re-article-370-petitions-day-6-11th-august-2023/> accessed 20 November 2023

91 ibid

Article 370 when the conditions that have led to the formation of Article 370 have either persisted or remained unfulfilled?[92]

The basic structure doctrine does not operate as a standalone concept but needs the application of historical and normative frameworks, particularly when evaluating a deeply political issue.[93] It cannot afford to miss the political and historical conditions of one constituent part of the country that has been promised constitutional accommodation and is caught in a profoundly complex political situation. In 2015, the Jammu and Kashmir High Court had an opportunity to explain the meaning of the basic structure doctrine pertaining to J&K and had a passionate view in the context of history.

It was in *Abdul Qayoom Khan Vs. State of J&K and Ors.*[94] that the petitioner argued that the state officials and constitutional bodies' failure to hoist the state flag of Jammu and Kashmir was a contempt of the State Flag and breach of law. He also demanded that the Republic Day of the State be celebrated "with dignity and honour demonstrating the sanctity of the State Flag."[95] What came as a result of the petition was a lucid interpretation of the basic structure doctrine by Justice Hasnain Masoodi. Justice Masoodi held that the constitutional autonomy of the State of Jammu and Kashmir was the "basic structure" of the State Constitution. It went further to say that the "elected head of the state", also called the *Sadri riyasat*, was part of this basic structure framework.[96] It called into question the Constitution of Jammu & Kashmir (Sixth Amendment) Act 1965, which amended the State Constitution and replaced "Sadri Reyasat" by

92 Muzafar (n 72)
93 Sudhir Krishnaswamy, *Democracy and Constitutionalism in India*: *A Study of the Basic Structure Doctrine* (OUP 2009) 107
94 *Abdul Qayoom Khan v State of J&K and Ors* 2016 (1) JKJ 506
95 ibid para 5
96 ibid para 24

the Governor by saying that the "elective" status of the constitutional post was part of the basic framework of the State Constitution and therefore beyond amending power. Apart from asking the state government to uphold the Constitution of Jammu and Kashmir, it warned that any amendment of the basic structure is "*void like a law* that offends the Constitution."[97] The Court thus brought both constitutional amendments and legislative actions under the purview of the basic structure doctrine. It applied a historical framework to say the same.

It becomes clear from the discussion that the languages of expression for the basic structure doctrine differ as we consider different frameworks. The framework adopted by Justice Masoodi locates the J&K Constitution at par with the Indian Constitution, directs the government to correct the violations committed against the Constitution of J&K, and attaches binding authority to the original idea of constitutional autonomy. It is this return to the "original" that makes me think of "referendum" as part of the basic structure doctrine in the absence of Article 370. The understanding of the doctrine raises complicated questions when we contrast the views of the institutions of the liberal tradition and those that existed in Kashmir with a limited sense of autonomy.

CONCLUSION:

In my article, I demonstrated the need for interdisciplinary alternative conversations on Kashmir and the 'constitutional promises' made to the people of the erstwhile state. While the region has not seen peace for decades, it's essential for us to speak a clearer language and put forward narratives that are agentifying to the people rather than those that are hegemonic and make the language of the state and

97 ibid para 20 (emphasis mine)

the liberal elite thrive. Hindu nationalists may have perpetuated the dispossession of Kashmiri Muslims through their so-called aggressive approach towards Kashmir, but the liberal elite of India who generally subscribe to the 'Nehruvian tradition' of politics have hardly honoured the wishes of the people of Kashmir.

Note: This paper was written when the Supreme Court of India had yet to pronounce its judgment on the matter. While it is difficult to predict the fate of Article 370, given the Court's approach in recent cases, a reversal of the government's actions seems impossible. In any case, we must not stop imagining decolonial futures.

TYING THE KNOT: A COMPARATIVE ANALYSIS OF LGBT++ MARRIAGE RIGHTS IN INDIA, USA AND CANADA

Vivasvan Gautam[*]

Abstract

The article traces the historical development of these rights through judicial decisions, with a focus on three provinces in Canada: Ontario, British Columbia, and Quebec. It is noteworthy that Canada emerged as one of the first nations globally to recognize same-sex marriage, a milestone achieved in 2004. In contrast, India is still in the early stages of recognizing such rights. The Canadian journey towards the recognition of same-sex marriage is characterized by a dialogue that transpired among institutions. This dialogue has played a pivotal role in the evolution of LGBT rights, leading to the landmark decision(s) between 2000-2004 A.D. However, in the case of India, a comprehensive institutional dialogue is conspicuously absent. The struggle for recognition of same-sex marriage in India is still in its nascent stages, marked by numerous legal challenges and debates. A recent judgment in India, the Supriyo Chakraborty v. Union of India, provides hope that Indian institutions may adopt a more Canadian-like approach. By taking inspiration from the Canadian experience, India has the opportunity to foster a more inclusive and equitable society. This article attempts to sheds light on the differing trajectories of LGBT marriage rights in India and Canada, in the final section, highlighting the importance of institutional dialogue and the potential for India to learn from Canada's experience to pave the way for a more inclusive society.

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1. Introduction

In the evolving landscape of human rights, the recognition of same-sex marriage has to stand as a significant milestone for the progress of gender equality norms and law. This paper embarks on a comparative study of the journey towards legalizing same-sex marriage in three diverse jurisdictions: India, the United States of America, and Canada. Supreme Courts of all three countries have, over the years, have developed rich constitutional jurisprudence.[1] Since India is located on a continent different from the USA and Canada, India may not share common history, culture or festivals with the other two nations. Nonetheless, all three countries possess common political and legal traditions rooted in the governance system of English common law. The similarities range from (1) the doctrine of the rule of law[2], (2) federalism[3], (3) importance and value of democracy[4], (4) protection of minority rights[5], (5) a strong and independent functioning judiciary[6], (6) respect for institutions and separation of power[7]. Both India and Canada have adopted a parliamentary form of government with a strong tilt towards a union of states or provinces, unlike the USA,

1 Vivek Krishnamurthy, 'Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles' 34/207 .

2 *In Reference re Secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada) 76; *Roncarelli v Duplessis* [1959] SCR 121 (Supreme Court of Canada); *IRCoelho Vs State of Tamil Nadu* AIR 2007 SC 861; *Madbury v Madison* 5 US (1 Cranch) 137 (1803) (Supreme Court of United States).

3 *In Reference re Secession of Quebec* (n 2) 5; *SR Bommai And Others Etc v Union Of India And Others* (1994) 3 SCC 1 112; *Printz v United States* 521 US 898 (1997); (Supreme Court of the United States) Supreme Court struck down Brady Handgun Violence Act as being unconstitutional since it violated 10th Amendment of the Constitution of the United Sates under which federal government could not force state officials to carry out federal policies.

4 *In Reference re Secession of Quebec* (n 2) 252; *Switzman v Elbling* [1957] SCR 285 306; *People's Union for Civil Liberties v Union of India* (2013) 10 SCC 1.

5 *Mahe v Alberta* [1990] 1 SCR 342. The Canadian Supreme Court held that minority language and education rights guarantees control of parents over education facilities in which their children are taught. *Loving v Virginia* 388 US 1.

6 *Valente v The Queen* [1985] 2 SCR 673 697–707.

7 *State of WB v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 589; *Her Majesty the Queen v Criminal Lawyers' Association of Ontario* 2013 SCC OnLine Can SC 39 43.

where the framers of the Constitution made Federalism an end in itself.[8] These three nations each have a rich tapestry of multicultural and multi-ethnic threads, alongside a shared commitment towards the rule of law that is upheld by an independent and impartial judiciary.[9] Endless comparative exercises from the legal standpoint can be conducted between these nation-states under the vast terrain of comparative studies. However, the focus of this article will be confined to examining the recognition of marriage as a right, especially concerning the LGBT++ community.

In Canada, we delve into the prominent cases before the constitutional courts that shaped the legal framework for same-sex marriage in three provinces: British Columbia, Quebec, and Ontario. We will see through analysis of precedents that in the Canadian jurisdiction, the recognition of the right of the LGBT++ community to marry came about through constitutional dialogue between the Judiciary, the Executive and the Parliament. Canadian courts, by the dawn of the millennium, had little patience to tolerate the violation of the provisions of the Canadian Charter of Human Rights, 1972("*Charter*" after this). In 2004, two of the decisions by the highest courts of the provinces, namely British Columbia and Quebec, held that the "definition" of marriage ("union between a man and woman to the exclusion of others") was violative of the Charter. They gave the Parliament two years' time to bring required amendments to the laws related to marriage. On the other hand, the Court of Appeal in Ontario held the definition of marriage to be unconstitutional from immediate effect, stating that striking it down would not cause any public order issues. In the USA, our focus is on the landmark cases before the

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8 Douglas V Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India'.

9 Martha A Field, 'The Differing Federalisms of Canada and the United States' (1992) 55 Law and Contemporary Problems 107.

Supreme Court of the United States (SCOTUS), which played a pivotal role in the nationwide recognition of same-sex marriage. This paper has consciously limited its scope to the federal level, i.e., only to SCOTUS, acknowledging that an exhaustive study of individual state laws would be an immense task.

Turning to India, this paper examines the recent judgment of *Supriyo Chakraborty v. Union of India*[10] on same-sex marriage, casting it in the light of the historical and legal contexts of the USA and Canada.

As we venture into the realm of recognition of the right to marry for the LGBT++ (this paper will also use the phrase "same-sex marriage" in certain places since precedents have analysed the issue by employing such language), this article hopes to shed light on how principles of equality have developed in each nation.

2. The Evolution of Marriage Equality: Canada's Judicial Journey to Inclusive Legislation

For the longest time, the LGBT++ community was discriminated against based on Victorian morality. Historians and scholars have considered marriage to be among the oldest social institutions of the world, predating even law and significant religions of the world. However, marriage as an institution has not remained static and has continuously changed with time depending upon cultures, traditions, beliefs, religion, and capitalism.[11]

The right to equality or the right to equal treatment without discrimination finds its origin in Section 15(1) of the Charter of the Canadian Constitution which came into force on 17 April 1985. It states that:

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10 *Supriya Chakraborty and Another vs Union of India* 2023 INSC 920 (Supreme Court of India).

11 Nicholas Bala, 'The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution' 20.

> "*Every Individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*"

This section has been the cornerstone, the fulcrum upon which the whole structure of equal treatment of the LGBT++ community has been built, and the right to marry comes within the scope of this Section. The Supreme Court of Canada has laid down a three-pronged test to find whether Section 15(1) of the Charter has been breached.

Firstly, the aggrieved person claiming the breach must prove they have been treated unequally, discriminatorily, or differently. The court will then scrutinize whether this type of unequal treatment occurs because of some personal characteristic within the person or if the government has failed to consider the aggrieved person's disadvantaged position within Canadian society.[12] Further, the aggrieved person has to prove that the unequal treatment is based on a ground of discrimination enshrined in the Charter.[13] Lastly, the aggrieved person has to prove further that such unequal treatment has substantially affected their human dignity due to unequal treatment.

2.1. Judicial Empowerment

Judicial empowerment has been vital in developing LGBT++ rights and jurisprudence in Canadian Law. One of the first cases to break the ground was *Canada (A.G) vs. Massop.*[14] Here, a same-sex couple challenged discrimination based on "family status". Brian Massop was a gay man residing in Toronto who had sought leave from

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12 *Law vs Canada* [1999] 1 SCR 497 (Sup Ct Can) ('Law') (Supreme Court of Canada).
13 ibid 535–536.
14 *Canada(AG) v Mossop* [1993] 1 SCR 554 (Supreme Court of Canada).

work to attend funeral of his partner, Ken Popert's father. However, this bereavement leave was denied to Massop stating that Popert's father was not an "immediate family" member. Massop contested this view before Canadian Human Rights Commission stating that sexual orientation was not a prohibited ground of discrimination. Massop argued that he was being discriminated against on basis of "family status", under section 3 of Canadian Human Rights Act. This case was contested all the way to the Supreme Court of Canada. Although the Supreme Court of Canada rejected his contention, it ended up making an observation that many had not anticipated at the time. The Supreme Court of Canada observed that there is a possibility to challenge discrimination under Section 15(1) of the Charter. In fact, the Supreme Court gave an indication that if the issues were contested under the violation of equality provisions of the Charter, its decision could have turned out differently.[15] After the decision of *Massop* came the decision of *Miron v. Trundel*[16] which established a first-of-its-kind precedent in common law. This case contested the rights of spousal benefits to which a same-sex partners could be entitled after a car accident. The court, in this case, ended up recognizing "marital status" as a potential ground for discrimination under the Charter. This was a crucial first step towards recognising same-sex relationships in Canada. The Court observed that "marital status" was an analogous ground for discrimination under Section 15 of the Charter. The case became the first step towards same-sex relationship recognition in Canadian jurisdiction.[17]

The quest of *equality before law* and *equal protection of law* continued in another case of *Egan and Nesbit v. Canada* ("Egan v.

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15 J Scott Matthews, 'The Political Foundations of Support for Same-Sex Marriage in Canada' (2005) 38 Canadian Journal of Political Science 841, 848.

16 *Miron v Trudel* [1995] 2 SCR 418 (Canadian Supreme Court).

17 Matthews (n 15) 847.

Canada").[18] James Egan and John Nesbit cohabitated for well over 40 years. James, in this case, sought to claim benefits from John's old age pension. While the court ultimately sided with the then-prevailing definition[19] of "spouse", it unanimously declared sexual orientation to be a protected category under the Charter. This meant that discrimination based merely on a person's sexual orientation would be considered illegal in Canada.[20] It is also important to note that *Egan v. Canada* was not the only case at the time being fought in Canada; in fact, fourteen[21] others had already been fought under the Charter. However, it was *Egan v. Canada* that marked a turning point in the interpretation of the equality clause. It created ripples in the Canadian jurisdiction and could be considered a period of "cooling off" until 2000s for the legislature at the federal and provincial levels.[22] It brought the issue of equality to the forefront, albeit momentarily. It also made legislators, who wanted to act "cautious" or wanted issues related to equality of LGBT++ people to remain on the back burner, wary that such conduct could invite serious backlash from the public and allegations of apathy towards the LGBT++ community.[23] Unfortunately, the judicial voice did not reach the Canadian public as clearly it should have.

2.2. The Air of Freedom and Equality

The journey towards equality in same-sex marriage rights in Canada didn't come about as a sudden shift because of legislative actions or court decisions. Such shifts within society are often slow and

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18 Egan v Canada, [1995] 2 SCR 513(Canada).

19 The common law case of *Hyde v Hyde and Woodmansee* [1866] 1 LRP & D 130, 133 (UK) did not include same-sex couples in its definition of marriage as per the finding of Canadian Supreme Court.

20 *Egan v Canada* (n 18) 528.

21 Miriam Catherine Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (University of Toronto Press 1999) 157.

22 *Egan v Canada* (n 18); Matthews (n 15) 848.

23 (n 15) 848–849.

happen over decades, fuelled by activities, strategic litigation, and advocacy by scholars and educators that culminate into a shift in the normative attitudes of people.[24] The case of *M v. H*, [25] contested within the providence of Ontario in 1999, was not limited to just law. It was about the hearts and homes of a lesbian couple. In the factual matrix of this case, two lesbian women who had been living together as a couple for a decade were going through a split. Under the province of Ontario's Family Law Act.[26] In this case, M sued H by challenging the definition of the word "spouse" to obtain alimony after separation. It was ruled that provisions of the Family Act clashed with the Charter, which guaranteed equal rights for everyone. The Supreme Court of Ontario gave the legislature a six-month period to bring amendments to ensure same-sex couples would be recognised as spouses under the law. The court's message was loud and clear. Love is love, and the Law needs to change to reflect this for LGBT++ people:

> "*The exclusion of same-sex partners promotes the view that M and individuals in same-sex relationships generally are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by the individuals in same-sex relationships and contributes to the erasure of their existence.*"[27]

In one stroke of a pen, the Canadian Court made it compulsory to bring forth legislative amendments to give effect to the decision

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24 Miriam Smith, 'Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada' (2005) 33 Politics & Society 327, 332.

25 M vs. H, [1999] 2 SCR 3(Canada).

26 Family Law Act, RSO 1990, c F.3, <https://canlii.ca/t/56763> accessed on 2024-08-19

27 *M vs. H* (n 25) para 73.

immediately.[28] This legislative activity throughout the Canadian provinces also started to diffuse the information about the judiciary's stance on Canada's public and civil society. Even today in most common law jurisdictions, this process of altering the legislative framework after a judicial decision is rendered, is considered voluntary and primarily depends upon political will. In the early 2000s, a "relentless tide of equality" started to flow within Canada that showed no signs of "receding backwards" or "slowing down".[29] By 2000, just over 50 per cent of Canadians had started to support the idea of marriage for same-sex couples.[30]

2.3. Battle for equality in provinces

At the dawn of the new millennium, the Canadian LGBT++ community, with newfound determination, started to contest marriage issues throughout Canada's various provinces.

The case of *EGALE Canada Inc. vs. Canada (Attorney General)*[31], took place in the province of British Colombia in 2001. Equality for Gays and Lesbians Everywhere Inc. ("EGALE v Canada AG"), filed a case before British Columbia's Attorney General. The petition requested the Attorney General to declare any of the following two things:

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28 Matthews (n 15) 849.

29 The Netherlands was the first country to legalize same-sex marriage in 2001. Since then, legal relationship recognition of same-sex couples has increased rapidly, especially among Western states. Eleven Western European countries have legalized same-sex marriage at the time of this writing: the Netherlands (2001), Belgium (2003), Spain (2005), Sweden (2009), Norway (2009), Iceland (2010), Portugal (2010), Denmark (2012), France (2013), England (2013), Wales (2013), and Luxembourg (2015. Canada was too, relatively early in implementation of same sex marriage. *See* Louise Richardson-Self, *Justifying Same-Sex Marriage: A Philosophical Investigation* [Rowman & Littlefield 2015] 15.

30 Matthews (n 15).

31 *EGALE Canada Inc v Canada (Attorney General)* 2001 BCSC 1365 (Supreme Court of British Columbia).

Either declare that same-sex marriage is not prohibited by statute or by common law, or;

> Declare that prohibiting or not allowing same-sex couples to marry within the province of British Columbia goes against the equality rights enshrined under the *Charter*.

The Attorney General then referred this petition to the Supreme Court of British Columbia. Interestingly, this decision also added complexity to the narrative by ruling that prohibitions on same-sex couples not to marry were discriminatory. However, in the view of the court such discrimination under Section 1 of the Charter could be allowed:

> "[*B*]*ecause of the importance of marriage in the Canadian context, the preservation of its opposite-sex core far outweighs the deleterious effect resulting from the refusal to provide legal status to same-sex relationships under the rubric of marriage.*" [32]

It was the view of the court that opposite-sex couples perpetuate the species of humans, therefore the State has the interest in creating the distinction based on this:

> "*the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propogate the species and thereby perpetuate humankind. Same sex couples cannot.*"[33]

In the eyes of the court, since same-sex couples could not "biologically" have children together, the court held that the then-existing definition of marriage required no change. Supreme Court of the British Columbia was of the view that the State had an interest in

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32 ibid 215.
33 ibid 205.

the *"traditional definition of marriage*" because it is a "*core social and legal institution in the society*".[34]

It needs to be clarified that this view among scientists and even science itself has progressed since then. Today, there are assisted reproductive technologies by way of sperm donation, egg donation and gestational surrogacy available through which same-sex couples can have biological children. Moreover, the Supreme Court of British Columbia missed the *intent* of the Charter, about equality before law, and lost its way to biology. There are many heterosexual couples who face difficulties to conceive, are infertile, or do not wish to bring children into the world. However, before law such marriages would not go unrecognized. Marriage is a social as well as a legal construct in which norms are enforced by communities, cultures, religions and even the State.[35] It cannot be reduced solely to the reproduction and continuation of species. Proponents omit the fact that homo-sapiens are a social species. Any social interaction, including sexual interaction in a social species such as ours performs the role of establishing and maintaining positive social relationships. It serves to maintain bonds and alliances. It facilitates reconciliation in the face of conflict.[36] Sexual attraction has both physiological and psychological ingredients. It is a stable trait which is innate to the individual. The moot question is whether such individuals deserve to be treated differently because of who they are. It is vital to have consideration over the fact that sexual orientation is not something that people choose to have. However, unfortunately this missed the eye of the Supreme Court of British Columbia.

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34 Alex Van Kralingen, 'The Dialogic Saga of Same-Sex Marriage': (2004) 62 University of Toronto Faculty of Law Review 149, 154.

35 See Generally, Elizabeth S Scott, 'Social Norms and the Legal Regulation of Marriage' (2000) 86 Virginia Law Review 1930.

36 José M Gómez, A Gónzalez-Megías and M Verdú, 'The Evolution of Same-Sex Sexual Behaviour in Mammals' (2023) 14 Nature Communications 5719.

Two years later in 2003, in the province of Ontario, another battle for the recognition of equality was fought. This was in the case of *Halpern v Canada (Attorney General)* in Ontario's Superior Court of Justice (Divisional Court).[37] The province's Superior Court agreed – that excluding same-sex couples was unfair and violated their Charter's provisions on equality before the law. The Court also rejected the arguments that the 1867 Constitution does not allow the Parliament to modify the legal meaning of "marriage." However, the Court in this case exercised judicial restraint and did not traverse into legislative domain by changing the definition marriage. Instead, it gave the legislature a 24-month time period to enable suitable remedy for the LGBT++ community. This meant amending marriage laws to be inclusive for everyone.

In the same year, a similar case titled *Hendricks vs Quebec* was instituted by petitioners Michael Hendricks and Rene LeBeouf, in the Cour Supérieure of Quebec. In this case, the court declared that excluding same-sex couples from the concept of marriage is discriminatory towards the LGBT++ community. The Cour Supérieure of Quebec ruled that heterosexual characterization of the institution of marriage as per *Federal Law-Civil Law Harmonization Act, No. 1,*[38](FLCLH Act) which was only applicable to the province of Quebec, represented an unjustified violation of the Charter. Interestingly, the Court ended up making a progressive observation that marriages do not happen "solely for procreation", deviating from judgment by Supreme Court of the British Columbia in case of *EGALE vs Canada AG,*[39] and that definition has to give way to

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37 *Halpern v Canada* (2003) 225 DLR 529 (Ontario Court of Appeal).

38 Federal Law-Civil Law Harmonization Act, No. 1, SC 2001, c 4, <https://canlii.ca/t/51zdl> retrieved on 2024-08-19

39 *EGALE Canada Inc v Canada (Attorney General)* (n 31).

recognizing same-sex marriage.[40] Cour Supérieure of Quebec recognized that moot question contested before it was not the "definition" of marriage as that of being between "man and a woman", rather it was about *equality before law* and *equal protection of law* under the Charter. Marriage is older than religions, and with time, religions came to define marriages. However, there is no reason why the religious grip on marriage should continue. The court succinctly put:

> "*The state must ensure respect for each citizen, but no group has the right to impose its values on others or define a civil institution."* [41]

The judge in sum and principle, came to the same conclusion as the Ontario Court and held that Parliament is indeed the competent and *ultimate authority to modify the definition* of marriage to reflect the change and evolution in marriage. The judge ended up declaring section 5 of the impugned FLCLH Act as inoperative, and just like in the judgment from province of Ontario, the Cour Supérieure of Quebec suspended its declaration for a two-year time period. These decisions highlight the growing momentum for marriage rights and equality. Moreover, Cour Supérieure of Quebec and Ontario's Superior Court of Justice made it clear with their rulings that they would not accept *subordination* of one group by the other. This legal back and forth between various institutions of Canada was setting up the stage for the national conversation that was about to happen in the coming years with regard to same-sex marriage rights. Two of the cases that we have seen eventually proceeded to Courts of Appeal in respective provinces which are the ultimate authorities in respective provinces to interpret any provision of law.

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40 Mary C Hurley, 'SEXUAL ORIENTATION AND LEGAL RIGHTS: A CHRONOLOGICAL OVERVIEW' 12.

41 *Hendricks v Québec* [2002] RJQ 2506 (Québec Superior Court).

In May of 2003, the British Colombia Court of Appeal (BC Court of Appeal), the province's highest court, in the case of *EGALE vs Canada AG*[42] ended up unanimously overturning the judgment of the Supreme Court of British Columbia in which the bar to same-sex marriage was upheld. The BC Court of Appeal ruled that the traditional definition of marriage was discriminatory against same-sex couples and could not be justified against the Charter. However, the Court was also of the opinion that Parliament has the constitutional authority to legislate a modified definition of marriage, which would ensure that a comprehensive solution could be made through amendments. The court made the decision to suspend its declaration until July 2004. This was to ensure that, in case the said period expired, same-sex couples would be able to marry regardless of the amendments made by the legislature. Lastly, the court observed that the Constitution of Canada cannot be considered a dusty rulebook. It is a "living document" which "evolves with time":

> "*Civil marriage should adapt to contemporary notions of marriage as an institution in a society which recognizes the rights of homosexual persons to non-discriminatory treatment. I do not think that the judgment under appeal can be supported on the ground that marriage is so essentially heterosexual as to be constitutionally incapable of extension to same-sex couples and in that respect immune from Charter scrutiny*" [43]

In sum, the BC Court of Appeal put greater emphasis on the part of the legislature in fashioning a comprehensive response. Even though the it declined to grant an immediate relief by striking down the law, the decision in *EGALE vs Canada AG* acted as a judicially

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42 *EGALE Canada Inc v Canada (Attorney General)* 2003 BCCA 251 (British Columbia Court of Appeal).

43 ibid 178–179.

reinforcing force in the institution for the recognition of equality for the LGBT++ community regarding marriage. As Canadian society was undergoing transformation since the post-World War period, an economic middle class of the LGBT++ community had emerged that had "out" itself to the eyes of the public.[44] These were primarily white men, but they were able to access various professions, such as lawyers, doctors, and nurses. Through these professions, they helped create an understanding in society that despite being homosexuals, they were not so different from the rest of the majority. In sum, this decision not only created an impetus to introduce institutional change but also created the push for a social movement and politics of human rights, which defined its end in recognition of equality.

In June 2003, the case of *Halpern v. Canada* went before the Ontario Court of Appeal, in which it was again unanimously held that the common law definition of marriage creates an unjustifiable violation of Section 15 of the Charter. In comparison to the Superior Court of Appeal of British Columbia and Cour de Superior of Quebec, the Ontario Court of Appeal took the big step of not waiting for the Canadian Parliament to bring in the amendments to the marriage laws. Instead, it declared the right of same-sex couples to marry with immediate effect in the following words:

> "*There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage. In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law.*"[45]

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44 Smith (n 24) 337.

45 *Halpern v Canada* (n 37).

However, the Ontario Court of Appeal did concede to the fact that reforming the definition of marriage would require a "*substantial volume of legislative reform*".[46] The Canadian Constitution vests the power to legislate matters related to marriage to the Canadian Parliament or Federal Government. We have seen that in three landmark cases of provinces of Ontario, British Colombia, and Quebec, the courts of these provinces started to observe that under Common Law, restrictions on LGBT++ couples or "same-sex" marriage go against Section 15(1) of the Charter and the restrictions on these freedoms could not be kept under iron-clad grip of tradition under the Section 1 of Charter.[47] The court, while weaving a new thread in the fabric of equality in the Canadian Jurisprudence, held that the Charter demands that a gay or a lesbian couple has every right to be treated equal to a heterosexual couple.[48] The Court further opined that as a guarantor of freedoms under the Charter, equal treatment for same-sex couples must be declared with immediate effect. The social ramifications of this decision were quick. The Court issued the writ of *mandamus* in Toronto to compulsorily issue marriage licenses or certificates to couples wanting to get married. Within hours, marriage ceremonies between same-sex couples were taking place, and by the end of the year, no less than a thousand same-sex marriages had taken place in the province of Ontario.[49]

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46 ibid 153.

47 *EGALE vs Canada* (2003) 225 DLR 472 (British Columbia Court of Appeal); *Halpern v Canada* (n 37); *Hendricks v Québec* (n 41).

48 Wintemute has given an excellent analysis of the doctrines employed in the judgment Egan v. Canada. The Supreme Court majority in this case failed to appreciate the case Egan and Nester were making out for themselves. The Court misapplied the test of "Similarly Situated", "Irrelevant personal Differences", "Ground of Distinction" and "Discriminatory Impact" of the majority view. *See* Robert Wintemute, 'Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charterin Mossop, Egan and Layland' 39 441-451.

49 Kralingen (n 34).

2.4. Response from Canadian Federal Government

The Federal government of Canada chose not to appeal the three judgments by the apex court of the respective provinces. Instead, the Federal government sought to propose a new law, providing for the first time a changed definition of marriage. It defined marriage as "the lawful union of two persons to the exclusion of all others". The Federal government made a reference to the Supreme Court of Canada seeking an advisory opinion on whether the new law, if enacted, would be constitutional or not.[50] It is a well-known principle in jurisprudence that references sought by the government from the Courts do not have a binding effect on the power of the legislature or executive. These opinions are merely advisory in nature.

The executive branch of the government posed three questions to the judiciary[51] :

1. Does the federal government or parliament have the exclusive authority to legislate the proposed bill?
2. If the first question is valid, is granting an extension of the right to marry to same-sex couples not against the *Charter*?
3. Does the *Charter* protect freedom of religion and thereby grant the right to religious groups not to perform religious ceremonies if they contradict their religious beliefs?

In a unanimous verdict[52], the Supreme Court of Canada observed succinctly that the moot question was whether the LGBT++ community had the "capacity for marriage" and whether the institution

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50 Graham Gee and Grégoire CN Webber, 'Same-Sex Marriage in Canada: Contributions from the Courts, the Executive and Parliament' (2005) 16 King's Law Journal 132, 136.

51 Order in Council PC 2003–1005 (16 July 2003) annexing the Proposal for an Act respecting certain aspects of the Legal Capacity for Marriage for Civil Purposes.

52 *Reference Same-Sex Marriage* [2004] 3 SCR 698.

of marriage could transcend its traditional confinement to heterosexual couples.[53] The interveners in the case endeavoured to persuade the court by using the rule of original interpretation at the time of the Constitution's drafting. The Court observed that the framers of Canadian Constitution could not have envisioned the extended the meaning of "marriage" to homosexual unions. The Court, with unwavering resolve, rejected this reasoning, stating that marriage cannot be kept "*frozen in time*".[54] The Court observed that marriage could not be held as a relic of the past; it is a living institution that had the capacity to change and evolve. It was further held that the Canadian constitution is a living document. The court held that marriage was an agreement between two persons "to the exclusion of all others".[55] This pronouncement by the Court would reverberate beyond the courtrooms and would be heard till the corridors of legislation. The Parliament of Canada enacted the Civil Marriage Act, under which the Canadian State legalised same-sex marriage. Canada became the fourth country after Netherlands, Belgium, and Spain to recognise same-sex marriage, etching its name in history. The Bill was passed in the Parliament by a solid majority and received assent from the Governor General on the 20th of July in 2005.

To summarise the right of Canadian same-sex couples to marry, we have seen how the Charter has played a pivotal role in bringing the LGBT++ community into its fold by extending to them the right to marry. This recognition of equality was simultaneously being contested in different provinces, such as Quebec, Ontario and British Columbia. Moreover, the federal character of the Canadian State allowed a pluralistic and enriching debate to emerge with regard

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53 ibid para 16.

54 'Canada: The Constitution and Same-Sex Marriage' (2006) 4 International Journal of Constitutional Law 712, 717.

55 *Reference Same-Sex Marriage* (n 52) para 27.

to the right of LBGT++ people to marry, both on legal as well as cultural fronts. Article 15 of the Charter grants equal opportunity to all persons under the law as well as the right to enjoy equal protection and benefits from it. This Article has played a pivotal role in furthering Canadian constitutional jurisprudence for sexual minorities and for aboriginals as well.[56] We have also seen that the judiciaries of British Columbia and Quebec were inclined in favour of reforms through legislative channels. They gave the Parliament the indication to make amendments to include same-sex marriage on an equal footing with heterosexual marriages. Meanwhile, Ontario's Court of Appeal considered a novel and more insightful approach, calling for the Canadian State to prove that striking the laws down as unconstitutional could cause the problem of maintaining "public order." A common golden thread that runs in every judgment by highest courts of respective provinces was that none would accept one group's domination over the other group when it came to defining marriage. Holding that marriage has a social and evolving character, the definition had to change with changing times. Moreover, as the highest courts of provinces were making it clear by way of their pronouncements that denying LGBT++ people the right to marry goes against the Charter, they kept galvanising the issue of same-sex marriage before the public. Lastly, the issue of same-sex marriage, as much as it may have become a conversation among intellectuals, scholars, feminists, lawyers and educators, still needed to become a conversation among common folks for attitudinal or normative change towards sexual minorities. Amending the law is often only a part of the solution to the problem. These are merely stepping stones towards resolving a social issue. Attitudinal change is much more formidable challenge. There is no option for the oppressed but to keep

[56] John D Richard, 'Federalism in Canada' (2005) 44 Duquesne Law Review 5, 16.

living under the coercive and arbitrary powers and actions executives and even society itself. Yet hope can emerge in hearts when institutions of nations – judiciary, legislature and executive engage in constitutional dialogue. This dialogue is not a battle ground for ideologies or assertion of power by one institution over the other. Instead it is an honest and good-faith conversation on basic tenets of constitutional guarantees, which eventually pave way for progression of gender equality in the legal realm, and by allowing diffusion of information among common persons, in the social realm as well. Is this not the hallmark of a well-functioning and mature democracy, where each voter able to participate in collective decision-making with the best information accessible to them? The constitutional courts of Canada and the Canadian Parliament had conversations by way of judgments, amendments and references and raised their baton like season choreographers in unison, coming to an agreement on the issue of same-sex marriage, causing a shift in the trajectory of Canadian polity, paving the path towards inclusive polity. Canada weaved a new chapter in its history where statutes bowed to rhythms of change. A land where love among consenting adults had no bounds.

3. Tracing doctrinal history of same-sex marriage in the United States of America

In the USA, there is a rich history and jurisprudence regarding the rights of same-sex couples to marry. In the USA, issues of same-sex marriage have been analysed from multiple viewpoints and approaches. The first one is under the "equal protection clause", the second one is the "anti-subordination" principle and last is "substantive due process". This article will not attempt to reproduce the above-mentioned approaches, for they have been succinctly and

adequately discussed elsewhere.[57] Instead, it shall confine itself to information that is minimal but necessary for the purpose of the discussion related to same-sex marriage.

3.1. Equal Protection before Law

Equal protection is also known by other names such as "equal access to liberty" and "equal protection of dignity"; similarly, the anti-subordination principle is also known as the "anti-humiliation" or "anti-subjugation" principle. Under the equal protection clause, cases have been traditionally analysed using the Three-Tier Framework. The first or the highest level is known as "strict scrutiny" or famously known as "strict in scrutiny, fatal in fact".[58] Under the tier of strict scrutiny, a law has to be "narrowly tailored to further a *compelling* interest".[59] The law that creates classification is challenged before the Court, and in such cases, it becomes "suspect classification". To understand this, consider a table on which there are two bins, namely "good on face" and "bad on face". When the court is called to apply the Strict Scrutiny test, it puts the law in the "bad on face" category

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57 Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection' 61 New York University Law Review 1003; Stacey L Sobel, 'When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications' (2015) 24 493; Steve Sanders, 'Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue' (2018) 87 Fordham Law Review; Maxwell L Stearns, 'Obergefell, Fisher, and the Inversion of Tiers' 19 1043; Peter Nicolas, 'Gay Rights, Equal Protection, and the Classification-Framing Quandary' (2014) 21 Geo. Mason L. Rev. 329.

58 *Washington v Davis* 426 US 229 239, 240 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another .... Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. ").

59 Gerald Gunther, 'Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' (1972) 86 Harv. L. Rev. 1, 8.

and proceeds on this assumption. The assumption of strict scrutiny goes heavily against the law. Against a strict scrutiny test, it is virtually impossible for a law to survive the interference of a "fundamental" right.

The second level of equal protection jurisprudence is "intermediate scrutiny". If a law can withstand this scrutiny, it "must serve important governmental objectives and must substantially relate to the achievement of those objectives".[60] This tier of equal protection scrutiny is also a difficult tier to satisfy. The question of why a court in the USA should apply *intermediate* tier rather than *strict scrutiny* tier in cases involving same-sex marriage is unclear.

The lowest tier of equal protection is known as the "rational test". It is considered the weakest form of judicial review because, under this scrutiny, a law is sustained "if the classification drawn by the statute is rationally related to a legitimate state interest".[61] It is the weakest form of scrutiny that could be exercised while testing the constitutionality of the State's action. Coming back to the bin analogy, most laws in this test would go into the "good law" bin. When a law only needs to justify rational test, it is likely to sustain the scrutiny of judicial review. Scholars also refer to the trinity of these equal protection tests as the "sliding scale" test for the equal protection clause in the USA. Another set of scholars have also developed additional tiers in this sliding scale.[62] The traditional sliding scale of equal protection clause in the USA is further divided into two additional tiers of scrutiny, namely, "Rational Basis Plus" and "Strict Scrutiny Lite". The "Rational Basis Plus" is more demanding than merely rational basis review, and "Strict Scrutiny Lite" employs a less

60 *Craig v Boren* [1976] 429 US 190.
61 *City of Cleburne v Cleburne Living Center* 473 US 432 (1985) 460.
62 Stearns (n 57) 1047.

stringent form of scrutiny utilised in the highest tier level. The Strict Scrutiny tier demands from the government that the classification created under a law serves a "compelling governmental interest". Additionally, such means employed by the government are "narrowly tailored to further that interest". However, the initial burden is on the claimant to identify the "trigger" for strict scrutiny. Once the challenger or petitioner discharges their burden, then the government has to satisfy *compelling state interest* and *narrow tailoring* to make the law sustainable. Conventionally, a rational basis has been the rule, and strict scrutiny is rarely employed.[63] On its own tiers of equal protection, scrutiny always analyses "discriminatory intent" on the part of the State's actions, which is ineffective due to the reason discrimination may also consist of "implicit biases" against "socially marginalized groups" that operate without our "conscious awareness".[64]

3.2. The Anti-Subordination Principle

On the other hand, scholars of anti-subordination primarily concern themselves with the effects that governmental action has on disadvantaged groups even when, on the face of it, the action does not seem to discriminate. The central point of the anti-subordination principle is that even when there is a lack of discriminatory intent in the law, the *effect* of such law perpetuates discrimination and creates disparate outcomes. The purpose of anti-subordination is to unearth not only those prejudices that people of the past had, but also to unearth those prejudices that, to *us*, seem "*natural, familiar and fair*".[65] The identification of the subordinate group could be done by asking whether the group:

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63 ibid 1049–1052.

64 Kristin A Lane, Jerry Kang and Mahzarin R Banaji, 'Implicit Social Cognition and Law' (2007) 3 Annu. Rev. Law Soc. Sci. 427.

65 Reva Siegel, 'Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action' [1997] Stanford law review 1111, 1113–1114.

1. Is an insular and discrete minority;
2. Has suffered historical injustice, such as discrimination, segregation or denial of access to public institutions such as educational institutions or temples;
3. Has no political power or is politically powerless or is a statistical and marginalised minority;
4. Is defined by an immutable or ascriptive trait that is not relevant for one to lead a functional life in society.[66]

Depending upon the facts and circumstances of a case a Constitutional court satisfies itself on above conditions based on empirical data or evidence. Robustness of such data will depend upon the sociological, historical, anthropological and legal research methods both in quantitative and qualitative domain utilized to ascertain whether a class or group satisfies some or all of the above conditions. If the answer to the some of the above questions is affirmative, then the second step is to apply heightened or strict scrutiny to the classification that has been challenged or will be created by the State. In such analyses, the specifics of each case will differ. For instance, women, despite not being a statistical minority, may experience subordination due to their gender. The aforementioned rules are not rigid; circumstances may necessitate deviations from them. The identification process outlined by these rules serves merely as an illustrative example. If a pre-existing classification, or one that is sought to be created by the State, develops hierarchies and perpetuates the subordination of marginalized groups, such classification would be liable to be struck down. Classification could be based on race, gender or even sexual orientation. When the law introduces a classification,

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66 Susannah W Pollvogt, 'Beyond Suspect Classifications' (2013) 16 U. Pa. J. Const. L. 739, 742.

the anti-subordinate doctrine will put emphasis on the *effect* of such classification on marginalized groups and see whether such groups are facing subordination under the scheme of classification.[67]

3.3. The Test of Substantive Due Process

The final test is that of "substantive due process". This doctrine originates from the Fifth and Fourteenth Amendments of the US Constitution. The Fifth Amendment is applicable to the federal government, while the Fourteenth Amendment is applicable to the action of the State. Under this doctrine, the government cannot deprive an individual of their life, liberty or property without adhering to procedural requirements. In other words, the Supreme Court has interpreted this doctrine to include substantive guarantees that require the State to fulfil certain obligations before it can restrict an individual's liberty. If it is proved before the Court that the State action infringes upon the fundamental rights of the people, the Supreme Court has consistently maintained the position that a test of *strict scrutiny* would be applicable. Therefore, it is necessary for the State action to be *tailored narrowly*. And as we have seen, the state action here must be substantial as well as legitimate in furtherance of a compelling interest.[68] If a compelling State interest is established, then the State action cannot interfere any more than is necessary to achieve that compelling interest.[69] In addition to these, there should be no possibility for the government to take any other alternative course that would further its interest while interfering less with fundamental rights.[70] In India, all

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67 Abigail Nurse, 'Anti-Subordination In The Equal Protection Clause: A Case Study' 89 New York University Law Review 293, 300–301; *Roe v Wade* 410 US 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992); *Loving v Virginia* 388 US 1; Maxwell L Stearns, 'Obergefell, Fisher, and the Inversion of Tiers' 19 1043, 1051–1053.

68 *San Antonio Indep School Dist v Rodriguez,* [1973] 411 US 1, 98 (Supreme Court of USA).

69 *Dunn v Blumstein,* [1972] 405 US 330 343.

70 ibid 488.

such tests related to "equal protection of law" are subsumed within the phrase "proportionality doctrine". [71]

3.4. Tracing History through cases of Supreme Court of US

The celebrated case of *Brown v Board of Education of Topeka*[72] condemned the classification of citizens on the basis of race and inflicting harm by perpetuating subordination. The case of *Loving v. Virginia,*[73] wherein miscegenation laws were declared unconstitutional, was similarly tested on the principles of strict scrutiny and *anti-group subordination*. After the decision of *Loving v. Virginia,* a number of activists and scholars argued for a ban on same-sex marriage to be looked at as a suspect classification and be subject to strict scrutiny.[74] An attempt was made to shift the burden onto the State to justify its discrimination against LGBT++ people. But we will see below that the Supreme Court has refrained from applying the anti-subordination principle since the mid-1970s. It is unclear as to why the courts in USA

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71 *Association for Democratic Reforms v Union of India* 2024 INSC 113 (Supreme Court of India) 103–111.(The Indian Courts apply the proportionality test in different stages.

1. The first stage involves analyzing the comparative importance of the rights in question.
2. The second stage lays down the justification for any potential infringement of these rights.
3. The third stage applies the proportionality standard to both rights.
4. In the Fourth and final stage, the Court undertakes a balancing act by weighing whether the cost of interfering with one right is proportional to the fulfilment of the other. This stage encapsulates an analysis of the comparative importance of consideration involved in the cases. The justifications for infringement of rights, the proportionality of the effect for infringement of the rights.

Thus, to sum up, the Court assesses

1. whether the measure is a suitable means for furthering rights A and B.
2. Then, determining the measure is the least restrictive and equally effective means to realise rights A and B.
3. Lastly, Evaluate whether the measure has a disproportionate impact on rights A and B.)

72 347 U.S. 483,493 (1954) ("[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.")

73 *Loving v. Virginia* (n 5).

74 Nicolas (n 57) 357.

have not included anti-subordination principle in case of same-sex marriage, when it was used on similar lines to strike down miscegenation laws. A possible explanation is that ant-miscegenation at its core is about whom people in America were *allowed* to marry, while when it comes to same-sex marriage the *definition* of marriage takes the centre stage during the debate.

For the better part of US Constitutional history, the issue of same-sex marriage has remained elusive to the Fourteenth Amendment's Equality Protection. In the case of *Baker v Nelson*[75] before the Supreme Court of Minnesota, a gay couple challenged the definition of marriage between "husband and wife" as violative of substantive due process and equal protection doctrine. The petitioners contested that the equal protection doctrine had to apply equally to "same-sex couples" and "heterosexual couples". However, siding with the State, the court rejected arguments and held that the statute was not discriminatory because neither men nor women were allowed to marry a person of the same sex. Court created the framework in which it looked at the issue from a lens of "formal equality". In the court's view, if both men and women were stopped from marrying their own sex, then the law could not be said to be violative of the equal protection doctrine. In sum, the statute did not offend the Constitution's equal protection doctrine as per the Supreme Court of Minnesota.[76]The couple then challenged this decision before the Supreme Court of the USA, arguing the following:

> First, that the statute violated their Fourteenth Amendment right to Equal Protection.

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75 *Baker v Nelson* 409 US 810 (1972).

76 *Baker v Nelson* 191 NW2d 185 (Minn 1971) (Minnesota Supreme Court) 186–187.

> Second, the statute further violated due process under the Fourteenth Amendment.
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> Third, the statute's definition of marriage was a violation of their right to privacy under the Fourteenth and Ninth Amendments of the US Constitution.

The Supreme Court of the US summarily dismissed the appeal. Then came the case of *Romer v Evans*[77], in which the Supreme Court had the task of determining whether the amendment of the Constitution of Colorado, which prohibited legislative, executive and judicial action to protect gay people from discrimination, violated the Fourteenth Amendment.

The Supreme Court in 1973, citing *USDA v. Moreno*, held that

> "[if] *equal protection of laws means anything, it must at the very least mean that a vast congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest*". [78]

There is an argument among scholars about whether, in this case, the Supreme Court applied a *rational basis* or a *rational basis plus review* doctrine. The hostility at that point towards LGBT++ people was high, and the Supreme Court probably took this fact into consideration and perhaps raised scrutiny to a higher level than *rational basis*. However, this is mere speculation that we can reasonably infer from the text of the judgment. The Supreme Court also failed to answer whether people who identified as LGBT++ could be considered a "suspect class" or not. In 1993, the Supreme Court of Hawaii became the first constitutional court in America to allow same-sex marriage.[79] However, this ruling ended up creating a popular

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77 *Romer v Evans* 517 US 620 (1996) (Supreme Court of United States).
78 *USDA v Moreno* [1973], 413 US (Supreme Court of United States) 538.
79 *Baehr v Lewin* 852 P2d 44 (Haw 1993).

backlash, due to which a constitutional amendment was brought in by way of a referendum in the State of Hawaii to keep same-sex marriage illegal. In 1996, Congress brought in the Defence of Marriage Act (DOMA) in order to thwart progress that various States within USA and as well as Courts tried to make in full recognition of same-sex marriages. During the enactment of DOMA time, around 44% of Americans were of the view that homosexual relationships between two consenting adults did not deserve to be punished under the law.[80] American views regarding homosexuality more or less had started to transform during the 1980s and 1990s. However, in the early 2000s, the opinion shifted so much that scholars described the attitudinal change of Americans as "unprecedented".[81] By the early 2000s, even if the American public was not ready to witness the extension of marriage equality to gays and lesbians, the attitude of Americans steadily moved in the direction before which it became difficult to defend and justify the objective of criminalization and banning of sodomy laws.[82]

The next landmark case was that of *Lawrence v. Texas*[83] in 2003, under which two gay men were arrested for engaging in sexual conduct. An immediate precedent on similar facts existed before the Supreme Court while deciding this case. In 1986, the Supreme Court, in *Bowers v. Hardwick*[84] had declared sodomy laws to be constitutionally valid. In *Bowers*, the court applied the *rational basis* doctrine because the State did have a legitimate interest in criminalising sodomy as it had to maintain moral order in public. The state of Georgia was merely

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80 Sanders (n 57) 2085.

81 'How Unbelievably Quickly Public Opinion Changed on Gay Marriage, in 5 Charts - The Washington Post' <https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts/> accessed 25 March 2024.

82 Sanders (n 57) 2085.

83 *Lawrence v Texas* 539 US 558 (2003) (Supreme Court of United States).

84 478 U.S. 186 (1986)

required to demonstrate before the Supreme Court that sodomy law served some "legitimate state objective" and that the law was *tailored narrowly* to achieve the objective. It is important to contextualise the decision of Bowers; it came during the peak of the AIDS crisis decision of the Supreme Court.[85] The Supreme Court in *Bowers* accepted the version of legal moralism, ignoring the relevancy of the right to privacy, contributing to not only *bad law* but also *bad science*[86], thereby contributing to stigma around AIDS.[87] It created fertile ground to intensify fear as well as to justify discrimination against a class of people who had no legal protections of the law. People were evicted out of their rented properties by landlords, ostracised by friends and family and, in the worst-case scenario, were even declined treatment by doctors for being infected with HIV.[88] Therefore, under the backdrop of this social context and history, the question before the Supreme Court in the case of *Lawrence* was whether the laws of Texas violated the substantive due process doctrine and infringed the fundamental right to privacy of same-sex couples. The Supreme Court in *Lawrence*, reversing the judgment of *Bowers*, came to the conclusion that substantive due process indeed played a role in the agreement between two consenting adults and that the petitioner would be entitled to *equal liberty protections*.[89] As much as the case was an important

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85 *Bowers v Hardwick* 478 US 186 (1986) (Supreme Court of United States).

86 Morality itself is a source of great debate among scholars, and a great amount of ink has flown into debating which kind of morals can be given the backing of the law. For example, Ronald Dworkin has been of the view that moral views cannot be given the force of law because they can be based on prejudice, false claims, rhetoric, and parroting. Then, Patrick Devlin advocates that morality is merely a feeling, it can arise from disgust, take birth from indignation, sprout from intolerance in the minds of ordinary men. HLA Hart has said if morals have "sufficient strong feelings" attached to them, they can be given the backing of the law. *See*, Christine Pierce, 'AIDS and Bowers v Hardwick' (1989) 20 Journal of Social Philosophy 21, 24.

87 David W Purcell, 'Forty Years of HIV: The Intersection of Laws, Stigma, and Sexual Behavior and Identity' (2021) 111 American Journal of Public Health 1231.

88 ibid.

89 *Lawrence v Texas* (n 83) 578.

step in the recognition of equality for LGBT++ people, it did not make it clear how *rational basis* scrutiny could be utilised to its maximum potential for applying equal protection for the LGBT++ community. Nevertheless, the Court did hold that the amendment to the statutory provisions, to contain *animosity* towards a particular class and *animus* towards a class, could never be a *rational objective*.[90] The cases of *Romer* and *Lawrence* are two focal points for us to understand whether a ban on same-sex marriage could be considered a *legitimate interest* of the Government.

In 2013, Pew Research Centre surveyed Americans regarding the cause of the shift in their minds regarding same-sex marriage; the most common answer was that they "*knew someone…who was gay*".[91] With time, more and more closeted LGBT++ individuals started to come out. In the same year, the Supreme Court faced the case of *United States v. Windsor*.[92] Windsor and her spouse resided in the State of New York, where their marriage was legally recognised by the law. The deceased spouse of Windsor left the entire estate, which was worth $363,053, to her. Windsor sought to claim an exemption to pay federal estate tax on this estate, claiming a marital exemption.[93] The Internal Revenue Service (IRS) denied Windsor's refund on finding that Windsor was not a "surviving spouse" under the Defense of Marriage Act (DOMA).[94] Windsor sought to challenge DOMA before the Supreme Court of the United States of America, claiming that it violated the *equal protection clause*.[95] The Supreme Court observed that

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90 ibid 575.

91 'Growing Support for Gay Marriage: Changed Minds and Changing Demographics' (2013) <https://www.pewresearch.org/politics/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/> accessed 25 March 2024.

92 *United States v Windsor* [2013] 133 S Ct 2675 (Supreme Court of the United States America).

93 ibid 2683.

94 ibid.

95 ibid.

protection under the Fifth Amendment prohibited Congress from targeting unpopular political groups by way of disparate and discriminatory treatment to harm that group. However, it is unclear how much role *equal protection doctrine* played in this case. But the Supreme Court did clarify that the *animus* test would get triggered in cases where "unusual character of discrimination has been established".[96] When animosity is involved in the discrimination, the Court would give weight to more consideration than discrimination in which there is no animosity is present. Cases where no animosity is present could be interpreted as systemic or unconscious discrimination that is embedded within the legal system. Scholars have argued that the American Federal Structure had far more influence on the outcome of this case. This is because the Supreme Court had done a historical analysis of the institution of marriage in America, which was subject to the regulation of the states rather than the federal government. Furthermore, DOMA had departed from this long-standing tradition or practice.[97]

Lastly, in the case of *Obergefell v Hodges*[98] the Supreme Court heard arguments from 14 same-sex couples. They asserted before the Supreme Court that states like Michigan, Ohio, Kentucky and Tennessee violated their right under the Fourteenth Amendment by not recognising their right to marry within their territory or any other state if even if such state recognized their marriage as legal and valid. The Supreme Court powerfully observed in this case that even though the right to same-sex marriage was not traditionally rooted in the history of America, the right to marriage was, and quoting a paragraph from *Lawrence* discussed its legal tradition:

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96 Samuel G Gustafson, 'The Doctrine of the Same-Sex Marriage Cases: A Brief Analysis of Animus' (2019) 33 Brigham Yougn University Prelaw Review 1, 2–4.

97 *United States v. Windsor* (n 92) 2680.

98 *Obergefell v Hodges* 135 S Ct 2584 (2015) (Supreme Court of United States of America)

> "*The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.*"[99]

The Court noted the blindness of each generation that Founders of America had humbly recognized while drafting the American Constitution. Framers foresaw that liberty would undergo abstractions by future generations.[100] Supreme Court extended *animus* analysis from *Romer* and struck down a ban on same-sex marriage in the whole of USA. As we have seen, the courts have been rather reluctant to utilize the *anti-subordination* doctrine, which was utilized by *Brown* and *Loving*. A pattern of analysis seems to suggest that there has been a shift in American Jurisprudence from the lowest tier of equal protection doctrine, i.e., *rational* basis, to a more intermediary type of scrutiny, be it *animus* or *substantive due process*. This is the case at least when it comes to analysing same-sex marriage by the Supreme Court. However, courts have consistently refused to apply the *anti-subordination* principle since the striking down of the anti-miscegenation laws, except when it comes to analyzing affirmative action by the State.[101]

4. Love Unchained: The Fight for Queer Affection in India

In a diverse country like India, the pursuit of love transcends all boundaries, yet the path to inclusive love has been fraught with

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99 *Lawrence v Texas* (n 83) 578–579; *Obergefell v Hodges* 135 S Ct 2584 (2015) (Supreme Court of United States of America) 2598.

100 Kenji Yoshino, 'A New Birth of Freedom? : Obergefell v. Hodges' (2015) 129 Harvard Law Review 147, 17.

101 Stearns (n 57) 1101.

challenges. India's struggle for freedom and its ideas of fraternity has been carved into the constitution. Analysis of the Indian judgment would be done under the light of American and Canadian jurisprudence that has been discussed in preceding sections. The Constitution of India aimed to bring an end to age-old customs of marginalization, oppression, exclusion, and humiliation, which ultimately resulted in the "dehumanization of the human self."[102] The idea of equality was central to eradicating practices like untouchability, violence, and discrimination based on caste, sex, and gender, which fundamentally undermine a person's dignity. *Dignity* is the "intrinsic worth of a human" by which they are "entitled to certain basic respect" from fellow humans. [103] Dignity has an internal as well as an external character. In its external state, dignity has multiple facets, such as a right to be "treated as a fellow human", a right of "due respect," and a right of "equal worth."[104] Denying these rights can harm an individual's internal sense of dignity, leading them to feel diminished in their own eyes.[105] It is under the shield of this dignity that Section 377 of the Indian Penal Code, 1860, was sought to be decriminalized. It was a colonial provision that imposed victorian morality on Indian Citizens. Decriminalization robbed homosexuals of the right to an identity and personhood. The Queer community again found itself at a crossroads. It now sought the right to marry within the existing framework of laws prevailing in India in the case of *Supriyo Chakraborty v Union of India*.

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102 *Supriya Chakraborty and Another vs Union of India* (n 10) 283.

103 *Francis Coralie Mullin v Administrator, Union Territory of Delhi* 1981 (2) SCR 516 held 'Right to life includes the right to live with human dignity'; In *Prem Shankar Shukla v Delhi Admn* 1980 (3) SCR 855 was held 'human tone and temper of the Founding Document highlights justice, equality and dignity of an individual'. *Justice KS Puttaswamy v Union of India* (2017) SCCOnline SC 996 (Supreme Court of India); *National Legal Service Authority vs Union of India* Supreme Court of India W.P.(C) No. 400/2012, 2014 INSC 275.

104 *Supriya Chakraborty and Another vs Union of India* (n 10) 285.

105 ibid.

4.1. Background

The brief background of this case is as follows. On the 14th November 2022, same-sex couples filed a writ petitions in the Supreme Court of India for recognition of the right of same-sex couples to marry in India. The petitioners argued that Section 4(c) of the Special Marriage Act (after this "SMA") discriminates against same-sex couples because it only recognises 'male' and a 'female' as parties capable of marrying. This discrimination, in turn, the petitioner contended, leads to the prevention of rights that they should be able to enjoy as any other citizen, such as benefits of adoption, employment, retirement, pension, and surrogacy.

Petitioners contended before the Court that not recognizing their right to marry goes against the fundamental rights given under Part III of the Constitution of India. The reliance was primarily based upon the Judgment of *NALSA* and *Navtej Singh Johar v. Union of India,* where recognition of the gender identity of non-binary people and guarantees of equal rights of homosexuals have been observed.[106]

The Supreme Court of India addressed numerous key questions regarding the marriage of same-sex couples raised by the petitioners. These questions include:

1. Is there a fundamental right to marriage guaranteed by the Constitution of India?

2. Do queer individuals have the right to enter an intimate union?

3. Is the Special Marriage Act considered unconstitutional for excluding the right to marry for queer or same-sex couples?

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106 *National Legal Service Authority vs Union of India* (n 103); *Navtej Singh Johar vs Union of India* (2017) 10 SCC 1 (Supreme Court of India).

4. Can the provisions of the Special Marriage Act be interpreted in a gender-neutral manner?

4.2. Constitutional Controversy: Is Marriage a Fundamental Right in India?

The Supreme Court unanimously delivered a verdict stating that there is no Fundamental Right to marry as per the Indian Constitution. Chief Justice, D.Y.Chandrachud distinguished the present set of petitions from the cases of *Shafin Jahan*[107] and *Shakti Vahini.*[108] In the case of *Shafin Jahan*, the High Court declared the marriage between Shafin and Hadiya null and void. The Supreme Court recalled the observations made in *Shafin* in this case

> "*The right to marry a person of one's choice is integral to Article 21 of the Constitution. This right cannot be taken away except through a law which is substantively and procedurally fair, just, and reasonable. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the State nor the law can dictate a choice of partner or limit the free ability of every person to decide on these matters.*"[109]

In a meticulous examination of the petitioner's arguments, the Supreme Court drew a clear distinction between the current case and the precedent set by Shakti Vahini. The petitions in Shakti Vahini, filed under Article 32, implored the Central and State governments to take decisive action against "honour crimes" and caste or religion-based murders. The petitioners advocated for the establishment of special teams in each district to prosecute those involved in such heinous crimes. In response, the Supreme Court mandated the authorities to

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107 *Shafin Jahan v Asokan KM & Ors* 2018 (4) SCR 955 (Supreme Court of India).
108 *Shakti Vahini v Union of India* 2018 (3) SCR 770.
109 *Supriya Chakraborty and Another vs Union of India* (n 10) 135.

implement preventive measures and devise strategies to curb honour killings.[110] The court then revisited its celebrated decisions of *Navtej Johar* and *Justice K.S.Puttaswamy* and observed that none of these decisions made any inkling of a notion of whether the constitution of India provides for the fundamental right to marry. It, therefore, fell upon the court to decide whether the Constitution grants or recognizes a fundamental right to marry.

The court then turned its gaze to the jurisdiction of the USA, as the petitioners had cited the *Obergefell* decision by the Supreme Court of the United States of America.[111] The Supreme Court of India distinguished the present case of *Supriya Chakraborty v. Union of India* from the ruling of *Obergefell*.[112] In *Obergefell*, the United States Supreme Court acknowledged the right to marry as a fundamental right and it had been deeply ingrained in American tradition, whereas even if the institution of marriage was an important institution in Indian society, its relevance under law was never to the level of being recognised as a fundamental right.

Justice Bhat, Justice Kohli, and Justice Narasimha concurred with the Chief Justice's perspective that fundamental right to marry does not exists in India. Justice Bhat, speaking for the majority in his opinion, pointed out a key distinction between India and the USA. He observed that marriage historically was not a socio-legal status conferred by the Indian State. In USA, the marriage was regulated through license regime, however in the Indian Context "marriage has been a union solemnized as per customs, or personal law tracing its origin to religious texts". The essence of Justice Bhat's opinion is that

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110 ibid 134–135.

111 *Obergefell v Hodges, Director, Department of Health* 576 US 644 (2015) (Supreme Court of USA).

112 *Supriya Chakraborty and Another vs Union of India* (n 10) paras 177–180.

the notion of marriage in the Indian context is autonomous and independent of the State, where the roots of the origin of marriage lie beyond its perimeter, whereas in USA, marriage historically had been regulated by both Church and the State.[113] Bhat J further addressed the question under the assumption that even if the right to marry is elevated to the level of fundamental rights within India, like the ones under Articles 17[114], 23[115], and 24[116] (which apply to both governmental and non-governmental entities), the right cannot be put into practice without specific laws and regulations. Therefore, the Supreme Court declined to grant the petitioner relief for enabling marriages between queer or homogeneous couples since the legislature and executive wing of the State can administer this demand and access to the institution of marriage.[117] This reading of history by the majority in Supreme Court judgment, with due respect to the Supreme Court, it is self-contradictory on its face, which shall be discussed in subsequent section. However, to mention in brief, marriage today is indeed

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113 ibid 290.

114 Constitution of India 1949 Art 17 Abolition of Untouchability - Untouchability is abolished and its practice in any form is forbidden The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.

115 ibid Art 23. Prohibition of traffic in human beings and forced labour
(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

116 ibid Art. 24. Prohibition of employment of children in factories, etc–
No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment Provided that nothing in this sub clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7); or such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause (7).

117 Marriage as an institution here means an established and recognized social structure or practice that plays a significant role in society. It encompasses religious, cultural and legal aspects that define and establish relationship between individuals typically involving rights, obligations and commitments creating a framework for social stability and family life.

regulated *by* the State, even if it had not been regulated historically. Further, it should not matter how historically marriage had been treated by the Indian State; the Court failed to appreciate the *effect* of present regulations *by the State* through various personal or secular laws of marriage; it ended up perpetuating subordination of the LGBT++ community, which, in the present batch of petitions, the court was being asked to strike down.[118]

4.3. Is "Union" Just a Word? Division on the Meaning of "Intimate Union"

Is the Special Marriage Act considered unconstitutional for excluding the right to marry for queer or same-sex couples? With regard to this question, there was disagreement in the bench. Chief Justice turned out to be in a minority view along with Justice Kaul. Justice Bhat, Justice Kohli and Justice Narasimha formed the majority bench. Article 21 of the Indian Constitution, which grants the Right to Life and Personal Liberty, was at the heart of discussion between the diverging judges.[119] Chief Justice, underscored that the "right to live under Article 21 secures more than the right of physical existence".[120] It encompasses the "right to a quality life", which includes the right to reside in a smoke-free and pollution-free environment, the right to access well-maintained roads, and the right to suitable accommodation that allows an individual to foster mental, physical, and intellectual growth. Similarly, the free exchange of ideas under Article 19 is an integral element of self-development. Chief Justice further emphasized that the Directive Principles of State Policies provide guidance to the State in its endeavour to promote the well-being of the people, ensure

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118 *Supriya Chakraborty and Another vs Union of India* (n 10) 291.

119 Constitution of India Art. 21–Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

120 *Supriya Chakraborty and Another vs Union of India* (n 10) 157.

humane working conditions, and elevate the standard of nutrition and living for the population. Drawing from the capabilities approach of Amartya Sen and Martha Nussbaum, the Chief Justice opined, "Access to the institution of marriage is crucial to individual self-definition, autonomy and pursuit of happiness."[121] Love and affection form the core of our identity. While it may not be an exclusive trait that has been bestowed upon humans, it certainly is the one that makes us feel human. As humans, we innately seek to be seen, understood and develop an identity along with emotions. Thereby, a full acknowledgement, acceptance, and recognition of our relationship with ourselves and others whom we love as friends, family members, or even romantic partners is quintessential to being human.[122] Having the ability and freedom to form an unregulated relationship by itself is not enough; in fact, to pave the way for the full enjoyment of a relationship, the State must recognize them. Chief Justice, by integrating Article 19(a) into Article 19(c), remarked that freedom of expression is not merely limited to expressions made by words. Over time, the scope of freedom of expression expanded to encompass "sexual identity"," choice of partner," and expression of "sexual desire to a consenting party."[123] Traditionally, the interpretation of Article 19(c) as "Freedom to form Association" had been confined to political spaces in which people sought to further the cause of labour rights. While it forms an integral element of Article 19(c), the Chief Justice argued that this definition needs to be expanded to include other forms of associations, including "intimate associations". This progressive reading of Article 19(a), along with 19(c), is a sublime example where the whole becomes greater than the parts constituting it. This reading

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121 Martha C Nussbaum, 'A Right to Marry?' (2010) 98 California Law Review 667, 678–685; *Supriya Chakraborty and Another vs Union of India* (n 10) 160.

122 *Supriya Chakraborty and Another vs Union of India* (n 10) para 217.

123 *National Legal Service Authority vs Union of India* (n 103); *Navtej Singh Johar vs Union of India* (n 106).

of both the articles by the Chief Justice deserves appreciation; even when there was no remedy directly under the Statute, he took its analysis to its logical conclusion by pointing out an immediate remedy to the petitioners, where the LGBT++ community's right to choose a partner can be traced from. This expansive reading of Article 19(c) is in the opinion of the minority view *necessary* to embrace freedom of expression in a holistic manner to protect the diverse forms of expression of human relationships that could be safeguarded under Article 19(a) of the Indian Constitution along with Freedom of expression to realise all forms of expression including expression of human relationships that could be protected under Article 19(a).[124,125] While the Supreme Court unanimously held that no fundamental right to marriage exists in India, the Chief Justice remarked that the right to choose one's partner also emerges from Article 21. Many of us regard making the decision about whom we want to marry as one of the most important decisions in our lives, which often comes to define one of our core identities, which is also true for people who wish to marry someone of their own gender.[126]

The Indian Constitution also recognises the concepts of *positive* and *negative rights*.[127] The government can indirectly limit individual freedoms when it fails to create the necessary conditions for people to exercise those freedoms. Therefore, to fully enjoy the right to form intimate associations guaranteed by the Constitution, it's essential for such associations to be formally recognised.[128] Interestingly, the Chief Justice, in his minority opinion, also developed a curious interpretation

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124 *Supriya Chakraborty and Another vs Union of India* (n 10) 162.

125 *Roberts v United States Jaycees* 468 US 609 (1984); Kenneth L Karst, 'The Freedom of Intimate Association' (1980) 89 The Yale Law Journal 624, 634–636.

126 *Supriya Chakraborty and Another vs Union of India* (n 10) 170; *Supriya Chakraborty and Another vs Union of India* 2023 INSC 920 (Supreme Court of India) [233].

127 *Supriya Chakraborty and Another vs Union of India* (n 10) 122–126.

128 ibid 223.

of Article 25 under the constitution of India.[129] Chief Justice's interpretation of Article 25 affirms that every individual, including members of the queer community, possesses the right to assess the moral character of their own actions. Once they have made such judgments, they are entitled to act in accordance with their own judgment as they deem appropriate. The meaning of liberty under the Constitution is what a person wishes to do or be in accordance with the law. Individuals have the right to decide for themselves or according to their conscience.[130] Supplementing this decision by underscoring the important ideal of equality enshrined under the Constitution Chief Justice recalled the judgment of *Navtej Singh Johar v. Union of India*, thereby highlighting that Article 15 prohibits both direct and indirect discrimination.[131] Thus, the Chief Justice came to the conclusion that the right to enter into a union under Article 19(c) under the Indian Constitution encompasses the right to choose one's life partner.[132]

Justice Bhat speaking for the majority, disagreed that Queer people today enjoy the "right to intimate union" under Article 19(c)–

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129 Constitution of India 1949 Art. 25- Freedom of conscience and free profession, practice and propagation of religion (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus
Explanation I– The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion
Explanation II –In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

130 *Supriya Chakraborty and Another vs Union of India* (n 10) 175.

131 *Navtej Singh Johar vs Union of India* (n 106).

132 *Supriya Chakraborty and Another vs Union of India* (n 10) 161.

freedom of association.[133] It was the view of the majority bench that the right to a relationship resides within Article 21. This right to a relationship includes choosing a partner, living together, and sharing a physical and intimate space with them. These rights flow from privacy, autonomy, and dignity, integral parts or elements of the Right to Life and Personal Liberty.[134] Expanding further on his reasoning Bhat J observed that queer people, like all citizens, are entitled to live freely

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133 Constitution of India Art 19 Protection of certain rights regarding freedom of speech etc
(1) All citizens shall have the right
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted
(g) to practise any profession, or to carry on any occupation, trade or business
(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence
(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause
(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause
(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe
(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

134 *Supriya Chakraborty and Another vs Union of India* (n 10) 281.

and can express their choices without interference from society, and he also held that whenever this right to enjoyment comes under the threat of violence, the State shall be bound to *extend all the necessary protection* to the couples.[135] By tracing the trinity of rights – autonomous choice, dignity, and non-discrimination, the majority conceded that these are now enjoyed by queer persons under the Constitution. Further, majority also pointed out that the understanding of constitutional progress in the realm of personal liberties (Article 21) and equality (Article 14) has revealed *layers of biases, prejudices, and lack of understanding* from members of society about a person's freedom that resides outside of their "group." [136] Analysing a catena of precedents, Bhat J faced no hesitation in holding that a person's right to choose a life partner is integral to their fundamental right to life.[137] The Court also views this issue from the viewpoint of dignity in its various facets. For Dr Ambedkar and other constitution-makers, political freedom (swaraj) represented the liberty to shape one's identity, to make choices with dignity, and to break free from the shackles of historical suffering and humiliation. The historical development of the equality code (Articles 14, 15, 16, 17, and 18) vividly attests to this principle.[138] Despite such eloquent and moving discussion, Bhat J, speaking for the majority, did not take this judgment to its logical conclusion by extending all necessary protection and holding the State duty-bound to protect the rights of LGBT++ people which he had himself observed

135 ibid 294.

136 ibid 281.

137 Right to choose partner *Asha Ranjan v State of Bihar* 2017 (1) SCR 945 (Supreme Court of India); In *re [Gang-Rape Ordered by Village Kangaroo Court in WB* ((2014) 4 SCC 786) it was held that state is under obligation to protect fundamental rights and an inherent right vested under Article 21 is freedom to choose partner in marriage. *Shafin Jahan v. Asokan K.M & Ors.* (n 107) held that expression of choice has to be exercised according to law; In *Justice KS Puttaswamy v. Union of India* (n 103) the present Chief Justice D.Y. Chandrachud had observed that 'personal choices governing a way of life are intrinsic to privacy'.

138 *Supriya Chakraborty and Another vs Union of India* (n 10) 285.

on behalf of majority. However, there is an inkling of hope to argue for the *anti-subordination* principle in the words of Bhat J where he has held that Articles 21 and 14 of the Indian Constitution can reveal our potential hidden biases.

4.4. Can the Special Marriage Act Break Free from Gender Norms?

When a court finds a part of a law unconstitutional, it can declare it invalid.[139] However, in this case, the court believed that if it were to declare the provisions of the Special Marriage Act ("SMA") as unconstitutional, it would undermine the entire purpose of the law, which is to encourage interfaith and inter-caste marriages. This is so because, in the view of the Court, holding SMA unconstitutional would essentially take the country back to a time before independence when people from different castes or religions couldn't marry and celebrate their love through marriage. Such a decision would lead to a different form of discrimination and bias at the expense of others. Therefore, the Chief Justice reached the following conclusion that the Court lacked the capacity to engage in such a broad exercise due to institutional constraints. Redrafting laws under the guise of interpretation is not within the powers of the court as it would amount

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139 Constitution of India, Article 13 (1949)-
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,—
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

to judicial legislation. Further, the Chief Justice wrapped up by saying that in the factual matrix of the case, the determination of unconstitutionality of SMA would be futile since the Court would not be able to grant *immediate remedy* to petitioners since it is for the Parliament to legislate a framework. Justice Kaul's views were in alignment with the Chief Justice, and he came to the conclusion that numerous challenges existed in the interpretation of SMA to encompass non-heterosexual relationships. He further concurred that modification of the definition of provisions under SMA had the potential to trigger a ripple effect throughout the legislative provisions of personal laws as it forms a "proverbial spider's web of legislation." by taking notice of diverse viewpoints prevailing throughout the territory of the nation.[140] Justice Bhat, again speaking for the majority in his separate but concurring opinion, observed that petitioners had urged that there exists a "hostile classification" that results in the exclusion of queer couples in the enjoyment of benefits of a statute or policy.[141] This is based on the premise that "equals are treated differently."[142] The petitioner contended that no "intelligible differentia" exists in the classification of queer and heterosexual couples under the framework of the SMA. The petitioners further urged that this had a discriminatory effect, resulting in the exclusion of a group that otherwise would form a part of the group. The court, in a careful analysis of a series of judgments[143] along with provisions of SMA, concluded that the impugned legislation's objective was intended to enable marriage for "heterosexual couples" belonging to

140 *Supriya Chakraborty and Another vs Union of India* (n 10) 154.

141 ibid 304.

142 ibid.

143 *DS Nakara v Union of India* (1983 (2) SCR 165); *Kedar Nath Bajoria v State of West Bengal* [1954] 1 SCR 30; *Chandan Banerjee v Krishna Prasad Ghosh* [2021] 11 SCR 720; *Transport & Dock Workers Union v Mumbai Port Trust* ((2010) 14 SCR 873); *Union of India v MV Valliappan* 1999 (3) SCR 1146; *State of J&K v Triloki Nath Khosa* 1974 (1) SCR 771; *In Re the Special Courts Bill, 1978* (1979) 2 SCR 476.

"different faiths."[144] Queer people were kept out of the purview of SMA because even consensual sexual intimacy was outlawed by Section 377 of the Indian Penal Code.[145] Therefore, SMA cannot be held unconstitutional because it failed to make a better classification for the LGBT++ community.[146]

The Court then addressed the second challenge by the petitioners that the passage of time had made the provisions of SMA lose its relevance. Justice Bhat, however, noted that the significance of the SMA had actually grown due to the rising awareness and the increasing choices made by spouses from different faiths to marry each other. In conclusion, Justice Bhat observed that it could not be argued, under any interpretation, that the exclusion of non-heterosexual couples from the ambit of SMA renders it devoid of rationale and, therefore, is discriminatory in nature. Without such a finding, the Court is incapable of utilizing "reading down" doctrine into the words of the statutes. In sum, the majority in this view agreed with the rationale forwarded by the Chief Justice that SMA could not be held unconstitutional.[147]

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144 *Supriya Chakraborty and Another vs Union of India* (n 10) 312.

145 On 6 September 2018, a five-judge Bench of the Supreme Court partially struck down Section 377 of the Indian Penal Code in case of *Navtej Singh Johar vs Union of India* (n 106)., thereby decriminalizing same-sex relations between consenting adults. LGBT++ can now legally be allowed to engage in consensual intercourse. The Court has upheld provisions in Section 377 that criminalized non-consensual acts or sexual acts performed on animals. *See* Indian Penal Code, 1860, *supra* note 1 at Section 377 Unnatural offences.—

Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

146 The court concluded that "under classification" is not discriminatory. *See State Of Gujarat And Another v Shri Ambica Mills Ltd* 1974 (3) SCR 760; *Supriya Chakraborty and Another vs Union of India* (n 10) 307.

147 *Supriya Chakraborty and Another vs Union of India* (n 10) 312.

4.5. Breaking Boundaries: Embracing Transgender Marriage Rights

The Chief Justice offered a broader interpretation to incorporate transgender individuals within the framework of the traditional understanding of the SMA and personal laws, thereby affirming that transgender individuals in heterosexual relationships are eligible to marry under the SMA or personal laws. Chief Justice started his reasoning by addressing a flawed submission made by the Solicitor General of India that a Queer person exercises a "degree of choice" in determining their sexual orientation because the person "identifies" as a Queer.[148] Sexual orientation is an "ascribed" characteristic that cannot be "achieved" or "reversed."[149] However, a person's gender identity is changeable. This concept is best illustrated by the example of a person who transitions from a male to female, embracing her identity as a woman. She may face discrimination based on her gender, experiencing bias and prejudice. It's also important to consider her past, where she might have faced discrimination based on the sex she was assigned at birth. This highlights how discrimination can stem from both an individual's true identity and the identity imposed by societal expectations. However, the law is not just about protecting innate characteristics of a person; it also addresses imposed identities. It is also about ensuring people are not treated unfairly for things they choose in their lives. A person is born into a caste[150], a person is born with a sexual orientation, but then a person's gender identity can transform with time. When individuals undergo such a transformation, they may face discrimination. Therefore, people can face

148 ibid 180.

149 ibid 181.

150 *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1; *Indian Medical Assn v Union of India* (2011) 7 SCC 179; *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

discrimination because of their innate and imposed identity. Article 15(1) of the Constitution of India encloses stereotypes that can arise because of gender, i.e., non-straight relationships challenge traditional male-female roles, and discrimination based on sexual orientation indirectly involves stereotypes about gender, which is against the law. So, a law discriminating based on sexual orientation is questionable under the Constitution.[151]

Following the previous discussion, a different group of petitioners asked the Supreme Court to clarify the marriage rights of transgender individuals within the existing legal framework. The Solicitor General, representing the Union Government, argued that discrimination against transgender individuals no longer existed because Parliament had passed the Transgender Persons Act in 2019. However, the Court rejected the Union's argument and explained the difference between "sex" and "gender." Thereafter, the Court also recalled the observations made in *NALSA v. Union of India* and delved into the rights granted to transgender persons under the Transgender Persons Act of 2019.[152] The Court while carefully interpreting of the Transgender Persons Act and existing marriage laws, such as the Special Marriage Act, Hindu Marriage Act, Domestic Violence Act, Dowry Prohibition Act, and Section 498A of the IPC, which address the traditional nature of heterosexual marriages came to conclusion by noting that these statutes do not explicitly restrict their application to cisgender men and women. The plain language of the gender-specific terms in these statutes suggested to the Supreme Court that transgender individuals in heterosexual relationships are included. The Union of India's argument that only "biological men" and "biological women" were cast aside by the language of the statutes, neither any

151 *Supriya Chakraborty and Another vs Union of India* (n 10) 179–182.
152 ibid 188–197.

legal principles or methods of interpretation could be utilized to the restrictions on marriage within prohibited degrees, as outlined in marriage laws, remained applicable. The NALSA judgment also acknowledged the right of transgender individuals to marry. Furthermore, various State Governments have established and executed programs that promote and support transgender individuals in the context of marriage.[153] As a result, the Court determined that marriages involving transgender individuals in heterosexual relationships would be considered valid under the law.

5. Three Nations, One Journey: India, USA and Canada Compared

Most of the time in the history of Canada, the courts did not act as the custodian of rights of sexual minorities. Upon the adoption of the Charter, the Canadian Parliament granted the judiciary the status of "Guarantors and Protectors of Rights."[154] Under this spirit, the Superior Court of Ontario came to the rescue of the LGBT++ community. It granted them the right to marry on same footing that had existed for heterosexual people.[155]

It is interesting how the Superior Courts of Appeal in Ontario, Quebec, and British Colombia interacted with their respective jurisdictions' legislature and executive branches. The Superior Court of British Colombia believed that the legislature was primarily responsible for changing the law. Quebec's Cour de Superieure also gave way to the Parliamentary wisdom to tackle this delicate issue comprehensively. We have seen how Indian Courts have also reasoned

153 ibid 199.

154 Hon Irwin Cotler, 'Marriage in Canada—Evolution or Revolution?' (2006) 44 Family Court Review 60, 61.

155 Christy M Glass and Nancy Kubasek, 'The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights' 15 144.

along similar lines to the Courts of Quebec and British Colombia. However, the Ontario court showed little patience for deliberation and chose to strike down the challenged provisions immediately to grant same-sex couples the right to marriage.[156] Case outcomes often depend on how the Courts frame the issues. The Canadian Courts and American Supreme Court framed the marriage issue primarily on the touchstone of equality before law and equal protection of law.[157] In Canadian cases we have seen that Courts when faced with challenge in early years kept accepting that discriminating on basis of one person's sexual orientation was unjustified before the Charter but the courts eventually started to rule that it is the *definition* itself which is discriminatory and needs to be changed to incorporate same-sex couples. The Indian Supreme Court, at least in the majority ruling, has seen the issue of same-sex marriage from the lens of "Privacy," "Dignity," and "Autonomy." [158] The majority opinion of the Court conceded that discrimination existed against same-sex couples but this was "under-classification" on the part of legislature when it was drafting the SMA in 1950. At that time, the lawmakers did not anticipate or include same-sex relationships within the scope of the SMA, likely because societal norms and even understanding about marriage itself different (or limited). As a result, the exclusion of same-sex couples in the opinion of Supreme Court was not a deliberate act of discrimination but rather a reflection of perspective of that era which unfortunately failed to account for evolving notions and deepened understanding of equality and personal liberty that we have us with today. This is not to say that the Indian Supreme Court did not deal with the issue of equality altogether. In fact, the Court was not persuaded by the petitioners precisely because it would have

156 Gee and Webber (n 50) 135.
157 Matthews (n 15) 842.
158 *Supriya Chakraborty and Another vs Union of India* (n 10) 281–287.

encroached upon the legislature field if it had read into the words of the statute. The Solicitor General had made submissions before the court stating that there are about 160 laws that would be impacted by bringing marriage equality through the Court's declaration.[159] Consequently, he argued that Parliament is the only suitable and capable authority to bring such change. In the words of Justice Kaul, the provisions of the Special Marriage Act make a complex "inter-connected web of statutes," and striking it down would have created a cascading effect.[160] Hence, the Indian Supreme Court opted for restraint in addressing same-sex marriage, leaving it to the legislature to reform the marriage definition through new laws. However, as we have seen in the discussion of Canadian doctrinal history, the Court of Appeal in British Columbia and the Court de Superior of Quebec gave the Parliament 24 months to amend laws, failing which the laws would automatically become null. It is unfortunate that this type of exercise could not be carried out by the Indian Supreme Court in conjunction with the Indian Parliament. It can certainly be argued that facts of Indian case were different, the issues were different, the history is different, nonetheless, the constitutional principles upon which the Court ought to render a decision were the same. It was not even necessary for Indian Supreme Court to go to the extent that the Court of Appeal for Ontario in the case of *Halpern v. Canada*[161] under which it had immediately declared the ban on same-sex marriage as unconstitutional and asked the Canadian State to demonstrate how such striking down could cause public disorder, but merely specifying a reasonable time-frame to the parliament of India to carry out

159 'SC Verdict on Same Sex Marriages Explained Highlights: No Fundamental Right of Same-Sex Couples to Marry, Says Supreme Court' (*The Indian Express*, 17 October 2023) <https://indianexpress.com/article/explained/explained-law/sc-verdict-on-same-sex-marriages-explained-live-8986361/> accessed 23 October 2023.

160 *Supriya Chakraborty and Another vs Union of India* (n 10) 255.

161 *Halpern v Canada* (n 37).

amendments in the respective laws would have been a suitable remedy as well for the aggrieved petitioners.

Then, in his reasoning, Justice Bhat speaking for majority held that the petitioners essentially aimed to "establish an entirely new social and regulatory institution", leading to the dismissal of the petitions. In contrast, the Chief Justice countered this perspective by underlining the state's duty to create an inclusive environment for all citizens, particularly vulnerable minorities, enabling them to enjoy their rights and freedoms as equally as privileged members of society.[162] This argument further asserted that the LGBT++ community has the right to establish unions, including intimate same-sex unions, as protected under Article 19(c) of the Indian Constitution. The Chief Justice also acknowledged that Justice Bhat reached a similar conclusion but did not pursue it further under Article 32 of the Indian Constitution. In response, Justice Bhat expressed empathy for the challenges faced by the LGBT++ community but stressed that the *appropriate* path to seek justice involved enacting new statutes or amending existing ones through legislative processes. Achieving outcomes must mean arriving at the desired destination in a manner that is legally sound, adhering to the "Architecture of Constitutional scheme."[163]

With due respect to Hon'ble Supreme Court, the majority bench in the ruling of the *Supriyo* judgment[164] failed to consider two factors. First, while the constitutional bench has given us the answer to the question that there is no abstract fundamental right to marry under the Constitution of India unlike America or Canada, at the same time, it failed to appreciate to look at this issue from the point of view of whether LGBT++ couples can be *excluded* from the present legal

162 *Supriya Chakraborty and Another vs Union of India* (n 10) 236.
163 ibid 353.
164 *Supriya Chakraborty and Another vs Union of India* (n 10).

regime just because of their sexual orientation? The Indian Supreme Court pondered deeply on the question of whether it is capable of creating a new legal regime striking down the provisions of SMA but failed to address the moot question of *equality before the law* and e*qual protection of the law*, which at all times, been the focal point of contention as we have seen while discussing the Canadian and American cases as we have seen. The Indian Supreme Court carried out its assessment and unfortunately left a historically marginalised community, subordinated under the majority of people and within a legal framework which does not treat them as equal or at par with heterosexual people. Merely classifying people on the basis of their social identities and checking whether the statutes have a *rational basis* leaves no space for consideration to question classification themselves. It left no space to analyse this situation from a framework of group-on-group domination. The objective of SMA, along with its classification scheme, ought to have deserved a higher level of judicial scrutiny by the Indian Supreme Court. The Supreme Court, in the case of *Ashoka Kumar Thakur v. Union of India*, has rejected the application of strict scrutiny on governmental action in providing reservations to SC/ST communities.[165] However, it is probable that a persuasive argument can be built by utilizing strict scrutiny doctrine in the American Jurisprudence where State classification seems to be adverse to a historically marginalized group and violates principles of equality before the law and equal protection of the *law*.[166] This is precisely why *the anti-subordination principle* needs to find a place within the Indian

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165 *Ashoka Kumar Thakur v. Union of India* (n 150) para 268 ('In India there has to be a collective commitment for upliftment of those who needed it. In that sense, the question again comes back to the basic issue as to whether the action taken by the Government can be upheld after making judicial scrutiny').

166 *State of Kerela v NMThomas* (1976) 2 SCC 310 (Supreme Court of India) ('The victims of untouchability, identification of social and economic backwardness have been accepted as permissible measures.').

Constitutional jurisprudence, which would allow the constitutional courts to protect only those classifications that do not perpetuate the subordination of one group over another. It would allow us to ask ourselves whether certain hierarchies, whether constructed socially or conferred on us by law, are so *unjust*, *arbitrary* and *irrational* that they violate *equal protection doctrine* and the right to dignity of members of certain groups, that they deserve to be discarded or abolished, from the scheme of permissibility of the Constitution. Human history is witness to atrocities that have been carried out with subjugation, either between individuals and as well as between various groups. People belonging to certain *groups*, such as Jews, have faced the horrors of the holocaust while being used as scapegoats in political spheres.[167] Such consideration may be very hard for the Court to spot on its own due to the limitations of the institution, but it can surely look at studies or ask experts to apprise itself about the same important contextual details. Nonetheless, in one aspect, it needs to be appreciated that Chief Justice, in his opinion, did manage to create consensus with his fellow judges by declaring the right of transgender persons to enter into heterosexual unions. Unfortunately, the majority opinion in the judgment went on to a tangent to determine the "intent of the legislators" at the time of drafting the SMA while ignoring the *effect* that the SMA creates today for same-sex couples. While the majority view did *concede* in its view that, indeed, SMA is exclusionary and discriminatory towards LGBT++ people, it left the *remedy* at the discretion of an "executive committee".[168] This approach, in the light of the Canadian and American jurisprudence we have seen above, raises the question as to if a provision is found discriminatory, can the highest court of the land leave the remedy at the discretion of the

167 Nurse (n 67) 301–305.
168 *Supriya Chakraborty and Another vs Union of India* (n 10) 165.

executive or as guarantor and protector of fundamental rights, a constitutional court ought to act assertively just as Courts of Canada and America did. Finally, the majority opinion also opined that the institution of marriage in the Indian context existed prior to the State but failed to appreciate that it may have been historically true in all its abstract sense, but at present, the institution of marriage is indeed sanctioned and regulated by the State. While the majority opinion is correct in stating that the Court cannot "create a social or legal status", the Court failed to appreciate that, at present, there is a "social and legal status" in the *institution* of marriage which is being perpetuated by the State. With the utmost respect to the Supreme Court of India, it is challenging to overlook the inherent contradiction in majority's reasoning. The petitioner, in this case, challenged the mandatory legal exclusion of LGBT++ people from the institution of marriage, whereas the Court, unfortunately, misread the prayer for it being the "creation of new social, legal status". Moreover, the reasoning by the majority bench falls flat on the face of a hypothetical example of inter-caste marriage. Suppose an imaginary legislation existed in India that banned inter-caste marriage or inter-religious marriage was to be tested on the anvil of the Constitution. Would the Supreme Court of India, in such a case, opine that caste existed prior to the State and was independent of the State? Would it provide similar reasonings for the hesitation to strike down such a law because the petitioner would effectively ask for a "new social and legal status" from the State? It would run against the basic tenets of the Constitution and would be a mockery of constitutional values to not strike down such a law; then, it is difficult to understand why discrimination based on sexual orientation that excludes a class of people in recognizing their right to get married could be constitutionally tolerated. By looking at this issue from the "right to marry", the majority opinion unfortunately could

not appreciate the right against discrimination and equal access to the institution of marriage within the territory of India. This is perhaps where the role of the anti-subordination principle would have provided more clarity while framing the issues and weighing them against each other based on strictly Constitutional considerations.

6. Conclusion

A marriage is considered by many in this world to have its own inherent value, whether it is given recognition by state or not A legal system that tries to create a distinction between "kinds of marriage", in the form of association or romantic, will always have justification for excluding certain associations from the definition of marriage. The moot question we may have to pose ourselves is what marriage truly *is*? It has to be emphasized that being able to understand the value of marriage can be easily distorted by policies, which may come due to animosity, mistakes on the part of people or even outright prejudice. In *Navtej Singh Johar v. Union of India* it was opined by Justice Indu Malhotra that history owes apology to LGBT++ community.[169] But what is the use of such an apology if no corrective action or remedy is provided to the aggrieved? Recognizing same sex- marriage India is still in the early stages of this development when it comes to recognizing same-sex marriage, but it has the potential to make progress at a faster pace than the western hemisphere and undo the historical injustices in a global context. The latest studies have revealed that more than 53% of Indians now support same-sex marriage, similar to the number of people Canada and the USA supported in the early 2000s.[170] The social attitudes are undergoing a shift in India as per

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169 *Navtej Singh Johar vs Union of India* (n 106) para 50.

170 Jacob Poushter, Sneha Gubbala and Christine Huang, 'How People in 24 Countries View Same-Sex Marriage' <https://www.pewresearch.org/short-reads/2023/06/13/how-people-in-24-countries-view-same-sex-marriage/> accessed 27 October 2023; Nikhil Rampal, '53% of Indians Are Accepting of Same-Sex Marriage, Finds Global Survey by

empirical findings. A review petition has been filed before the Supreme Court of India to reconsider its view, stating that there exists an error on the "face of the record".[171] It is difficult to anticipate whether the Supreme Court would reconsider its reasoning on merits in a review petition. At the very least, a 7-judge bench would have to be constituted to overturn this judgment. A revised perspective, nonetheless, would be a welcome one, which would eventually extend equal protection of law and equality of law to everyone in matters of marriage. Again, by no means are these easy questions to address theoretically, let alone assess their impact on the real and practical lives of people. It will be a test of our abilities and require all of us to be committed to making findings and be cognizant of the preambular ideals that the drafters of the Indian Constitution left us with.

Pew Research' *ThePrint* (14 June 2023) <https://theprint.in/india/53-of-indians-are-accepting-of-same-sex-marriage-finds-global-survey-by-pew-research/1626333/> accessed 27 October 2023.

171 *Utkarsh Saxena v Union of India* Review Petition (Civil) no. 1142 of 2022 (Supreme Court of India).

EXPANDING ARTICLE 17: LOGIC & EQUALITY

Archit Sinha[*]

ABSTRACT

Article 17 of the Indian Constitution prohibits "Untouchability". The jurisprudence on this article has been negligible. Thus, courts have dealt with issues of social discrimination through religion– Articles 25 and 26-which has resulted in social discrimination being linked to religious rights. For instance, the Supreme Court recently expressed doubt regarding the correctness of its judgment in Sardar Syedna, which upheld the right to excommunicate people, in light of 'Constitutional Morality' (Articles 25 and 26), implying that excommunication from all aspects of social life belies religious reasons which in contemporary times would be apathetical to the Supreme Court's idea of Constitutional Morality. In an attempt to remedy this conflation, this paper looks at Article 17 to say that it holds value in cases of social discrimination irrespective of basis–religion or otherwise. Justice Chandrachud J.'s reasoning in Sabarimala opened the doors for interpreting Article 17 expansively. Such interpretation of Article 17, following Chandrachud J.'s reasoning, has the potential to give way to a new form of the non-discrimination doctrine that includes instances of discrimination (social boycotts, ex-communication, etc.) without disturbing the case laws on religion. This paper gives a new meaning to Article 17 in two ways- by identifying the purpose of Article 17 to protect against discrimination belying the 'Purity-Pollution' logic; and by introducing the 'exclusionary effect' as a separate phenomenon worthy of

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consideration in addition to this 'logic'.

INTRODUCTION

Article 17 of the Indian Constitution provides for protection against "Untouchability" as a fundamental right.[1] It is noteworthy that "Untouchability" appears in quotes, implying a specific meaning to the term.[2] This specific meaning has been understood to be the social practice of "Untouchability" prevailing in Hinduism.[3] Meaning the practice of exclusion of purported 'lower castes' from social gatherings and public places like wells, temples, etc. It entails an exclusion of people from participation on aspects of social life on apparent This reasoning has prevailed in the Indian courts as of now.[4] However, Justice D.Y. Chandrachud J. in *Indian Young Lawyers Association and Ors. v the State of Kerala and Ors.*[5] ('*Sabarimala*'), introduced a novel interpretation of Article 17. Chandrachud J. went beyond just the historical understanding of "Untouchability" and expanded the scope of Article 17 by emphasizing the logic of Purity-Pollution. In doing so, Chandrachud J. strayed away from the prevailing judicial trend.[6]

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1 Constitution of India 1950, Article 17; Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (2018) 6; U. R. Rai, *Fundamental Rights and Their Enforcement* (2011) 624.

2 Rai (n 1) 625.
Rai understands "single quotes" to imply that the word "Untouchability" does not carry they "usual meaning". Interestingly, he also notes a connection between Article 17 and Article 15(2) while looking at the word "disabilities arising out of 'Untouchability'" in Article 17. This connection, originally appearing in the Constituent Assembly Debates will be explored by this paper in the coming sections.

3 See n 11.

4 See Karnataka High Court, in the case of *Devarajiah v B. Padmanna* AIR 1958 Kant 84; *The State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126; Gopal v State of Maharashtra (2020) 2 AIR Bom R (Cri) 339; P. Rathinam v State of Tamil Nadu (2009) 78 AIC 659 (Mad); K. Prabhakaran v The District Collector, Madurai District & Ors. 2015 SCC OnLine Mad 8704; *Vimla Govind Chorotiya v State of Maharashtra* (2022) 2 AIR Bom R 157, etc.

5 *Indian Young Lawyers Association and Ors. v State of Kerala and Ors.* MANU/SC/1094/2018.

6 See n 4.

This paper argues for an expanded interpretation of Article 17 based on this effect-based equality consideration. Chandrachud J.'s approach, though a positive step, still lacks the appropriate framework to have the effect on Article 17 as it intends to. This discussion around Article 17 becomes relevant and contemporary with the 9-judge bench constituted by the Supreme Court to consider the issues mentioned in the *Sabarimala* review. The bench framed seven new issues for consideration with one of them being on the scope and ambit of religious freedom and the interplay between religious freedom and the limits thereon. More recently, in June 2023, the Madras High Court in the case of *Elephant G Rajendran v The Registrar General and others*[7] has given a very broad reading to Article 17 to include "*all practices of social ostracism and exclusion that have their bases in ritual ideas of purity/pollution and hierarchy/subordination*".[8] In this context where conversations around religious freedoms and their extent are being taken up by the courts and simultaneously, Article 17 post *Sabarimala* is occupying a more nuanced meaning, this paper contributes to this discourse by providing an expansive interpretation of Article 17 with emphasis on equality.

This paper argues for expanding Article 17 through the equality aspect, because the Equality Approach is more appropriately in line with the historical context of Article 17, which this paper has derived from the plethora of case laws and a history of the practice. This allows for a wider set of practices to be considered under Article 17, unlike Chandrachud J.'s logic. The Logic Approach, although a potential alternative, is incomplete, as this paper will show. This paper contends that the harm that Article 17 seeks to prevent is that of exclusion *stemming from* the logic of Purity-Pollution, hence, the incorporation of the Equality Approach.

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7 *Elephant G Rajendran v The Registrar General and others* [2023] LiveLaw (Mad) 171.

8 ibid.

In Part I, this paper outlines the traditional approach to Article 17 and differentiates it from Chandrachud J.'s reasoning in *Sabarimala*. In Part II, this paper critiques Chandrachud J.'s approach by exploring the question – why does an Article 17 inquiry need to incorporate the logic of Purity-Pollution in the first place? This paper argues that Chandrachud J.'s approach, although a step in the right direction, is incomplete and needs to be refined. Here, this paper introduces the Equality Approach as well as the Logic Approach. In furtherance of this, in Part III, this paper analyses the two approaches and argues for the Equality Approach by dissecting it and going into its nuances. In Part IV, this paper will highlight the procedural nuances of the approach and clarify its working. Finally, in Part V, this paper looks at the limitations of the Equality Approach and concludes thereafter.

I. Understanding Article 17 and Where Sabarimala Comes in

A. Evolution (Lack thereof) of Article 17 since 1950

Having undertaken a qualitative assessment of Supreme Court and High Court judgements (post-independence) concerning the meaning of "Untouchability", this paper identifies that the Indian Courts have understood "Untouchability" in a historical sense, solely restricted to the caste based practice prevalent in the Hindu society. Out of 83 High Court and Supreme Court judgments (65 and 18 respectively) concerning Article 17 and "UUntouchability",[9] a total of

[9] These cases have been filtered using the SCC Database.

31 judgments (8 Supreme Court[10] judgments and 23 High Court[11] judgments) have directly dealt with the meaning of "Untouchability"

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10 Supreme Court cases, notably *The State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126 [14], [18]-[24]; Heikham Surchandra Singh v. Representative of Lois Kakching 1997 2 SCC 523 [5] citing Law Commission Report to interpret "Untouchability"; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1; A.S. Narayana Deekshitulu v State of A.P. & Ors. (1996) 9 SCC 548 [89]; State of MP v. Ram Krishna Balothia 1995 3 SCC 221 [6]; Adi Saiva Sivachariyargal Nala Sangam v. Govt. of TN 2016 2 SCC 725 [47]; N Adithyan v. Travancore Devaswom Board 20028 SCC 106 paras [12], [15]; M Chandra v. M Thangamuthu 2010 9 SCC 712 [41]; all deal with the meaning of the "Untouchability" appearing either in Article 17 or relevant statues (see n 9)

11 See notably Devarajiah v. B. Padmanna, 1957 SCC OnLine Kar 16 [10] which recognises the lack of a definite meaning of "Untouchability", [11]-[21] affirmed in *Sabarimala*; Commander Kamaljeet Singh Bhatti (Retired) & Ors. v State of Maharashtra 2016 SCC OnLine Bom 9029 [3] (unreported); Gopal v State of Maharashtra (2020) 2 AIR Bom R (Cri) 339 [6]-[7]; P. Rathinam v State of Tamil Nadu (2009) 78 AIC 659 (Mad [2]-[7], [10]; K. Prabhakaran v District Collector, Madurai District & Ors. 2015 SCC OnLine Mad 8704 [6]-[10]; Vimla Govind Chorotiya v State of Maharashtra (2022) 2 AIR Bom R 157 [11], [20]; Govind v State of Maharashtra (2019) 3 AIR Bom R (Cri) (NOC 77) 25 [13]; S. Gnanvel v The Principal, St. Joseph of Cluny Matric Higher Secondary School & Ors. (2012) 2 CWC 575 [2] and [8]; Pavadai Gounder v State of Madras 1972 SCC OnLine Mad judgment by Ramamurti, J. [1]-[3] and notably [4]; Ramchandra Machwal v. State of Rajasthan, 2015 SCC OnLine Raj 9660 citing *P. Rathinam* at [9], interprets "Untouchability" in similar fashion at [10] and [11]; V. Rajendran v. District Munsif, 1996 SCC OnLine Mad 442 [12]-[20] citing Shastri Yagnapurhdasji v Muldas Bhumdardas Vaishya AIR 1966 S.C. 111, State of Karnataka v. Appa Balu Ingle in context of the Madras Removal of Civil Disabilities Act, 1938, Devarajiah v. Padmanna A.I.R. 1958 Mysore 84 and Untouchability (Offences) Act, 1955; State v. Bhaishankar Uttamrai, 1955 SCC OnLine Bom 248 [32]-[34], [63], [109] in context of the Bombay Harijan (Removal of Social Disabilities) Act, 1946 s. 2(f); Daulat Kunwar v. State of Uttarakhand, 2017 SCC OnLine Utt 58 [11] in context of Protection of Civil Rights Act, 1955 s. 2(d) and the meaning of "shops" along with s. 4 in context of Article 17; Bhanudas v State of Maharashtra 2017 SCC OnLine Bom 7238 [37] notes "Untouchability" in Article 17 to be in context of Caste System prevalent in the Hindu Society; The Board of Trustees Arulmighu Poottai Mariamman Temple v The Revenue Divisional Officer-cum-Executive Magistrate, Kallakurichi, Villupuram District & Ors. 2009 SCC OnLine Mad 264 [2] and [26]; Chandrama Singh v. State of Bihar, 1999 SCC OnLine Pat 721 [14]; Monu v. State of M.P., 2016 SCC OnLine MP 12178 [10]-[12] citing the Supreme Court in the case of State of Karnataka v. Appa Balu Ingale; Duni Chand v. Sriniwas, 1993 SCC OnLine J&K 31 judgment of R.P. Sethi, J at [1]-[3] and [12] notes there to be a connection between Article 17 and s. 7 of the Untouchability Offences Act, 1955 in the meaning of "Untouchability" appearing in both the instruments; Stephen Doss v. District Collector, 2015 SCC OnLine Mad 13161 [7] and [19]; Mariswamy v. State by the Police of Kude, 1997 SCC OnLine Kar 438 [13], [19], and [20] citing Devarajiah v. B. Padmanna affirms the historical understanding of the term; Bishashwar Prasad v. State of U.P., 1965 SCC OnLine All 459 [10] connects Article 17 to s. 7 of the Untouchability (Offences) Act, 1955; Surya Narayan Choudhary v. State of Rajasthan 1988 SCC OnLine Raj 31 [7] attributes the historical meaning of "Untouchability" to be the intent of the framers; State of Karnataka v. Laxminarayana Bhat, 1991 SCC OnLine Kar 44 [55].

while interpreting Article 17, or in the context of statutes relating to "untouchability" which are linked to Article 17 of the Indian Constitution.[12]

In this context, analysing Chandrachud J.'s approach in *Sabarimala* has the potential to pave the way for a refined form of the 'non-discrimination' doctrine, one that preserves human dignity by allowing it to attack the branding of human beings as pure/impure, often associated with the Case caste system. This paper argues that his approach, though a step in the right direction, is still incomplete. This paper agrees in principle with Chandrachud J.'s consideration of the logic of Purity-Pollution for Article 17. However, expanding Article 17 by simply using this logic would be meaningless as Part II (C) of this paper will show. Chandrachud J. puts the logic of Purity-Pollution at the core of Article 17. Though not wrong, his approach needs to be in line with the historical basis of Article 17 as well by considering the exclusionary effect of such practices as the starting point of inquiry.

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12 Statutes such as Protection of Civil Rights Act, 1955, s. 7(1)(d) and Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 Objects and Reasons ("Untouchability as used in the Act is connected to Article 17 by the High Court of Madhya Pradesh in Arif Khan v. State of M.P., 2019 SCC OnLine MP 6979 [11] citing *Monu v State of MP* (n 8) at [21] and by M.P. Chothy v State of Kerala 202 SCC OnLine Ker 4254 [25] – "*The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, flows from Article 17*") and even Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Acts, 2013, are generally understood to give effect to the provisions contained in Article 17 of the Constitution.
Generally, in cases involving caste offences, a reference is always made to Article 17 in light of these specific statutes (See *Vimla Govind Chorotiya v State of Maharashtra* (n 3) [11], [20] as an example along with Monu v. State of M.P (n 8) [10]-[12], A.S. Narayana Deekshitulu v. State of Andhra Pradesh, (1996) 9 SCC 548 [92], aresh Kumar Singh v. Union of India, 1996 SCC OnLine Pat 438 [8] and Loknath v State of Karnataka [12]). Furthermore, in *Safai Karamchari Andolan v Union of India* (2014) 11 SCC 224, Supreme Court was concerned with enforcing the provisions of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. In doing so, it placed reliance on Parts IIthis paper and IV of the Indian Constitution and the enforcement of fundamental rights guaranteed under Article 17 among others (14, 21 and 47 of the Constitution of India). Hence, the connection between Article 17 and these statues makes such cases relevant for the purposes of this paper.

This is what this paper calls the Equality Approach because it accounts for a holistic understanding of discrimination by basing the inquiry on exclusion as the starting point, compared to its raw alternative – the Logic (of Purity-Pollution) Approach.

B. The Traditional Approach And Where Sabarimala Stands Out

With the context of judicial treatment of 'Untouchability' and Article 17 in mind, this section looks at the 'Traditional Approach To Article 17' which is derived from the previous section, in contrast with the approach followed in *Sabarimala*. The aim here, is to bring out the difference in these divergent approaches and lay the foundation for shifting the understanding of Article 17 from 'Untouchability' to the logic of Purity-Pollution.

The term 'Untouchability' in Article 17 is nowhere defined in the Indian Constitution,[13] and up until now, the judiciary has dealt with its interpretation in a historical context-based sense by confining it to the practice of caste-based discrimination only. [14] Notably, the

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13 See Durga Das Basu, *Short Constitution of India*, Eleventh Edition (1994) 102. Commenting on Article 17 of the Constitution read with Untouchability (Offences) Act, 1955 he states, "*the word "Untouchability" has not, however, been defined by the Act just as there is no definition in the Constitution*; Marc Galanter, 'Untouchability and the Law' (1969) *Economic and Political Weekly* 4(1/2) 131, 139; *Devarajiah v B. Padmanna* AIR 1958 Kant 84 [4]; Centre for Academic Legal Research, 'Analyzing the Scope of 'Untouchability' under Article 17' (*CALR,* December 19, 2020) <https://calr.in/analyzing-the-scope-of-"Untouchability"-under-article-17> accessed 6 May 2022.

14 B.R. Ambedkar, *The Untouchables: Who were they and why they Became Untouchables* (Kalpaz Publications 1948, republished in 2017) 21. Dr. Ambedkar mentions that "*Non-Hindu societies only isolated the affected individuals. They did not segregate them in separate quarters. The Hindu society insists on segregation of the Untouchables. The Hindu will not live in the quarters of the Untouchables and will not allow the Untouchables to live inside Hindu quarters. This is a fundamental feature of Untouchability as it is practised by the Hindus. It is not a case of social separation, a mere stoppage of social intercourse for a temporary period. It is a case of territorial segregation and of a cordon sanitaire putting the impure people inside a barbed wire into a sort of a cage. Every Hindu village has a ghettto. The Hindus live in the village and the Untouchables in the ghetto*." Dr. Ambedkar's understanding of it was in line with purity/pollution, attached it to caste-based discrimination; See also Mahatma Gandhi's *My philosophy of Life* where he considers 'Untouchability' to be the acts/practices committed against Dalits as described therein;

Karnataka High Court,[15] while tackling this issue in the case of *Devarajiah v. B. Padmanna* (1957),[16] restricted the scope of "untouchability" to the historical context of the practice and not a literal understanding of the term.[17] The Supreme Court reaffirmed it in *The State of Karnataka v. Appa Balu Ingale* (1992),[18] by confining the scope of the word to the discrimination faced by Dalits, as under the caste system in India.[19] In his judgment, Justice K. Ramaswamy provides the rationale behind this, and concludes "Untouchability" to be the "*basic and unique feature, inseparably linked up with the caste system and social set up based upon it.*"[20]

Chandrachud J., in *Sabarimala,* departs from this approach by choosing to inquire further into the logic behind the caste system;[21] he

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L. Elayaperumal, 'The Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents' (1969 New Delhi, Department of Social Welfare); M Kagzi, Mangal Chandra Jain, *Segregation and Untouchability Abolition* (1976, New Delhi: Metropolitan Book Co.) 207 notes that "*Untouchability connotes the acts, action or practice of non-touching of the members of the lowest by the caste Hindus, which means separation, segregation and isolation of such persons from the higher caste Hindus. It means keeping the Harijan untouchables outside the mission*"; Gerard Baader, 'The Depressed Classes of India: Their Struggle for Emancipation' (1937) *An Irish Quarterly* Review 26(103) 399, 400-403; Lela Dushkin, *The Policy of the Indian National Congress Toward the Depressed Classes, an Historical Study* (1967) notes that "*Untouchability is ordinarily used in all sense, first to refer to the pollution - stigma attached to untouchables, secondly to refer to the set of practice engaged in by the rest of the society to protect itself from pollution conveyed by the untouchables and to symbolise their inferior status*."

15 Note that the court cautions against construing 'Untouchability' in the literal sense, meaning those who cannot be touched literally. Rather, it opts for a historical context-based approach by looking at the evolution of the practice in India *Devarajiah v B. Padmanna* AIR 1958 Kant 84 [4].

16 *Devarajiah v B. Padmanna* AIR 1958 Kant 84.

17 Note that the court here was not interpreting Article 17 but the word 'Untouchability' under The Untouchability (Offences) Act, 1955 which made the practice a punishable offence, and for reaching an understanding about 'Untouchability', the court looks at Article 17. It mentions at [4]:
"*There is no definition of the word 'Untouchability in the Constitution also. It is to be noticed that that word occurs only in Article 17 and is enclosed in inverted commas. This clearly indicates that the subject-matter of that Article is not "Untouchability" in is literal or grammatical sense but the practice as it had developed historically in this country.*"

18 *State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126.

19 ibid [11]-[17].

20 *State of Karnataka v Appa Balu Ingale* [18].

21 He also relies on the Transformative Constitution theory and analysis of Assembly

acknowledges the logic of Purity-pollution to "*constitute the core of caste*."[22] He then proceeds to look at its working within the domain of caste and outside it as well (the society, regarding women).[23] He extracts the logic as a separate phenomenon, found in the practice of 'Untouchability,' as its core.[24] He considers Article 17 to be attacking that essence of the caste system[25] and not only its manifestation in the caste system because such logic can manifest in a kind of Untouchability that the Constitution[26] seeks to prohibit by mentioning the words "*in any form*."

Simply put, the genus is the logic of Purity-Pollution, (and one of) the species is the caste system. Article 17 targets the genus and this, consequently, allows for the presence of *different kinds(s)* of 'Untouchability. The principle here is that all practices of the caste system are bound to follow the logic but not the other way around, and since Article 17 targets the logic, the scope of Article 17 goes beyond the caste system.

II. Expansive Interpretation of Article 17 – A Critique

Having established the distinct approaches to Article 17, this part of the paper critiques the idea of expanding Article 17 in meaning and ambit. It explores arguments for reading Article 17 expansively. It discards Assembly Debates as the sole set of possible arguments for expanding Article 17 because of their inherent inconsistencies. Instead,

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Debates to infer an expansionary connotation to Article 17. My focus, however, is on the logic aspect only.

22 *Sabarimala* (n 4) [253].

23 ibid [258].
"*Menstruation has been equated with impurity and the idea of impurity is then used to justify (women's) exclusion from key social activities*."

24 *Sabarimala* (n 4) [253].

25 ibid.

26 The Constitution of India, 1950.

it looks at historical reasons and equality considerations for refining Article 17.

A. The Assembly Debates Argument

Starting with the very basis of almost all judgments on the interpretation of Article 17, the Constituent Assembly Debates find relevance. One of the primary reasons due to which Article 17 has come to be understood in its current form is because of the heavy reliance of courts on the Constituent Assembly Debates on Draft Article 11 (now Article 17).

However, an analysis of these debates can lead to a different proposition as well. Following this trend of using Assembly Debates, this paper presents some reasons against a restricted Article 17. *Firstly*, it is noteworthy that during the Constituent Assembly Debates, the lack of a definition for 'Untouchability' had come up. While some of the members understood the term in the context of historical caste-based discrimination, none of them proposed a narrow definition *in opposition* to an expansive one.[27] *Secondly*, the presence of Article 15(2) was noted to contend that its guarantee against 'horizontal discrimination' in access to hotels, shops, public restaurants, etc. was superfluous because of Article 17, as it already abolished such exclusionary practices that were based on caste.[28] Thus, a preliminary look at these debates leads to the inference that an expanded Article 17, though novel, is not entirely inconceivable.

Another way to look at these two Articles (Article 15(2) and 17) is that since Article 15(2) already covered caste and religion-based

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27 Gautam Bhatia, 'The Sabrimala Hearings and the Meaning of 'Untouchability' under Article 17 of the Constitution' (*Indian Constitutional Law and Philosophy* July 18, 2018) <https://indconlawphil.wordpress.com/2018/07/18/the-sabrimala-hearings-and-the-meaning-of-Untouchability-under-Article-17-of-the-constitution/> accessed May 6, 2022.

28 ibid.

discrimination, a narrow reading of Article 17 would make it redundant, therefore, the scope of Article 17 must be beyond just caste-based discrimination. Moreover, consider the amendment proposed by Mr. Naziruddin Ahmad to draft Article 11 (now Article 17). He had moved for the Article to be amended such that it only covered instances of religious or caste-based 'Untouchability'. But his amendment was rejected. Considering the rejection of Mr. Naziruddin Ahmad's amendment to the concerned Article,[29] which would have restricted it to only caste and religion,[30] a notion *against* attributing a limited meaning to Article 17 can be inferred and such was also noted by Chandrachud J. in his judgment in *Sabarimala.*[31]

However, such arguments are easily countered using literature on Constituent Assembly Debates, which shows an inclination of some other members to construe the term in a narrow sense. That is to say that there was a multiplicity of arguments and views on the scope of 'Untouchability' and Article 17, and there is no definite conclusion

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29 Naziruddin Ahmad had the following understanding of draft Article 11 (now Article 17): "*this paper submit that the original article 11 is a little vague. The word "Untouchability" has no legal meaning, although politically we are all well aware of it; but it may lead to a considerable amount of misunderstanding as in ale gal expression. The word 'untouchable' can be applied to so many variety of things that we cannot leave it at that. It may be that a man suffering from an epidemic or contagious disease is an untouchable; then certain kinds of food are untouchable to Hindus and Muslims. According to certain ideas women of other families are untouchables. Then according to Pandit Thakurdas Bhargava, a wife below 15 would be untouchable to her loving husband on the ground that it would be 'marital misbehaviour'. this paper beg to submit, Sir, that the word 'untouchable' is rather loose. That is why this paper have attempted to give it a better shape; that no one on account of his religion or caste be regarded as untouchable. Untouchability on the ground of religion or caste is what is prohibited.*" Hence, he moved to propose the following amendment: "*No one shall on account of his religion or caste be treated or regarded as an 'untouchable', and its observance in any form may be made punishable by law.*" This amendment would have restricted Untouchability to its religious and caste-based manifestations only. But it was rejected. *Sabarimala* (n 4) [249]; Constituent Assembly Debates, November 29, 1948, *speech by* Naziruddin Ahmad 62, para 183.

30 Constituent Assembly Debates, November 29, 1948, *speech by* Naziruddin Ahmad 62, para 183, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> Accessed May 6, 2022.

31 *Sabarimala* (n 4) [250].

about the true scope of Article 17 which can be gathered solely from the Assembly Debates. Such is also the reasoning that Justice Indu Malhotra relied on in her judgment in *Sabarimala*.[32] She mentions that "*a perusal of the Constituent Assembly debates on Article 11 of the Draft Constitution would reflect that "Untouchability" refers to caste-based discrimination faced by Harijans, and not women as contended by the Petitioners*."[33] So, this argument which argues for expanding Article 17 solely based on Assembly Debates is as easily made as it is countered. *Lastly*, as Justice Malhotra notes, even scholars like H.M Seervai[34] and M.P Singh[35] have pushed for a historical, caste-based understanding of 'Untouchability' under Article 17. So, sole reliance on Assembly

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32 ibid [310.7].

33 ibid [310.4]. Notably, she mentions Mr. V.I. Muniswamy Pillai and Dr. Monomohan Das to construe a narrow meaning for 'Untouchability' in Article 17.
She notes: *"During the debates, Mr. V.I. Muniswamy Pillai had stated: Sir, under the device of caste distinction, a certain Section of people have been brought under the rope of "Untouchability", who have been suffering for ages under tyranny of so-called caste Hindus, and all those people who style themselves as landlords and zamindars, and were thus not allowed the ordinary rudimentary facilities required for a human being... this paper am sure, Sir, by adoption of this clause, many a Hindu who is a Harijan, who is a scheduled class man will feel that he has been elevated in society and has now got a place in society.*"
Furthermore, Dr. Monomohan Das, quotes Mahatma Gandhi while undeniably accepting the meaning of "Untouchability" as intended under the Constitution*:* "*Gandhiji said this paper do not want to be reborn, but if this paper am reborn, this paper wish that this paper should be born as a Harijan, as an untouchable, so that this paper may lead a continuous struggle, a lifelong struggle against the oppressions and indignities that have been heaped upon these classes of people.... Not only Mahatma Gandhi, but also great men and philosophers of this ancient land, Swami Vivekananda, Raja Ram Mohan Roy, Rabindranath Tagore and Ors. who led a relentless struggle against this heinous custom, would also be very much pleased today to see that independent India, Free India, has at last finally done away with this malignant sore on the body of Indian Society.*"

34 H.M. Seervai, *Constitutional Law of India: A Critical Commentary* (4th edn. vol I, Reprint 1999), paragraph 9.418, 691. He notes " *that "Untouchability" must not be interpreted in its literal or grammatical sense, but refers to the practise as it developed historically in India amongst Hindus. He further states that Article 17 must be read with the Untouchability (Offences) Act, 1955, which punishes offences committed in relation to a member of a Scheduled Caste."*

35 M.P. Jain, *Indian Constitutional* Law, (6th edn., revised by Justice Ruma Pal and Samaraditya Pal, 2010) 1067. He states: "*Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do no come within the purview of Article 17. Article 17 is concerned with those regarded untouchables in the course of historic developments*."

Debates does not yield a definite conclusion on the exact scope of 'Untouchability' and Article 17.

This paper recognizes the lack of a decent argument that compels one to consider only one type of literature from CADs. Hence, relying solely on these debates to expand or restrict Article 17 would be naïve and misguided. Still, these debates are not entirely irrelevant. From a perusal of the points mentioned above and counterpoints by Justice Indu Malhotra,[36] it can definitely be extracted from CADs that there was an absence of consensus or even a single member's preference for a narrow definition of 'Untouchability' and Article 17 *in opposition* to an expansive one.

Furthermore, a plausible argument from the Assembly Debates can be made to argue against an expanded Article 17.[37] This is the Misappropriation Argument that attacks this form (expanded) of Article 17. It considers the newly expanded scope of 'Untouchability'

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36 ibid [310.2]-[310.4].
Justice Malhotra mentions – "*All forms of exclusion would not tantamount to "Untouchability". Article 17 pertains to "Untouchability" based on caste prejudice. Literally or historically, "Untouchability" was never understood to apply to women as a class. The right asserted by the Petitioners is different from the right asserted by Dalits in the temple entry movement. The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practises of the Sabarimala Temple.*" [310.2].

37 During the debates, such arguments had come up. As Santanu Kumar Das noted – "*This clause is intended to abolish the social inequity, the social stigma and the social disabilities in our society. We must ourselves first observe the law for otherwise there would be no sense in asking others to act upon it. If we fail to observe it, it would be impossible to root out this evil. Provincial Governments enact laws for the welfare of the Harijans; they pass bills for the removal of "Untouchability", for the removal of disabilities and for permitting temple entry but you will be surprised, Sir, if this paper tell you that our members act as fifth columnists in the rural areas, for they tell the people there that these laws are not in force and thus they themselves act against the law. this paper would request the Members of the House to try their best to make the law effective so that this present social inequity in the country may be removed. Sir, this paper support the clause whole-heartedly.*" Thus, he showed his support for the draft article in its original form, based on a caste system based understanding of "Untouchability".
Constituent Assembly Debates, November 29, 1948, *speech by* Santanu Kumar Das 62, para 172, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> Accessed May 6, 2022.

under Article 17 to be akin to misappropriating the struggles of caste discrimination by regarding practices that are not solely based in caste discrimination as 'Untouchability'. It removes caste from the focus of Article 17 by considering practices that go beyond caste discrimination to be included under the heading of 'Untouchability.'

Consequently, it dilutes the historical implications associated with caste-based practices. Resultantly, the meaning and gravity of caste discrimination stands misappropriated. Extending this argument further weakens the consideration of Assembly Debates (specifically Ahmad's amendment) for expanding Article 17. The people who had questioned the scope of Article 17 in the CADs were upper-caste men. Therefore, giving primacy to their views, it may be argued, is another form of subjugating Dalit voices.

In response to these points, this paper deals with the Misappropriation Argument *first*. The response would be a consideration of the phrase "*its practice in any form is forbidden*" present in Article 17.[38] The Article itself acknowledges the presence of *forms* of 'Untouchability' and protects against all such forms, out of which caste is the basis of one. This implies Article 17 has a broad scope.[39] So, when an expanded Article 17 bases its inquiry on the logic of Purity-Pollution, like Chandrachud J., the basis of 'Untouchability' and hence, caste discrimination is attacked. Hence, it is put forward that including practices based on the logic of Purity-Pollution under Article 17 does not misappropriate the issue of caste discrimination, but rather prevents a stigma similar to Untouchability from evolving by outlawing analogous disturbing practices.

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38 *Sabarimala* (n 4) [255].
39 ibid [250].

Secondly, this approach does not displace caste from the core of Article 17 because the historical practice of Untouchability remains prohibited even under an expanded Article 17. It is argued that by considering this logic of Purity-Pollution, the essence of caste discrimination is proscribed and consequently, all practices based in this logic, *including* the caste system, are sought to be outlawed. This understanding of Article 17 works to prohibit all practices that may be similar to the caste system in effect by attacking the very basis of a practice like the caste system. This reinforces the protection against Untouchability along with *its forms* and takes it a step further by outlawing its basis as well.

Lastly, the 'primacy to upper-caste views' argument is countered as Dalit voices are not being subordinated here. This is because (a) none of the members, *including* those from the Dalit community, preferred a narrow definition *in opposition* to an expansive one,[40] and (b) by incorporating the logic, historical Untouchability still remains prohibited. Rather, this approach harmonizes the two ideas in the CADs (narrow v. expansive Article 17). It incorporates Dalit voices by having historical Untouchability under the fold of Article 17 and other voices by locating logic as the driving factor of an Article 17 inquiry to include other types of 'Untouchability' as well. These "types" may include menstruation, discrimination in funeral rites/practices, the phenomenon of 'Temporary Untouchability', etc.[41]

In summation, this paper does not argue for an expansive interpretation only based on CADs, which would be an originalist argument to make. There exist inherent inconsistencies in these Debates regarding the ambit of Article 17. Relying solely on these will lead to a situation similar to one between Justice Chandrachud J. and

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40 Bhatia (n 24).

41 Subsequent sections of this paper will deal with these types in more detail.

Justice Indu Malhotra in the Sabarimala judgment. Both of them used similar sources to arrive at contrasting conclusions on the Article 17 issue. Rather, this paper refutes the arguments against expanding Article 17 by using the Assembly Debates to introduce counter arguments.

B. Historical Basis of Untouchability – The Need to Incorporate the Logic

Expanding Article 17 simply because it can be done is not appropriate as the sole reason for interpreting this provision a certain way. The explicit need to incorporate this logic which is essential to the spirit of Article 17 in terms of its purpose also needs to be shown and the purpose of this section is precisely that.

The expanded approach needs to have a basis to legitimately incorporate the logic of Purity-Pollution under Article 17 as a starting point of inquiry. This basis can be identified in the historical understanding of Untouchability read with the purpose of Article 17. This expanded Article 17 is quite different from the current historically understood Article 17 because unlike the latter, it considers the logic of Purity-Pollution as the focal point of inquiry. On the other hand, the former considers the caste system as the focal point of inquiry, thereby restricting its scope compared to the expanded Article 17.

The difference in these two versions is illustrated as follows – the expanded form would include the caste system within its fold, among other analogous practices based in the logic of Purity-Pollution whereas the historical form of Article 17 would only include the caste system which is necessarily based in this logic of Purity-Pollution. Therefore, its scope is simply the caste system and any consideration of the logic of Purity-Pollution is virtually meaningless. Analogous

practices would fall out of the scope of Article 17, rendering the phrase "*in any form*" appearing in the Article meaningless.

In this light, it is important to acknowledge how Chandrachud J. in *Sabarimala* starts his inquiry for Article 17. He considers this logic of Purity-Pollution to be at the core of caste-based Untouchability.[42] But he doesn't back this notion up with any literature around Untouchability, which is one of the criticisms of his argument and one of the reasons this paper considers his approach incomplete hence this paper *firstly* identifies this logic in the historical practice of "Untouchability" as its basis and *secondly,* places it under an expanded Article 17.

Moreover, Chandrachud J. focuses strictly on the logic of Purity-Pollution as the starting point. This form of expansion of Article 17 is unsustainable in its working as Parts II and IV of this paper will show. Rather, a more appropriate focus of inquiry which Chandrachud J. also hints at, though not as the starting point, is the exclusionary effect which is bound to stem from the logic of Purity-Pollution. This effect is evidenced by an analysis of the historical basis of Untouchability in Hinduism to attribute a purpose to Article 17.

The idea of Purity/Impurity (pollution) has been prevalent throughout Hindu society in both, domestic and public life – food & water, occupations, kinship, marriage, religious action & belief, access to temples/monasteries, etc.[43] Even in caste, the key idea of hierarchy has originated in "*priestly ceremonialism*," implying the general belief to be rooted in purity.[44]

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42 *Sabarimala* (n 4) [253].

43 A. M. Shah, 'Purity, Impurity, Untouchability: Then and Now.' Sociological Bulletin, 56(3) 2007, 355.

44 Compiled by Vasant Moon, *Dr. Babasaheb Ambedkar Writings and Speeches* (vol. 1 1st edn., Dr. Ambedkar Foundation Ministry of Social Justice & Empowerment, Government of India, 1979) 'Chapter 1: Castes in India: Their Mechanism, Genesis and Development' 5.

Such notions of Purity-Pollution, applicable since birth have played key roles in the separation and the hierarchical arrangement of castes.[45] The principle of hierarchy can be identified in the caste system.[46] The arrangement of this hierarchy was based on the level of purity and the indicator for it was the observance of the rules of Purity-Pollution.[47] Resultantly, castes have been ranked on their 'level of purity,' based on their compliance with such rules.

Basically, the higher one climbs up the caste ladder, the higher level of purity one would find. In summation, Purity-Pollution has been the basis of caste distinction, making it the idea behind the caste System and thus, Untouchability. If we trace the 'logical' flow, it becomes evident that Purity (or, the lack thereof) starts as a basis for distinction, which in the context of caste, spawned Untouchability as we have historically witnessed.

By considering a context other than caste, one could conceive a different form of Untouchability. For example, menstruation. In a gendered context, as opposed to caste, the notions of Purity-Pollution manifest as menstrual taboos.[48] Consequently, menstruation is seen as

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45 Shah (n 36) 356.

46 See Dumont L, *Homo Hierarchicus: An Essay on the Caste System* (University of Chicago Press, 1970) Introduction; M Kagzi, Mangal Chandra Jain, *Segregation and Untouchability Abolition* (1976, New Delhi: Metropolitan Book Co.) 207 notes that "*Untouchability connotes the acts, action or practice of non-touching of the members of the lowest by the caste Hindus, which means separation, segregation and isolation of such persons from the higher caste Hindus. It means keeping the Harijan untouchables outside the mission*"; Marc Galanter, 'Untouchability and the Law' (1969) *Economic and Political Weekly* 4(1/2) 131, citing the Privy Council decision of *Sankaralinga Nadan v Raja Rajeswara Dori* 35 this paper AC (1908) affirmed by the Bombay High Court in *Sankaralinga Nadan v Raja Rajeswara* (1908) 10 BOMLR 781.

47 A. M. Shah, in his 'Purity, Impurity, Untouchability: Then and Now,' acknowledges the enormity and the complexity of the literature on such rules. He mentions, "*even if one manages to read the entire literature on purity/impurity, this paper doubt if one would be able to grasp all its ramifications. A complete list of pure/impure actions, ideas, and materials would occupy a whole book, perhaps as large as an encyclopaedia*."
Shah (n 36) 356.

48 Mitoo Das, 'Menstruation as Pollution: Taboos in Simlitola, Assam' 2008 *Indian Anthropologist* 38(2) 29, 30.

a 'polluting agent' (in Hinduism), containing dirt/impurities,[49] and as a result, women have been relegated to an inferior position vis-a-vis men, resulting in a need to ostracize them for certain periods, resulting in their social exclusion.[50]

This notion of impurity is distinct from caste, where the observance of rules determined one's level of Purity. The principle apparent here is that the context in which the notion(s) of Purity-Pollution are practised, gives rise to a stratification (it may be caste hierarchy or gendered or otherwise), which spawns a form of Untouchability, derived from the context (for example, inferiority-based exclusion of women, or impure castes).

Hence, looking at (say) only caste, to determine 'Untouchability' is a misdirected approach as its manifestation can change with context, and it does not address the core of the issue. So, logic needs to be the focal point of Article 17.

C. Refining the Process – Introducing the Exclusionary Effect

This logic-driven approach to Article 17, this paper argues, still needs to be refined. This has to be done by incorporating the exclusionary effect of any practice, as the starting point of any Article 17 inquiry, and only then would the logic be considered. Here, this paper explicitly acknowledges the 'exclusionary effect' as a phenomenon, aside from the logic of Purity-Pollution, something that Chandrachud J. fails to do in *Sabarimala*.

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49 Some Vedic texts describe menstrual blood as "*impure and dangerous because it was the result of Indra's curse . . . women the bearers of the discharge, the curse, the danger, and the impurity were in turn subjected to severe restrictions*."
ibid 31.

50 Das (n 41) 31.

This paper presents two possible forms that an expanded Article 17 inquiry can take. *First*, it starts and ends at the logic only, that is, the logic of the practice is looked at. If found to be based on 'Purity-Pollution,' (like caste discrimination), it becomes a form of Untouchability as under Article 17 and hence outlawed. The rationale here is that the very act and significance of branding a human being as pure/impure falls so foul of human dignity that even in a world without Article 17, it would offend the principles of equality and dignity. So, any practice that is concerned with the purity/impurity of a human being is barred under the scope of Article 17.

The emphasis is only on the logic of any practice and not on the form this logic will take, the way it will play out in a context, etc. The argument is that any practice that is grounded in Purity-Pollution is a form of Untouchability and it does not matter whether or not it excludes people. The very idea that a human being is pure/impure is problematic enough to be under Article 17. This is what this paper calls the Logical Approach to Article 17 and Chandrachud J. largely[51] follows it in *Sabarimala*.

Chandrachud J. in *Sabarimala* talks of Article 17 as a "*powerful guarantee to preserve human dignity*"[52] but he does not stop there. He further includes "*stigmatization and exclusion of individuals and groups on the basis of social hierarchism*," to be under Article 17 as well. [53] He alludes to the concept of 'exclusion' in the context of the logic of Purity-Pollution **without** going into the nuances or the significance of it. This is where his argument needs sharpening.

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51 This paper says this because he refers to exclusionary effect as well but the focus and the basis of his argument seem to be the logic only. Exclusion is not elaborated upon. Chandrachud J.'s sole focus remains the logic first and foremost and not the exclusionary effect.

52 *Sabarimala* (n 4) [252].

53 ibid.

This paper argues that his approach needs to start by considering the exclusionary effect of any practice and only then check whether this exclusion *stems from* the logic of Purity-Pollution, which, if it does, would come under Article 17. Summarily, this paper contends that to legitimately expand the scope of Article 17, the inquiry has to start by considering whether the practice is exclusionary and only then check for the presence of Purity-Pollution. This is what this paper calls the *Equality Approach* and this is the *second* form of inquiry for an expanded Article 17.

There is a considerable difference between the 2 approaches. The Logic Approach focuses only on logic and not its manifestation or its consequences. It overlooks exclusion and hence, is incomplete. It is not the case of this paper to attack The Logic Approach, but simply to point out its incomplete nature. That, in contrast to the alternative this paper suggests, it cannot work to include practical cases of Purity-Pollution and exclusion. Moreover, it lacks focus as there is no guiding principle behind it. It discounts the very manifestation of an idea, essentially making it difficult to identify that idea in the first place.

Contrastingly, the Equality Approach is guided by principle. It falls in line with the historical context of Article 17 and the fight against caste inequality. Additionally, it also deals with the possibility of the extension of the logic of Untouchability and the consequences thereon. It identifies the logic of Purity-Pollution by incorporating the effect of this logic, i.e., exclusion, and starts from there. This gives an identifiable starting point and direction to the inquiry. It allows the room to include practices that go beyond the caste system and operates on the same principles as caste-based Untouchability, under Article 17.

III. Equality Approach v. Logic Approach – Why Consider the Effect?

With the two approaches introduced, this section of the paper puts them against each other to bring out why the logic of Purity-Pollution alone belying Article 17 would be incomplete. This paper goes on to suggest a solution to make the approach complete – by introducing the exclusionary effect of the logic, the practical manifestation of it. It will argue for considering this effect under Article 17 specifically keeping in mind the history, purpose, and practical application of the provision.

A. Argument From History

As this paper has established above, at the core of the historical practice, sits the logic of Purity-Pollution. However, this conception of Untouchability, stemming from the logic and presenting as it did under the caste system, is incomplete. Its aim/consequence, which is 'exclusion' needs to be considered as well. Ambedkar defines caste as "*a self-enclosed unit [that] naturally limits social intercourse, including messing, etc. to members within it*."[54]

He attributes this rigidity not to an explicit, positive restriction, but to the natural result of caste, which is exclusiveness.[55] From the need to preserve exclusivity (say, of caste, etc.) arose the idea of exclusion. The goal is esotericism, to identify what makes a caste exclusive, and preserve those characteristics from being diluted by association with those who lacked them. This is to say an

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54 Ambedkar (n 26) 8.

55 Ambedkar also mentions Émile Senart, a French authority, who relates caste groups to the ceremonial questions of pollution and deems 'irrevocable exclusion' from the group, to be the final form of penalty, authorizing the sanction of the community. Ambedkar (n 26) 6.

individual/caste (etc.), is not simply branded pure/impure for no reason, there has been an end goal for it – Exclusion.

Expanding on the above-mentioned examples, historically speaking, this logic has manifested in the exclusion of certain castes by either avoiding their physical contact or ostracizing them from social life – exclusion from wells, homes, temples, etc. or otherwise.[56] Even in the case of menstruating women, notions of Purity-Pollution have manifested as social taboos that seek to justify the exclusion of menstruating women from social life.[57]

Ultimately, the logical flow of the argument is this – the logic of Purity-Pollution brands people as either pure or impure. This leads to the establishment of a hierarchy, and following this, some form of exclusion (social, literal, or otherwise) is practised against the group/individuals ranked lower on the list. Without considering the exclusionary effect, the inquiry, therefore, is incomplete because this logic is only visible on ground through actual exclusion. The end goal of this ordeal is to exclude. Creation of hierarchies, purity/impurity, all work for the purpose of segregating people.[58]

While Article 17 may not be solely restricted to the historical practice of caste-based discrimination, its aim has been acknowledged to be that of 'social transformation.'[59] It represents the struggles to break away from an '*unequal social order,*'[60] created primarily because of the caste system. Thus, caste-based Untouchability has at least some bearing on the interpretation of Article 17 in that, the harm it seeks to prevent is of exclusion, *stemming* from the logic of Purity-Pollution.

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56 Judy Whitehead, 'The Mirror of Inequality: A Reinterpretation of Homo Hierarchicus' Social Scientist, 10(11) 1982 33, 45.
57 Das (n 31) 34.
58 Ambedkar (n 26) 5-8.
59 *Sabarimala* (n 4) [251].
60 ibid.

Consequently, since the practice of caste-based Untouchability is incomplete without exclusion,[61] its incorporation under the inquiry for Article 17 becomes imperative. The Equality Approach, therefore, is more in line with the historical context of Article 17 and the movement it began for social reform.

B. Argument From Scope

Adding the extra layer of 'exclusionary effect' gives direction and defines the scope of Article 17 while ensuring that the principles of caste-based Untouchability remain at its core. Since the *Equality Approach* is more in line with the historical context of Article 17, adding the provision of 'exclusionary effect' legitimizes the scope of Article 17 to only those cases where a *form* of Untouchability is practised in its entirety. This paper does not deem branding people as pure/impure as unproblematic for human dignity. But simply recognizing the existence of this logic, without it manifesting as exclusion is imperfect and does not encapsulate 'Untouchability' in its entirety. As mentioned above this whole ordeal operates with a purpose. Historically, this purpose has been to exclude. Thus, recognising exclusion is fundamental to refining an expended Article 17.

While such branding is a step toward practising Untouchability, this paper maintains that an 'exclusionary effect' is bound to follow such logic which is why an inquiry for Article 17 has to start with the consideration of the presence of an exclusionary effect (present or not). But this logic alone is not 'Untouchability,' as it is yet to manifest as exclusion. The acknowledgement of the effect is crucial, as this harm of exclusion from Purity-Pollution, is what Article 17 attacks.[62]

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61 That is not to say that exclusion is not present in other forms of 'Untouchability'. The fact that it was the ultimate goal of caste-based Untouchability and that primarily, this practice sparked the movement for social reform, it is imperative to consider the effect.

62 Arguments for Social Transformation, as Chandrachud J. puts it, in *Sabarimala*. He notes at [248]:

This argument has a procedural bearing and the inquiry must start by considering exclusion and only then proceed to look at the logic. Consider the purpose of this inquiry – preventing the exclusion of individuals and not only merely declaring the group/individual as 'not impure'. A lack of consideration of the 'effect', could arguably justify exclusion (the end goal of Untouchability), and allow caste groups to conflate the issue by arguing to maintain their 'exclusiveness' in other ways, possibly, by justifying the practice to be of 'ritualistic importance',[63] something the judiciary has acknowledged in the past and subsequently awarded 'purificatory ceremonies,' necessitated by 'pollution' due to the presence of 'untouchables'.[64]

Emphasizing the procedural nature of this argument, this paper puts forward that the incorporation of the effect will not raise the threshold for the petitioner seeking relief under an expanded Article 17. On the contrary, it will reduce the standard of proof required for the petitioner. Previously, the standard was to show the existence of the logic of Purity-Pollution for seeking relief. Now the threshold is only to show exclusion, without considering whether its motive lies in Purity-Pollution. The existence of exclusion itself becomes the ground on which an inquiry for the logic can begin. The onus of this inquiry is not cast on the petitioner as subsequent parts will show.

This paper maintains the 'presumption of exclusion' stand and as a result, the petitioner need not prove it separately in cases where

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"*Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation. Article 17, along with other constitutional provisions61, must be seen as the recognition and endorsement of a hope for a better future for marginalized communities and individuals, who have had their destinies crushed by a feudal and caste-based social order.*"

63 *Anandrav Bhikaji Phadke v Shankar Daji Charya* ILR 7 Bom 323.

64 Marc Galanter, 'Untouchability and the Law' Economic and Political Weekly 4(1/2) 1969 131.

logic is explicitly identifiable as of Purity-Pollution. Moreover, this paper envisions this presumption as refutable, so the respondent is not left without a remedy. This paper will elaborate on this aspect in Part IV.

C. Argument From Principle

Simply put, the existence (identification) of the logic of Purity-Pollution is not going to be so clear as to recognize it *prima facie*. Since there is no universal understanding of Purity-Pollution. It has varied from 'ritual impurity' to 'literal impurity', in the context of jobs, 'impurity' based on adherence to rules, and even menstrual taboos and more. Thus, having the petitioner prove the presence of this undefined concept in a court of law is a very high threshold to meet because it is a Part III inquiry.[65] There has to be a principled methodology for such an inquiry, which the Logic Approach lacks. It looks only at the logic without considering its effect, and hence, is disorganized as it lacks an explicit starting point.

How does one even start looking for the logic? Logic is not always apparent and is often hidden under layers of reasoning. Do you look for each and every manifestation of the logic (caste, menstruation, occupation, etc.)? Where and in what context, do you look for it? Who all are harmed by it? How do you confirm that people/groups have been branded as pure/impure? Does this branding need to be codified? Do you wait for the instances where such logic is clearly apparent to show up, or do you just evaluate every single aspect of society to look for it? Either of these methods is unrealistic.

Looking for every manifestation of logic, in every context is not realistic. Therefore, this paper proposes a principled approach –

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65 Part VI of this paper will elaborate on this claim.

the Equality Approach. Considering that Article 17 seeks to prevent the harm of exclusion *stemming from* the logic of Purity-Pollution, you start with the presence of that effect, its manifestation, as it is (a) conceivable because people experience it through 'exclusion,' and (b) more in line with the historical context of caste struggle and places the social transformative role of Article 17 at the core. Once (a) is identified, the inquiry for Article 17 would begin.

Such is plausible as there is a legitimate basis for the inquiry – Exclusion. Whether such exclusion is based on Purity-Pollution is to be decided by the inquiry. The aforementioned questions can be answered if the *Equality Approach* is followed. The starting point is the manifestation of logic (exclusion from a certain activity of a certain people) in a specified context, and for a specified people/group. Only these are considered within the sphere of the exclusionary effect. Under this approach, identifying Purity-Pollution is conceivable by considering the presence of relevant facts, the context of the exclusion (its nature, basis, justification of the basis, etc.), and the nature/demographic/religion/commonality (etc.) of the excluded group.

Consider *Anandrav Bhikaji Phadke v Shankar Daji Charya*,[66] (1883) where the Bombay High Court was hearing an appeal regarding a matter wherein Brahmin defendants, belonging to the 'Palshe' caste, were alleged to have 'infringed the right of exclusive worship', of the petitioners (upper-caste Brahmins), by entering and performing worship in the sanctuary of a temple.[67] Here, a misappropriation of the

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66 *Anandrav Bhikaji Phadke v. Shankar Daji Charya* ILR 7 Bom 323. Available at Book Depot Branch of the Legislative Department of the Bengal Secretariat 'The Indian Law Reports, Bombay Series' (1883) Volume VIthis paper South Asia Archive, available at <http://www.southasiaarchive.com/Content/sarf.100032/212272/002> Accessed June 26, 2022.

67 ibid.

logic of Purity-Pollution is apparent. From the judgement, it becomes clear that sole reliance on the 'logic' (Purity-Pollution) behind any practice overlooks the forms in which this logic can manifest through exclusion in various contexts. *Anandrav Bhikaji Phadke* is a clear archetype of this phenomenon.

This paper acknowledges the outdated nature of the judgment and considers it extremely unlikely for this judgment to stand in today's context, but that is not my purpose in introducing it. Through the stance taken in this judgment, this paper aims to bring out why the consideration of the effect is imperative.

The Bombay High Court, while 'applying its mind', acknowledged the exclusive right of worship, of upper-castes as "*one which the Courts must guard, as otherwise, all high-caste Hindus would hold their sanctuaries, and perform their worship, only so far as those of the lower castes chose to allow them*."[68] Here, the protection of this exclusion-based right is grounded in the preservation of the nature of the sanctuary.[69] The very presence of the Palshe is considered to 'pollute' the temple premises because they, as people from a 'non-privileged' caste make their way into the sanctuary.[70]

Since they are not privileged, that environment becomes 'polluted' and thus unfit for the upper castes (or as the court notes, privileged castes) to offer prayers, and hence, avoiding this 'pollution' of the premises (and not the caste – Palshe) becomes imperative. So, this prohibition on the right of upper castes because of a 'polluted' atmosphere is identified as the core issue.

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68 *Phadke* (n 48) [329].
69 ibid [324].
70 *Phadke* (n 48) [325].

As per the High Court, the only way to remedy this is to acknowledge the exclusionary right so that their (upper castes') right is not contingent on lower (non-privileged) castes 'allowing' them to offer prayers by refraining people of their stature from entering the temple premises. The logic of Purity-Pollution seems to have been shifted by the Bombay High Court and applied to the 'place' while a farcical reason, like 'privilege', is used to justify caste exclusion.

Analyse this argument using the Logic Approach. It fails to offer any reason to probe the basis of 'privilege' because the question of human dignity through purity/impurity of the caste never arises. The Caste is not branded Untouchable/impure but rather, 'not-privileged', so, since the place 'gets' polluted, it is to be avoided. The caste is never branded 'impure' as the presence of non-privileged people causes the 'pollution.' Here, the logic of Purity-Pollution is obscured behind a scapegoat factor, like that of 'privilege,' while the logic is underhandedly practised.

There are possible derivations of this argument that conceal the Purity-Pollution logic behind a farce while practising a form of Untouchability, based on such logic. This is a shortcoming of the Logic Approach.[71]

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[71] Another similar case coming up in 1908, by the privy council led to a similar conclusion as *Anandrav Bhikaji Phadke v Shankar Daji Charya*. In the case of *Sankaralinga Nadan v Raja Rajeswara Dorai* 35 this paper AC (1908), the Privy Council (rater reaffirmed by the Bombay High Court) upheld the exclusion of people belonging to the Shanar caste from a Hindu temple and granted damages for its purification after scrutiny of their social standing by observing that "*their position in general social estimation appears to have been just above that of Pallas, Pariahs, and Chucklies [regarded as unclean and prohibited from the use of Hindu temples] and below that of the Vellalas, Maravars, and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples*" *Dorai* [182]; Galanter (n 39) at 131-132.
The court further concluded that the presence of Shanar people was repugnant to the "*religous principles of the Hindu worship of Shiva as well as to the sentiments and customs of the Hindu worshippers*." *Dorai* [182]; Galanter (n 39) at 132.
Consequently, Untouchable Mahars who entered the enclosure of a village idol were convicted on the ground that "*where custom ordains that an untouchable, whose very touch is in the opinion of devout Hindus pollution, should not enter the enclosure sur- rounding the shrine of any Hindu god*" it held their entry into the temple to be a defilement in violation of Section

But, if you consider the Equality Approach, you start with the effect. 'Exclusionary-right', as it has been called will never find justification under it. Clearly, there is an exclusionary effect that is operating against a group, and exclusion from the temple sanctuary is based on the logic of Purity-Pollution because this is a consequence (lack thereof) of 'privilege' which is attached to the place. Purity-Pollution, here, is easily identified by looking at the context of exclusion as well as the justification offered for it. But here, by stating that lack of 'privilege' 'pollutes' a place, it is argued that 'privilege' is the immediate basis of exclusionary treatment and not Purity-Pollution. Purity-Pollution, here, is presented as a consequence rather than a reason for lack of privilege. The Logic Approach can plausibly befall this style of argumentation.

Unlike the Logical approach which looks at the logic of Purity-Pollution operating against an individual or group by the branding of pure/impure, the Equality approach looks at the ultimate effect of a practice which is exclusion in this case. Thus, it is not restricted to the immediate reasoning for the practice. So, in this case, this reason was 'privilege' but the effect was ultimately exclusion. Exclusion *stemming from* this tag is what Article 17 targets. It doesn't matter who gets that tag as long as it is based on the logic.

D. The Logic Approach & *Sabarimala*

To bring out the implications of the argument from principle, consider *Sabarimala* and the Logic Approach. A different conclusion can be reached provided some necessary assumptions be made.

Envision the exact scenario as *Sabarimala* – the procedural history, facts, issues, some arguments, (etc.) but the only difference is

295 of the Indian Penal Code 1860. Galanter (n 39) at 132.

that in this world, the Logic Approach is followed for the interpretation of Article 17. The case filed by the Indian Young Lawyers Association finds its way to the Supreme Court and is argued accordingly by the two sides. Now, since the Logic Approach is prevalent and it would have a bearing on the arguments put forward by the respondents in defence of restricting the entry of menstruating women into the Sabarimala temple.

So, it is entirely plausible for the respondents to argue that since the *deity* of Lord Ayyappa is an eternal celibate, the presence of menstruating women makes the **temple premises impure** as his vow of eternal celibacy is broken. So, owing to that, the impurity of the temple needs to be remedied and to do so, restricting women becomes imperative.

Over here, the challenge to Article 17 will fail as the logical approach won't remedy this situation. This is because the reason for exclusion would be the deity's celibacy, making Purity-Pollution a consequence of menstruating women's presence and not a cause for restrictions on their entry. Celibacy is the cause. This will be supplanted with the fact that other temples of Lord Ayyappa across India do not restrict menstruating women from entering the temple premises because the vow of celibacy of the deity is specific to this one temple.[72] So, here, the reasons for exclusion are not a direct functioning of the logic of Purity-Pollution but factors affecting the celibacy of the deity. A logic-based inquiry would consider celibacy-affecting factors and deem exclusion to not be based on Purity-Pollution **of** women. Keep

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72 Even Justice Indu Malhotra recognizes this in her judgment in *Sabarimala*. She notes at [310.2]: "*The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practices*." Further, she adds: "*Women of the notified age group are allowed entry into allother temples of Lord Ayyappa. The restriction on the entry of women during the notified age group in this Temple is based on the unique characteristic of the deity, and not founded on on any social exclusion of the Sabarimala Temple*." Sabarimala (n 4) [310.3].

in mind that that the argument is that menstruating women are not 'impure' but the premises, in consequence of this presence only become impure as a result. This impurity of the premises is a result of the presence of women who are menstruating which ultimately hampers the vow of celibacy of the deity. So, since this vow of celibacy is broken, factors which bring about this consequence – the presence of menstruating women only, must be restricted. Contrastingly, as per the Equality Approach, the nature of such an argument would have no bearing on the outcome. There is resultant exclusion operating on the logic of Purity-Pollution, regardless of the source of exclusion.

Here, an argument may be made that following the logic approach, this whole ordeal falls foul of human dignity in the first place by allowing for such branding of pure/impure. In this case, then, Articles 17 along with 21 would come into place and thus, then it may be said that Article 17, following the logic approach allows for an inquiry-based on 'human dignity' as its basis. But here more problems come to light. There exists literature[73] which explores the question of equality from the lens of dignity. It is found that human dignity is unsustainable as the sole basis of any inquiry in a discrimination matter. Though an important factor, in isolation, the human dignity aspect is insufficient as the only benchmark to establish an anti-discrimination claim.[74] Rather, as Fredman notes, dignity must be one factor in a multi-factorial analysis and an equality claim. Fredman notes that in many jurisdictions "*dignity is a central pillar of the constitutional text itself*," addressing directly the history of humiliation and degradation.[75] However, she also notes the fact that 'human dignity' as a concept "*has*

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73 Sandra Fredman, *Discrimination Law* (3rd edn., Clarendon Law Series, London, 2002) 20-25, 28, 137-138.

74 ibid.

75 ibid 20-22.

its difficulties."[76] She notes the multiplicity of interpretations of the concept often leading to opposite results as intended. She mentions the South African case of *President of the Republic of South Africa v Hugo*[77] where a Presidential pardon accorded to all incarcerated mothers of young children was challenged by a male prisoner who happened to be the sole caretaker of his children for sex-based discrimination and human dignity.[78] Though the Court rejected this argument, there was a notable dissenting opinion. Kriegler J. noted that the assumption of women being the primary carers of children was an affront to their dignity. He further mentioned:

> *One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely. . .*[79]

In furtherance of problems with basing equality claims solely on 'human dignity', Fredman also notes that "*there is a risk that dignity comes to be regarded as an independent element in discrimination law, requiring a claimant to prove not just that she has been disadvantaged, but that this signifies lack of respect of her as a person.*"[80] She notes the Canadian case of *Gosselin v Quebec*[81] where it was held "*that proof of disadvantage on grounds of an enumerated characteristic would not in itself be discriminatory if the claimant could not prove in addition that this disadvantage signified that society regarded her of less value than others.*"[82] This is precisely one of the issues identified by this paper in an approach that is based in the logic for Article 17. Lastly, as

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76 ibid 23.
77 *President of the Republic of South Africa v Hugo* (CCT 11/96) [1997] ZACC 4.
78 ibid.
79 ibid [80].
80 Fredman (n 69) 23-24.
81 *Gosselin v Quebec* 2002 [SCC] 84 (Canadian Supreme Court).
82 Fredman (n 73) 23-24.

a solution to avoid such pitfalls, Fredman proposes approaches that regard 'dignity' as just one aspect of equality instead of it constituting the whole concept under a singular notion of 'human dignity'.[83] Thus, she argues for "*dignity to be regarded as one facet of a multi-dimensional notion of equality, which also comprises disadvantage, accommodation of difference, and participation.*"[84] Such is the argument which this paper also purports to make. Instead of following the logic inquiry which reduces the whole claim of equality only to this dignity aspect of human beings, it seeks to include the exclusionary effect as a separate phenomenon in addition to, and stemming out of this logic and adds a layer of *disadvantage* resulting from such practices at the core of the claim for equality.

It must be noted that as a practical matter, it is yet to be seen the exact difference between an inquiry followed via the logic of Purity-Pollution and one followed via the Equality consideration. It may even be that practically, there is no difference between following the Logic or Equality approach. However, it is the position of this paper that if the Equality Approach is made the basis of an Article 17 inquiry, then the case to be established by the petitioner would not only be procedurally easier as the next part will show but also jurisprudentially stronger as previous parts have shown.

IV. Procedural Nuances of the Equality Approach

Having laid out the content of the exclusionary effect and the subsequently expanded Article 17, this paper now expands the procedural significance argument made in Part III (B). This paper stands by the presumption of the exclusion line of reasoning because historically speaking, the logic of Purity-Pollution has ultimately

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83 ibid.
84 ibid.

manifested as exclusion.[85] So, realistically the practice of the logic of Purity-Pollution will not be devoid of any consequences, it will manifest in the form of exclusion. It won't just be there and stay dormant. But as shown above, starting with an inquiry for the logic will lead nowhere. The consideration has to start from the presence of an exclusionary effect.

Hence, this paper contends the presumption of exclusion if and only if the logic of Purity-Pollution is explicitly established. This paper maintains that every manifestation of the logic of Purity-Pollution will manifest as exclusion but every exclusion need not be based on this logic only. So, starting the inquiry from exclusion and then checking the rationale for exclusion would be the procedure for Article 17. Here, if the exclusion is always presumed then the argument becomes circular – exclusion is there because of the logic (presumed) and the logic is there because of the exclusion (historically understood as such). So, there are two ways to consider the presumption of exclusion argument. *Firstly*, this presumption is refutable and in the *second* case, it is irrefutable.

If one were to consider the latter case, i.e., an irrefutable assumption of exclusion, then the whole process falls apart because of a circular argument. If the exclusionary effect is taken to be incontestable in every case involving the logic of Purity-Pollution, then there is no sense in considering the effect under any inquiry, because as long as the logic is shown the court would irrefutably presume exclusion. The inquiry would then turn into establishing the presence of the logic of Purity-Pollution. Note that the problem is not the presumption but its irrefutable nature. This basically becomes the

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85 Ambedkar (n 26) 8.

Logic Approach only with the dead weight of 'exclusion' that adds no real value to the inquiry.

Presuming the presence of the logic of Purity-Pollution from any exclusion is fallacious but exclusion from the logic is fine as long as that presumption can be contested. This would imply that the respondent can refute an Article 17 challenge by showing that no exclusionary effect is stemming from the impugned practice. This shifts the burden of proof away from the petitioner and hence, an impracticable standard of somehow 'proving' exclusion is not imposed on her. Therefore, the latter case i.e., a refutable assumption of exclusion has to be considered.

The presence of the logic of Purity-Pollution, unlike the 'exclusionary effect,' cannot be presumed if the exclusion is shown as it assumes every single instance of exclusion to be based on that logic only.[86] Rather, this assumption would end up misappropriating the struggles of caste by equating Untouchability with discrimination.

Finally, the inquiry, as this paper envisions would be the State's prerogative because Article 17 can be applied horizontally, to non-state actors. Basically, the concept of Indirect Horizontality puts an obligation on the state to not only 'not violate a fundamental right' but to also ensure that no other party violates that right – a positive obligation, ensuring a progressive realization of rights.[87]

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86 All forms of exclusion need not be based on this logic only. There can be exclusion based on sex, race, age, and anatomy (height, weight, etc.), which may/may not be permissible. But as far as Article 17 is concerned, exclusion stemming from Purity-Pollution is the focus.

87 Aparna Chandra, '*Equality*,' Constitutional Law I, lecture on Substantive Equality (April 19, 2022), National Law School of India University Bangalore.

V. Limitations of the Equality Approach

With one of the aims of this paper – laying down substantive and procedural intricacies of an expanded reading of Article 17 – undertaken, this paper now moves to the limitations made in the arguments.

A. The Manifestation Argument & The Dignity Question

Starting with the procedural assumptions this paper has made, it is conceivable to think of cases where despite the logic of Purity-Pollution being apparent, there may not be exclusion *per se* (the Manifestation Argument). Exclusion may possibly manifest in a different form, such as having separate accommodations for those 'impure'.[88] Then essentially, the dignity question comes up – does it not fall foul of the right to a dignified life as enshrined by Article 21 of the Indian Constitution to allow for the branding of people as pure/impure? This paper acknowledges this limitation of the Equality Approach. It does not deal with the dignity question entirety but for the purposes of this paper, the relevant arguments have been dealt with in the preceding part. Thus, this paper maintains that an inquiry that is based solely on this dignity question would be inadequate to establish a claim for equality.

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88 See A.M. Shah, 'Purity, Impurity, Untouchability: Then and Now' Sociological Bulletin 2007 56(3) 355; "Pune Housing Society's Separate Lift for Domestic Workers Sparks Debate, Splits Netizens" (The Indian Express May 8, 2022) <https://indianexpress.com/article/trending/trending-in-india/pune-society-elevator-usage-notice-sparks-debate-online-netizens-divided-7905557/> accessed June 18, 2022; "Society in Mumbai's Bandra Is Allegedly Using Separate Lifts for Owners and Servants" (India Times April 19, 2020) <https://www.indiatimes.com/trending/social-relevance/society-in-mumbais-bandra-is-allegedly-using-separate-lifts-for-owners-and-servants-511234.html> accessed June 18, 2022.

Furthermore, in response, this paper claims this harm of being branded pure/impure is not one that Article 17 prevents. It targets the exclusionary effect which *stems* from the logic of Purity-Pollution. This paper admits that branding people as pure/impure falls foul from a human dignity standpoint and needs to be prohibited, but not under Article 17 because (a) Article 17 has at least some basis in the historical Untouchability prevalent in India and, (b) since this practice is not complete without exclusion, the historical connection is not complete, so Article 17 would not cover it. But this does not legalize such branding. Articles 15(1) & 15(2) prohibit discrimination based on caste, among other things.[89] Thus, this notion of branding could arguably be included under them.

B. Dissecting The Manifestation Argument

Coming to the Manifestation Argument, 3 things need to be considered: (a) Is it possible to think of instances where logic *sans* exclusion is apparent? (b) If one can conceive such cases, what if they are more central than marginal? and (c) Even if there is no exclusionary effect, shouldn't Untouchability only be concerned with the classification aspect of it? (c) is just another form of the dignity question and has been dealt with. Regarding (a) & (b), this paper put forward the presumption stance and maintains that exclusion would always necessarily follow from the tag of pure/impure. So, such cases are not possible, but this paper will consider them from an academic standpoint.

Regarding (a) this paper argues that in such a practice then, the logic would have been incorrectly identified and that it would not fit in with the historical connection between Article 17 and 'Untouchability' in understanding its forms. This paper maintains that

89 Constitution (n 15) Articles 15(1) and 15(2).

the caste struggle did have at least something to do with the incorporation of Article 17 as evidenced by the discussion of its nature during the CADs.

So, by including the logic *sans* exclusion, the historical connection is severed. However, a tweaked form of (a) can be proposed here which deserves consideration. It can be said that exclusion can manifest in different forms and need not be exclusion *per se* – instances like differential treatment, prohibitions, etc.[90]

This paper argues such instances are only steps (if based on Purity-Pollution) in the process of practising a 'form' of Untouchability that does not meet Article 17 standards (yet) and can be answered under Article 15(1) and (2). So, it will be covered under Article 17 as soon as the practice has an exclusionary effect. Contending these steps problematic in themselves would be going back to the dignity question.

C. Where The Equality Approach Falls Apart

Regarding (b) from the previous section, this paper acknowledges the consequences that this quantification will have. Should such cases occupy the core rather than the penumbra, the question takes a different form and comes down to where the balance of convenience[91] lies. In this case that would be with those people who

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90 See for reference "Pune Housing Society's Separate Lift for Domestic Workers Sparks Debate, Splits Netizens" (The Indian Express May 8, 2022) <https://indianexpress.com/article/trending/trending-in-india/pune-society-elevator-usage-notice-sparks-debate-online-netizens-divided-7905557/> accessed June 18, 2022; "Society in Mumbai's Bandra Is Allegedly Using Separate Lifts for Owners and Servants" (India Times April 19, 2020) <https://www.indiatimes.com/trending/social-relevance/society-in-mumbais-bandra-is-allegedly-using-separate-lifts-for-owners-and-servants-511234.html> accessed June 18, 2022.

91 Basically, considering which party's suffering is more convenient to be remedied if a particular course of action is followed. For example, in a world where the instances of people being branded as pure/impure exist with such huge numbers and impact that they overshadow that of people facing exclusion from this branding, it becomes more appropriate to remedy the suffering of the larger group, moreover, the former approach

are branded as compared to those being excluded owing to such branding, so the inquiry would then have to be restricted to the Logic Approach. In this context, this paper acknowledges that the Equality Approach would fall flat. Such is the biggest flaw of this paper's argument.

D. The Argument from Within

Lastly, there exists an argument against the Equality Approach which stems from the wording of Article 17 itself.[92] The latter part of the Article deems an offence, '*the enforcement of any disability arising out of "'Untouchability*'.[93] Here, one can argue that the words '*any disability*' be read to include the branding aspect under Article 17.

But this paper counters it by contextualizing the phrase. It is also followed by '*arising out of Untouchability*'. Untouchability is complete when (i) there is exclusion, and it is based on (ii) the logic of Purity-Pollution. Branding, in itself, is a component of Untouchability, as long as exclusion is not an effect, 'Untouchability' is not complete.

Rather, the phrase '*any disability*', has to be read in the context of 'exclusion' only. It would, therefore, qualify the scope of Article 17 to include every sphere where exclusion, based on Purity-Pollution is practised. Ultimately, the 'exclusion' that is based on Purity-Pollution, in every context – social, occupational, private, temple entry, association during certain periods, and more, is the scope of '*any disability*'. This brings out the absolute nature of Article 17.

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would always encapsulate the latter (in every form of the logic of Purity-Pollution exists exclusion but not the other way around), so, it is convenient to follow that approach.

92 Constitution (n 15) Article 17.
"Abolition of 'Untouchability' – 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with [the] law."

93 ibid.

CONCLUSION

There is a strong rationale for using Article 17 to target other forms of discrimination. Article 17 prohibits discrimination on the basis of "*birth*", and it can be argued that discrimination based on Purity-Pollution is a form of discrimination on the basis of birth. Additionally, Article 17 prohibits discrimination that is "*derogatory to human dignity*," and it can be argued that discrimination based on Purity-Pollution is a form of discrimination that is derogatory to human dignity.

However, there is also a lack of a strong legal basis for using Article 17 to target other forms of discrimination. The Supreme Court of India has not yet ruled on whether Article 17 can be used to target other forms of discrimination.

If the Supreme Court of India were to rule that Article 17 can be used to target other forms of discrimination, this would be a significant development in Indian law. It would mean that the Indian Constitution would provide a strong legal basis for challenging discrimination based on Purity-Pollution, disability, sexual orientation, and other grounds.

This paper has provided a sophisticated account of how Article 17 can be read to include other forms of discrimination based on Purity-Pollution. It has shown that there exists a stronger rationale for using Article 17 to target other forms of discrimination and possibly bring Article 17 within the fold of the anti-discrimination guarantees in the Indian Constitution. Chandrachud J.'s approach to Article 17 marks an important jurisprudential development in Article 17 but as of now, his approach has lacked a strong legal basis. In this paper, I sought to provide it through the inclusion of the exclusionary effect. That is the contribution I have made. It remains to be seen what

practical difference this requirement makes to Article 17. It may help us unlock the true potential of Article 17 by including practices derogatory to human dignity. Further questions for research are still left looming before a concrete version of a reformed Article 17 is presented before us. As mentioned, it is yet to be seen what practical difference these 2 approaches will make when applied in practice. Questions such as - What are other contexts in which purity pollution logic will have an exclusionary effect? etc. need to be considered as well. Furthermore, the extent of Article 17 inquiries can be explored, given that sexual orientation or disability based discrimination is not covered under Part III. Can Article 17 serve as the constitutional home for the violation of the Fundamental Rights of these groups? Perhaps, it is yet to be seen.

If the Supreme Court of India were to rule that Article 17 can be used to target any form of discrimination that is "*derogatory to human dignity*", this would be a major victory for those who are fighting against discrimination in India. It would mean that the Indian Constitution would provide a strong legal basis for challenging all forms of discrimination, regardless of the ground on which it is based.

It is important to note that this is a complex issue, and there are a variety of different perspectives on it. The conclusion that I have presented is just one perspective, and it is important to consider all of the different perspectives before forming an opinion on this issue.

ROHINGYA AND BANGLADESH CONSTITUTION: CONSTITUTIONAL OBLIGATION TO PROTECT REFUGEES

*Zia Uddin Ahmed**

Introduction

S. Islam[1] observed that '*national legal frameworks have been and can be adapted and applied to recognize and grant refugee rights in the absence of formalized international or regional refugee protection frameworks*.' This paper considers in detail how the needed protections for Rohingya refugees already exist in the domestic constitutional law framework of Bangladesh and argues that they ought to be used by the Rohingya as well as those who seek to assist them. What is substantially missing is the awareness of this possible application of the constitutional rights of Rohingya as residents, even though not as citizens of Bangladesh, and the financial resources to use the Bangladesh court system, which no Rohingya refugee from the genocide attempted in 2017 has tried to do.

Bangladesh, which has not signed the 1951 Convention on Refugees, should have given the Rohingya their constitutional rights under its own law.[2] At times, and in some piece-meal ways, it has done so. Laying aside the legal obligations, no one can deny the generosity of the Bangladeshi Government, which is itself struggling to develop their own least-developed nation with massive problems of poverty and ill health. It has provided refuge, rations and basic services to almost 1,000,000 Rohingya who have fled across the border from Myanmar in 2017, carrying little more than their children. The

* Senior Assistant Judge, Bangladesh Judicial Service.

1 S Islam, C Schupfer, Z Hydari, A Zetes and K Cole, "The Peril and Potential of Ambiguity" (2021) 22 Asia-Pacific Journal on Human Rights and the Law 7.

2 Convention relating to the Status of Refugees, April. 22 1954, (1954) 189 UNTS 137.

Bangladeshi Government has done this without any legal obligation to protect the refugees.

Though Bangladesh is not legally bound to protect refugee under international law, it still is constitutionally obliged to protect human rights of people who are residing in its territory temporarily.

This article will argue that as a non-citizen resident group; Rohingya refugee's human rights can be better protected by Constitution of Bangladesh without having the need to apply international refugee laws.

I am certain that the Bangladeshi Supreme Court would say that Bangladesh must follow its own laws and Constitution when dealing with everyone. The Rohingya at least have the right to that formal standard of protection, without question.

Literature Review

Several international organizations and academics have written on the Rohingya crisis. It is a burning issue in international politics. UNHCR has been playing a key role in mitigating the problem. They have documented many Rohingya issues. Although many articles have been published on Rohingya issues, there has been a lack of research on the constitutional rights in Bangladesh and their implications for Rohingya as residents.

Most of the writing has been focused on the rights of Rohingya as refugees under Public International Law. There have been a few exceptions to this trend. Islam looked at applicable legislation in Bangladesh which set out rights and obligations applicable to Rohingya, including the Constitution, Criminal Law and Civil Law, referring to some relevant court decisions.[3] He argued for a specific

[3] See, Shawkatul Islam, Refugee Dilemma in Bangladesh (2015)

law to be written on this subject as, right now, there is no law at all referring to refugees in Bangladesh. Mohammad merely listed the Constitutional provisions that might apply to Rohingya without much discussion of the content of those rights as I do here.[4]

Bangladesh's judiciary has not yet directly dealt with the Rohingya's constitutional rights. In the past, the apex court of Bangladesh has guaranteed the citizenship of Urdu-speaking residents in Bangladesh, essentially Pakistani settlers who remained in Bangladesh after independence from Pakistan.[5] The court has not, however, addressed the rights of Rohingya in a comprehensive way, except to decide that customary international law can apply in Bangladesh if it is not contradicted by domestic law or the Constitution.[6]

Gorlick reported that while there is action on the Rohingya crisis on many fronts, including by the Government of Bangladesh and Non-Government Organizations (NGOs), new ideas and options are very much needed.[7] UNDP has published detailed accounts of the impact of the Rohingya influx on poverty, social cohesion and social safety nets in southeastern Bangladesh.[8]

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https://www.academia.edu/20079961/Refugee_dilemma_in_Bangladesh_searching_for_a_specific_legislation

4 See, Nour Mohammad, Refugee Protection Under The Bangladesh Constitution: A Brief Review at https://www.mcrg.ac.in/rw%20files/RW39_40/12.pdf

5 Abid Khan (& Others) v. Government of Bangladesh (& Others) [2003] 55 DLR(HCD) 318.

6 M Sanjeeb Hossain, Bangladesh's Judicial Encounter with The 1951 Refugee Convention [July 2021] Forced Migration Review 67.

7 Brian Gorlick, Rohingya Refugee Crisis: Rethinking Solution And Accountability,2019, University of Oxford RSC Working Paper Series 131https://www.rsc.ox.ac.uk/publications/the-rohingya-refugee-crisis-rethinking-solutions-and-accountability.

8 Impacts of Rohingya Refugee Influx in Host Community. 2018, UNDP, at www.undp.org.

UNHCR in Bangladesh is working to protect the refugee rights of Rohingya. UNCHR provides refugee identification cards for Rohingya, which Bangladesh authorities accept. UNCHR seeks to assure basic services in the Rohingya refugee camps by working with the Bangladesh officials. UNCHR periodically publishes reports on Rohingya issues, which focus on the real condition of the Rohingya community.

The literature on Rohingyas places a lot of emphasis on describing their plight, but there is a pervasive feeling that new options are needed. The situation now is acceptable to almost only the Myanmar military. There has been almost no discussion of the option of using the Bangladesh court system to enforce the Constitutional rights of Rohingya as residents of Bangladesh, so as to improve their conditions until the question of where they will live permanently has been resolved. My motivation for writing this article is to outline some of the possibilities in this direction.

Human Rights and the Bangladesh Constitution

Bangladesh's Constitution gives certain human rights to its citizens and, in some cases to non-citizens present in Bangladesh. Rohingya, who have fled from Myanmar to Bangladesh as refugees from an attempted genocide, can access those rights which are categorically provided for non-citizens who are present in Bangladesh.

Human beings have some rights merely because they are humans. International human rights agreements like the Universal Declaration on Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Political Rights, 1966 (ICESCR) are the three main international instruments that guarantee some basic rights to humans, irrespective to their legal status and

location. Bangladesh's Constitution has also provided those rights, as "fundamental rights". Some of the fundamental rights can be availed by both citizens and non-citizens of the country. These rights are the subject of this paper.

Rights to Protection of Law and to Life

These rights arise under the Constitution of the People's Republic of Bangladesh, Articles 31-32, which state:

Article 31. Right to protection of law.

> "To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, *and of every other person for the time being within Bangladesh*, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law." [*emphasis added*]

Article 32. Protection of right to life and personal liberty.

"*No person* shall be deprived of life or personal liberty save in accordance with law." [*emphasis added*]

The emphases added in the above quotations demonstrates that these rights apply not only to citizens but to any person in Bangladesh. As the Rohingya are people in Bangladesh, these rights apply to them too. According to the Bangladesh Constitution as quoted above, the Rohingya community must be treated according to law, with no detrimental action against any Rohingya's life, body, liberty, reputation or property, except as provided by law. Only detrimental action provided by law may be applied to them, as a penalty, after due process in a fair trial which proves them guilty of an offence against applicable law beyond reasonable doubt. This is

obviously a high standard which gives anyone in Bangladesh, including Rohingya, significant protection from detrimental action by agents of the State.

All three of these rights, to the protection of law, to life and to personal liberty, are basic and inalienable rights for human beings. These are the basic requirements for a civilized State which upholds the rule of law and good governance. At least the life of the resident must be allowed to continue, and he/she must not be physically, socially or mentally interfered with except as a penalty provided by law.

These rights in the Bangladesh Constitution are also like those in the American Constitution, which grants the right to due process of law to every person present in the country[9]. The cardinal rule is that every action of the State which adversely affects a person should be permitted by a rule of law, whether Constitutional, Statutory or Juridical. If it is not so permitted, it is illegitimate and prohibited as an abuse of the State's power. This also relates to the customary international law of non-refoulement, which is one of the few legal rights that the Bangladesh courts have recognized in respect of Rohingya.[10] The concept of non-refoulement means that no person shall be delivered to a country where there is a reasonable likelihood of that person being killed or tortured. Moreover, the State has a Constitutional obligation to do positive acts, or to refrain from acts, to save the life of any citizen as well as any non-citizen present in the country.

The Supreme Court of Bangladesh has explained that the constitutional right to life is something more than the right to an animal-like existence[11]. It means having rights and access to all other

9 Constitution of the United States of America, Amendment 14 (1868).
10 (n. 9).
11 Dr. Mohammad Mohiuddin Faruque v. Bangladesh (1996) 48 DLR 433,434 (AD).

humane facilities which ensure a dignified and meaningful life to a human being. To ensure the right to life, one should have access to proper health security, opportunity for livelihood and the necessities of life. Enjoyment of one's culture and protection of one's environment is also a part of the right to enjoyment of a human life, according to Islam[12]. In other words, the State should ensure all necessary elements for life at the standard of an ordinary human being.

Implementation of the 'Right to Life' of Rohingya by Bangladesh

Bangladesh has given shelter to the displaced people of Myanmar. Rohingya were floating in the Bay of Bengal for want of shelter and wading across the River into some of the most wild, isolated and impenetrable places in Bangladesh. These are locations where agriculture even for the tribal peoples who live there is difficult and furthermore dangerous animals, snakes and insects abound. Bangladesh's Government decided to shelter them, and they are providing Rohingya's with their basic needs, including food, in collaboration with national and international organizations. Bangladesh has taken positive responsibility to save the lives of the Rohingya community. To this extent, the People's Republic of Bangladesh has given the Rohingya refugees their constitutional right to life.

However, in some cases, the Bangladesh Government action was detrimental to the lives of Rohingya people, thus failing to give them their constitutional right to life in a substantive manner. Bangladesh authorities have sometimes refused to give shelter to Rohingya. Human rights groups had to lobby with the Bangladesh

12 Islam,Mahamudul, Constitutional Law of Bangladesh (2d ed, 2009), Dhaka, p. 188.

Government to ensure the safety of Rohingya floating at sea in early 2020 and not to push them back into the sea[13].

Bangladesh is constitutionally obliged to save the lives of Rohingya who are floating within the maritime boundaries of the country under Article 31 and 32 of the Constitution, which assures the right to protection of law to a person "wherever he may be". Certainly, to push a destitute person back on to the sea in an unsafe, makeshift craft would be an action "detrimental to life" even by a common definition, let alone a legal one.

The human rights groups could have brought a Writ Petition to the High Court, on behalf of the Rohingya on the sea, asking for an interim order to the Government to bring the petitioners to safety and give them emergency care – food, shelter, medicine - as needed. Article 25 of the Constitution has given responsibility to the State to respect international law and policy. The courts may issue orders to do so where the Government have not done so[14].

A study by the Asia Foundation documents the low quality of life of Rohingya refugees in Bangladesh camps.[15] They have often lost all their assets and then become deeply indebted while trying to support the surviving members of their families left behind in Myanmar. Bangladesh provides a place to sleep, sometimes hut-building materials, food and medical care: but denies the right to earn income, to leave the camp, and does not provide access to telecommunication and internet facilities, education for children, etc. In recent years, Bangladesh has transported large numbers of Rohingya

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13 Human Rights Watch, Bangladesh: Rohingya Refugees Stranded at Sea (April 25, 2020).

14 *Professor Nurul Islam v. Government of the People's Republic of Bangladesh* (2000) 52 DLR 413 (High Court of Bangladesh).

15 https://asiafoundation.org/wp-content/uploads/2020/05/X-Border_Securing-Livelihoods-and-Agency-for-Rohingya-Refugees-in-Bangladesh_Brief.pdf Accessed on 26th May,2021.

from mainland camps to isolated small islands in the sea, with no modern facilities. These smaller camps became centers of disease during the coronavirus pandemic. Rohingya living in camps are far from enjoying the total benefit of the right to life guaranteed by the Constitution. The most that they are getting is a right to sojourn and a right to breathe. If all the facts were properly presented to the Supreme Court, the court would likely conclude that the Rohingya are not getting their 'right to life' guaranteed by the Constitution. They live in unhealthy, filthy camps. They lack proper sanitation and adequate medical facilities. So, they suffer from various diseases and malnutrition. The World Health Organization (WHO) has reported a serious health crisis among Rohingya.[16]

Desperate for income, Rohingya men, women and children have been found begging in the streets illegally as far away as Chottogram, Dhaka and Rajshahi, in Bangladesh. Unable to work lawfully or have a business, persons from the Rohingya community become involved in drug dealing and other kinds of crime, such as burglary and robbery, which sometimes leads to murder. As for action detrimental to liberty, the Rohingya are confined in camps under 24-hour surveillance by law enforcement. They are not free to go anywhere: any movement outside the camp is prohibited and leaves them liable to arrest.

The Bangladesh Constitution requires far more for the Rohingya than the picture presented here. Yet the Constitution does not enforce itself. People must bring lack of compliance to the attention of the courts in Dhaka so that they can order remedies. That is what has been missing.

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[16] https://www.who.int/bangladesh/emergencies/Rohingyacrisis accessed on 30th May 2021.

Right to fair trial and access to justice:

Bangladesh is an ex-British colony. It follows the British common law system. So, most of the laws and legal system have been derived from the British system. According to the criminal law, an accused must be given a fair opportunity to defend himself at trial against any accusation of criminal conduct made against him/her. This is also as per the principles of "natural justice" recognized across common law jurisdictions [17]. Thus, no one can be arbitrarily arrested or detained, and this principle is enshrined in the Constitution as well, in Article 33, below.

33. Safeguards as to arrest and detention.

(1) *No person* who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. [*Emphasis added*]

(2) *Every person* who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate. [*Emphasis added*]

Again, emphasis is added to show that the right applies to all persons, including Rohingya and not only to citizens of Bangladesh.

Rohingya and other Stateless people have rights against arbitrary arrest and unlawful detention by any authority in Bangladesh,

17 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 33 (Supreme Court of Bangladesh, Appellate Division).

simply because they are people. Furthermore, Article 35 of the Constitution requires that the accused shall have access to a speedy trial and not languish for years on remand. An accused shall not be tried under a law which did not exist at the time of the alleged crime, and one shall not be tried twice for the same allegation. Moreover, the accused shall not be punished in a cruel manner. According to Article 44 of the Constitution, any person, including a Rohingya present in Bangladesh can go to court, even up to the apex court, to enforce his constitutional rights if they are violated. Again, the rights are broad, and the standard is high. The remedies are available to Rohingya. Yet they have never been used.

Implementation of right to fair trial and access to justice:

Arbitrary arrest and detention by law enforcing agencies is an endemic problem in Bangladesh,[18] to which Rohingya refugees, having no social networks or legal status in the country, are especially vulnerable[19]. The High Court bar, who could bring these cases to the court for relief. The High Court bar have a monopoly on representation for constitutional Writ Petition cases and, while the Rohingya have the right to defend themselves, they know nothing of the legal system. Also, the language of the High Court documents, and some of the oral arguments, is English.

The UNHCR, in collaboration with BLAST, a non-government organisation of lawyers in Bangladesh, has taken some projects in this regard so that victims can get access to justice in informal and formal justice systems. However, UNHCR and BLAST have never tried to pay the legal fees for High Court representation of

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18 Al-Faruque, A. and Bari, H.M.F., "Arbitrary Arrest and Detention in Bangladesh" (2019) 19(2) Australian Journal of Asian Law Art. 10: 1-11.

19 *See* Access to Justice for Rohingya and Host Community in Cox's Bazaar, International Rescue Committee, 2009.

Rohingya to enforce their constitutional rights, which has the best chance of success. Unlike the informal system, the High Court can issue mandatory orders on the Government and jail those who do not follow such orders for contempt. Their decisions are also precedent for all other courts and legal processes.

Bangladesh's Government have appointed some Executive Magistrates in the Rohingya camps who deal with offences covered by the Mobile Court Act, 2009 inside the camps. The Executive Magistrates deal with petty offences in the camp. However, usually the only persons present are the accused, the magistrate and the police. Usually no one is there to represent the interests of the accused. Thus, the accused is almost always convicted. This is true as much for Bangladeshi citizens as for Rohingya, despite the best efforts of the magistrates to give the accused a fair trial.

Rohingya who are not registered by the UNHCR as refugees are considered by the police to be illegal immigrants and prosecuted. They are often kept in jail even after completing their term of imprisonment, as they have nowhere to go[20]. Myanmar also does not consider Rohingya citizens so they have no right to return there and would not be safe there if returned.

Prohibition against forced labor:

Any sort of forced labor is prohibited in Bangladesh, under Article 35 of the Constitution. But the United Nations has reported that at least 30 Rohingya girls were victims of forced labor in the fish processing sector and as domestic helpers[21].

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20 *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, Writ Petition no. 10504 of 2016, Bangladesh: Supreme Court, 31 May 2017.

21 'Un Says Rohingya Refugee Girls Are Being Sold into Forced Labour in Bangladesh' (The Indian Express, 17 October 2018) https://indianexpress.com/article/world/un-says-rohingya-refugee-girls-are-being-sold-into-forced-labour-in-bangladesh-5406121/.

Conclusion

Bangladesh is not a signatory to the UN Convention on Refugees,1951 but it has voluntarily given some protection to non-citizens in its Constitution. Bangladesh can assure constitutional rights of the Rohingya. Therefore, it is recommended:

(1) to set up an independent committee of constitutional law and human rights experts to observe the compliance of Bangladesh State authorities with the constitutional rights of Rohingya. The committee should periodically make public reports about the State's compliance with the Bangladesh Constitution in dealing with Rohingya individuals and the Rohingya community.

(2) that the international donor countries and non-government organizations working with Rohingya, including BLAST, routinely instruct and pay High Court advocates to bring Writ Petitions on behalf of Rohingya whose constitutional rights have not been given effect. While this is expensive in Bangladeshi terms, it is well within the means of international donors and non-governmental organizations, who should also consider subsidizing Bangladeshi governmental and non-governmental organizations to take legal action.

(3) that international donor organization should financially support Bangladesh Government to implement court order and constitutional obligation.

Though Bangladesh or its Constitution cannot permanently solve Rohingya refugee issues, its constitutional obligation can safeguard the basic rights of Rohingya for the time-being.

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